



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

3 3433 06740480 0

12

LS

70

24

State Trials.

VOL. XIX.

A
COMPLETE COLLECTION
OF

State Trials

AND

PROCEEDINGS FOR HIGH TREASON AND OTHER
CRIMES AND MISDEMEANORS

FROM THE

EARLIEST PERIOD TO THE YEAR 1783,

WITH NOTES AND OTHER ILLUSTRATIONS:

COMPILED BY

T. B. HOWELL, Esq. F.R.S. F.S.A.

INCLUDING,

IN ADDITION TO THE WHOLE OF THE MATTER CONTAINED IN THE
FOLIO EDITION OF HARGRAVE,

UPWARDS OF TWO HUNDRED CASES NEVER BEFORE COLLECTED;

TO WHICH IS SUBJOINED

A TABLE OF PARALLEL REFERENCE,

RENDERING THIS EDITION APPLICABLE TO THOSE BOOKS OF AUTHORITY IN
WHICH REFERENCES ARE MADE TO THE *FOLIO EDITION.*

IN TWENTY-ONE VOLUMES.

VOL. XIX.

26 GEORGE II. TO 10 GEORGE III.....1753—1770.

L O N D O N:

Printed by T. C. Hansard, Peterborough-Court, Fleet-Street:

FOR LONGMAN, HURST, REES, ORME, AND BROWN; J. M. RICHARDSON;
BLACK, PARBURY, AND ALLEN; BALDWIN, CRADOCK, AND JOY;
E. JEFFERY; J. HATCHARD; R. H. EVANS; J. BOOKER; E. LLOYD;
J. BOOTH; BUDD AND CALKIN; AND T. C. HANSARD.

1816.



ALL VOLS
EXC
BAND 1

TABLE OF CONTENTS

TO

VOLUME XIX.

*** The new Articles are marked [N.]*

REIGN OF KING GEORGE THE SECOND.

| | <i>Page</i> |
|--|-------------|
| 529. THE Trial of JAMES STEWART, in Aucharn in Duror of Appin, for the Murder of Colin Campbell of Glenure, esq. Factor for his Majesty on the forfeited Estate of Ardshiel, A. D. 1752 ... | 1 |
| 530. The Trial of MARY SQUIRES and SUSANNAH WELLS, Widows, for an Assault and Felony committed on the Person of Elizabeth Canning; at the Sessions-House in the Old Bailey, A. D. 1753 | 262 |
| 531. The Trials of JOHN GIBBONS, WILLIAM CLARKE, and THOMAS GREVILLE, for Wilful and Corrupt Perjury; at the Sessions House in the Old Bailey, A. D. 1753 | 275 |
| 532. The Trial of ELIZABETH CANNING, Spinster, for Wilful and Corrupt Perjury, at Justice-Hall in the Old Bailey, A. D. 1754 ... | 283 |
| 533. The Trial of TIMOTHY MURPHY, for Felony and Forgery, A. D. 1753 | 694 |
| 534. Proceedings against Dr. ARCHIBALD CAMERON, at the King's Bench, May 17th, on the Bill of Attainder passed against him 19 Geo. II. for being in the Rebellion 1745, A. D. 1753 | 734 |

TABLE OF CONTENTS.

| | <i>Page</i> |
|--|-------------|
| 535. The Trial of STEPHEN M'DANIEL, JOHN BERRY, JAMES EGAN, (otherwise GAHAGAN) and JAMES SALMON, at Justice-Hall in the Old Bailey, A. D. 1755 | 746 |
| 536. The Trial of WILLIAM BARNARD, on the Black Act, at the Sessions-House in the Old-Bailey, A. D. 1758 | 815 |
| 537. The Trial of JOHN STEVENSON, late of Bickerton, in the County of Chester, Cheesefactor, for the Murder of Mr. Francis Elcock; at Chester Assizes, A. D. 1759..... | 846 |
| 538. The Trial of LAWRENCE Earl FERRERS, for the Murder of John Johnson, A. D. 1760 | 886 |

REIGN OF KING GEORGE THE THIRD.

| | |
|---|------|
| 539. The Case of JOHN WILKES, esq. on a Habeas Corpus; A. D. 1763 | 982 |
| 540. Proceedings on Error in an Action of False Imprisonment by DRYDEN LEACH, against JOHN MONEY, JAMES WATSON, and ROBERT BLACKMORE, three of the King's Messengers, A. D. 1765..... | 1002 |
| 541. The Case of Seizure of Papers, being an Action of Trespass by JOHN ENTICK, Clerk, against NATHAN CARRINGTON and three other Messengers in ordinary to the King, A. D. 1765... | 1030 |
| 542. Proceedings in the Case of JOHN WILKES, esq. on two Informations for Libels; A. D. 1763—1770 | 1075 |
| 543. The Case of BRASS CROSBY, esq. Lord-Mayor of London, on a Commitment by the House of Commons, A. D. 1771 | 1138 |
| 544. The Case of General Warrants; JOHN WILKES, esq. against ROBERT WOOD, esq. in an Action of Trespass, A. D. 1763, [N.]..... | 1154 |
| 545. The Trial of WILLIAM Lord BYRON, Baron BYRON of Rochdale, for the Murder of William Chaworth, esq. A. D. 1765 | 1178 |

TABLE OF CONTENTS.

| | <i>Page</i> |
|---|-------------|
| 516. The Trial of KATHARINE NAIRN and PATRICK OGILVIE, for the Crimes of Incest and Murder; before the High Court of Justiciary in Scotland, A. D. 1765 | 1235 |
| 517. The Trial of FLORENCE HENSEY, M. D. for High Treason, A. D. 1758 [N.] | 1342 |
| <hr/> | |
| ADDENDA to the Cases of Wilkes and Canning..... | 1382, 1418 |

A COMPLETE COLLECTION
OF
STATE TRIALS,
&c. &c.

529. The Trial of JAMES STEWART,* in Aucharn in Duror of Appin, for the Murder of Colin Campbell of Glenure, esq. Factor for his Majesty on the forfeited Estate of Ardshiel; before the Circuit Court of Justiciary, held at Inverary in Scotland, on Thursday the 21st, Friday the 22d, Saturday the 23d, and Monday the 25th of September, by his Grace Archibald Duke of Argyll, Lord Justice-General, and the Lords Elchies and Kilkerran, Commissioners of Justiciary: 25 GEORGE II. A. D. 1752.

THE CRIMINAL LETTERS;

LIBEL OR INDICTMENT.

GEORGE, by the grace of God, king of Great Britain, France and Ireland, defender of the faith. To our lovits, — macers of our court of justiciary, messengers at arms, our sheriffs in that part, conjunctly and severally, specially constitute, greeting. Forasmuch it is humbly meant and complained to us, by our right trusty William Grant of Prestongrange, esq. our advocate, for our interest, and also by our lovit Janet Mackay, daughter to the hon. Hugh Mackay of Bighouse, esq. and relict of the deceased Colin Campbell of Glenure, for herself, and on behalf of Elizabeth and Lucy Campbells, her infant children, with concurrence of our said advocate, for our interest, upon

* See some observations on this Case in Mr. Burnett's "Treatise on various branches of the Criminal Law of Scotland," chap. 14. Of this and many other remarkable Cases before the Justiciary, no account was given by Mac Laurin in his Collection, because reports of the trials had been previously published. See his Preface, p. 4, contents, p. 15.

A zealous partisan of Stewart published, under the title of "A Supplement to the Trial of James Stewart," a warm and spirited arraignment of the proceedings upon this Trial. I have made some extracts from his publication, of which I know not the date.

VOL. XIX.

James Stewart in Aucharn in Duror of Appin, commonly known or reputed to be the natural brother of Charles Stewart of Ardshiel, attainted, and present prisoner in Fort-William; and upon Allan Stewart, commonly called Allan Breck Stewart, son to Donald Stewart alias Vic Ean Vic Allister, sometime in Inverchomrie in Rannoch; and since, or sometime after the 18th day of April, 1746, a cadet or soldier in the French king's service, or reputed in this country to have been such.

That whereas, by the law of God, and the laws of this and all other well-governed realms, murder is a most heinous crime, and severely punishable, especially when the same is committed deliberately, and by lying in wait, and from a malice conceived against the person so murdered, on account of the faithful discharge of the duty of his office.

Yet true it is, and of verity, that the said James Stewart and Allan Stewart, commonly called Allan Breck Stewart, complained upon, are guilty, actors, or art and part of the said heinous crime of murder, aggravated as aforesaid, in so far as the barons of our Court of Exchequer in Scotland having, by commission dated the 23d day of February, 1748-9 years, appointed the said Colin Campbell of Glenure to be factor upon the lands and estate of Ardshiel, forfeited to us by the attainder of the said Charles Stewart, and lying within the shire of Argyll, and in the neighbourhood of Glenure, the house of the said Colin Campbell, and also

B

appointed him factor on that part of the forfeited estate of Lochiel, called Mamore, lying in the shire of Inverness, and in the neighbourhood of Fort-William, and upon the forfeited estate of Allan Cameron of Callart, in the shire of Inverness, adjoining to the said lands of Mamore, and lying betwixt Fort-William and Appin; he, the said Colin, entered upon the said office, and proceeding in the faithful execution thereof, did, among other things, at Whitsunday 1751, cause to be removed the said James Stewart from Glenduror, a farm or possession that had been held by him on the said estate of Ardshiel: and in the month of April, in this present year 1752, the said Colin Campbell had taken measures for causing to be removed at the term of Whitsunday, or 15th day of May, now last bypast, certain other persons who were tenants or possessors of farms upon the said lands or estate of Ardshiel; which proceeding was by the said James Stewart, for reasons known to himself, so much resented, that, without any warrant or authority from the tenants, or persons themselves, so intended to be removed, he the said James Stewart, in the month of April last, came in person to Edinburgh, and caused to be presented, in name of the said tenants, to our lords of session, a bill of suspension of the said intended removing, upon divers affected reasons, that were either false or frivolous; and having procured an order for answering the said bill, and a sist of execution in the mean time, he returned into the country, and caused the tenants intimate the sist to the said Colin Campbell; who thereupon repaired to Edinburgh, where an answer having been made to the said bill, the same was refused by the lord ordinary, and the said Colin Campbell returned to his own house at Glenure, where he might be in the way to attend the duty of his office, and to cause the said removing to be put in execution, and the new tenants introduced to the lands on the said 15th day of May last.—And on account of the said Colin Campbell's accepting of the said office, and of the above-mentioned and other his proceedings in the faithful discharge of the duty thereof, the said James Stewart, and Allan Breck Stewart, conceived a most groundless and unjust resentment, malice, and enmity against him, and at length entered into a wicked conspiracy, barbarously to murder the said Colin Campbell, and to bereave him of his life by the hands of the said Allan Breck Stewart, who had but then lately come back from foreign parts into that country, and intended soon to go again beyond sea; and, during his said last abode in the country, had chiefly frequented the house and company of the said James Stewart. And, in prosecution of this wicked conspiracy, upon Monday the 11th day of May last, on the morning of which day the said Colin Campbell left his own house of Glenure, to go to Fort-William, in the country of Lochaber, about the distance of 16 computed miles northward, in order to transact some business relating to his factory on the estate of Lo-

chiel, and from whence he was certainly expected to return to the lands of Ardshiel before Friday in the same week, being the 15th day of the said month, when certain tenants on the lands of Ardshiel were to be removed, as above-mentioned, and others introduced in their room; the said Allan Breck Stewart went from the house of John Stewart of Fasnacloich, which lies near to Glenure, to the house of the said James Stewart at Aucharn, lying in the same neighbourhood, at the distance of about four miles northward; and there the said James Stewart was informed, either by the said Allan Breck Stewart, or by his own son Charles Stewart, or by — Stewart, daughter to the said John Stewart of Fasnacloich, that they heard, or were informed, that the said Colin Campbell of Glenure was to go to Lochaber that day, and that he was to persist or proceed in the intended removing of the tenants of Ardshiel (as the said James Stewart has, among other things, acknowledged in his judicial declaration taken before the sheriff-substitute of Inverness;) and there, after receiving such advice, in the evening of the same day, the said Allan Breck Stewart laid aside his own clothes, which he had brought with him, being a blue coat, scarlet vest, and black breeches of shag or velvet, which were believed to have been brought by him from France, and which was a remarkable or distinguishing dress in that part of the country; and then and there the said James Stewart furnished him, the said Allan Breck Stewart, with a suit of his, the said James's own clothes, being a dark coloured short coat, with silver buttons, trowsers, and a blue bonnet, in which the said Allan dressed himself that evening.—And also next morning of Tuesday the twelfth of May last, when he left the said James Stewart's house, where the said Allan left behind him his own French clothes aforesaid, together with his hat, and then set out, in order to lie in wait for the said Colin Campbell on his way, when he should return from Fort-William to the lands of Ardshiel, which lands are bordered on the north-east with the lands belonging to Alexander Stewart of Ballachelish, whose house stands near to the ferry of Ballachelish, upon a narrow arm of the sea called Lochlevin, that separates the country of Appin on the south, from that of Mamore, part of Lochiel's estate, on the north side of it, and by which ferry of Ballachelish it was known or expected, that the said Colin Campbell would pass, in his return from Fort-William; and, to the said place of Ballachelish, the said Allan Breck Stewart directly went from the house of the said James Stewart at Aucharn, on this Tuesday the twelfth of May last; and from thence, the same day, accompanied by James Stewart the younger of Fasnacloich, went to Glenoe's house in Carnoch, about three miles farther eastward, where the dowager lady of the house is sister to the said Charles Stewart late of Ardshiel, and to her the said James Stewart is natural brother; and, from thence, he went

that same day to the house of Callart, which sometime belonged to Allan Cameron of Callart, attainted, and was still inhabited by Helen Stewart his widow, and also sister to the said Charles Stewart of Ardsziel, and to the said James Stewart, at which house he lodged all that Tuesday night;—and next day, being Wednesday, the thirteenth of May last, the said Allan Breck Stewart came back, after calling again at Carnoch, to the house of Alexander Stewart of Ballachelish, near the ferry aforesaid, where he remained the night following;—and, upon Thursday the fourteenth of the said month of May last, when it might be certainly expected, that the said Colin Campbell would return from Fort-William to the lands of Ardsziel, and country of Appin, by the said ferry of Ballachelish, the said Allan Breck Stewart waited about the said house, till about twelve of the clock that day; and then, under pretence of going a-fishing, walked up along a burn or rivulet near to the said house to the higher grounds, from whence he had a prospect of the high road leading from Fort-William to the lands of Ardsziel, and access by a short passage into the wood of Lettermore, standing upon the lands of Ardsziel, and adjoining to the said road on the south side, about a mile distant from the house and ferry of Ballachelish; and, having posted himself in the said wood, near to the high road, by which the said Colin Campbell was to pass, at a convenient station for his wicked purpose, where he had brought, or caused to be brought and placed, one or two guns, or muskets, loaded, with which he continued some time concealed in the wood; and, at length, about five or six o'clock in the afternoon of the said fourteenth day of May last, the said Colin Campbell having passed the ferry of Ballachelish, and been conveyed by the said Alexander Stewart of Ballachelish from the ferry to the entrance of the wood of Lettermore, as he continued his journey passing on horseback along, or through the said wood, accompanied by Donald Kennedy, a sheriff's officer of Argyll-shire, who was on foot, and had got some space before him, the road being bad for horses, and by Mungo Campbell, writer in Edinburgh, a young man, who was then riding a little way before him; and behind him, at some distance, was John Mackenzie, servant to the said Colin, and also on horseback.

And then and there the said Allan Breck Stewart fired upon the said Colin Campbell from behind his back, and shot him through the body with two balls, of which wounds the said Colin Campbell died upon the spot, in less than an hour after.

Whereupon the said Allan Breck Stewart absconded, and, from that time, appeared no longer openly in the country; but, during the night following, or about three o'clock in the morning of Friday the fifteenth day of May last, he came to Carnoch, the house of John Macdonald of Glenco abovementioned, where he knocked at a window when the family were

all in bed; and the said John Macdonald of Glenco, and Isobel Stewart his step-mother, got up, and went to the door to the said Allan, who then told them, that the said Colin Campbell had been shot dead the evening preceding, in the wood of Lettermore, and that he, the said Allan, was leaving the country, and going the Moor-road, and was come to take leave of them, the said lady, and Glenco her son-in-law, which he immediately did, and went away, without entering the house, though he was invited by the lady to come in, and take some refreshment there.

That, in the mean time, the said James Stewart, complained upon, remained at his own house at Aucharn, from which, on the morning of Thursday, the 14th of May last, he sent a letter by John Maccol his servant, to Charles Stewart, writer in Auchintour, in which, *inter alia*, he writes, "As I have no time to write to William, let him send down immediately 8*l*. sterling, to pay four milk cows I bought for his use at Ardsziel." And as he, the said James, hath judicially declared, (when examined at Fort-William, on the 2nd of June last, in presence of George Douglas, sheriff-substitute of Inverness-shire) he did not see the said Allan Breck Stewart after the murder; but upon notice being brought to the said James Stewart, complained on, at his own house at Aucharn, immediately after it happened, on the said Thursday evening, by the said John Mackenzie, servant to the said now deceased Colin Campbell, who, having left the said Mungo Campbell to attend the corpse where it lay, rode away to get help or assistance for transporting the same to some fit house or place; the said James Stewart, complained upon, appeared noways surprised or concerned at the news of the murder; and neither he, nor any of his family, went to look after the corpse, or to assist in the carrying it, as others of the neighbourhood did. And, upon the morning, or about noon of the day following the murder, being Friday the 15th of May last, the said James Stewart, complained upon, sent Alexander Stewart, travelling packman in Appin, to William Stewart merchant in Maryburgh, with directions to get from the said William 5*l*. sterling, or 5 guineas; and then told the said packman, that his friend Allan Breck Stewart was going to leave the country; and that it was incumbent on him, the said James, to supply him with money; whereupon, the said packman, that same day, repaired to Fort-William, and delivered his said message from the said James Stewart, to the said William Stewart, who immediately caused his wife bring the packman three guineas,—with which the packman returned the next day, being Saturday, the 16th of May last, back to the said James Stewart's house at Aucharn; and, upon his arrival there, found the said James Stewart prisoner, in the custody of a party of soldiers; and the said packman being allowed to converse privately with the said James Stewart and his wife; and having informed him, that he had only received

3 guineas from William Stewart at Maryburgh, the said James Stewart took out of his purse 2 guineas, which he gave to his wife, desiring her to give the same to the packman; to go with these, and the three guineas he already had, and also with Allan Breck Stewart's clothes, to him, the said Allan: and, accordingly, on the evening of that same Saturday, after the said James Stewart had been carried off prisoner to Fort-William, his wife brought the said Allan Breck Stewart's clothes above-mentioned, to the packman, and delivered the same tied up in a bundle to him, containing a pair of red breeches besides the black breeches above-mentioned, that were the property of the said Allan himself; and at the same time, delivered to the packman the two guineas above-mentioned, which she had received from her said husband for that purpose, and directed the packman to go with the clothes and the five guineas, and deliver the same to the said Allan Breck Stewart, whom he would find or hear of at the house of John Maccol, bouman, having the charge of milk cows upon a farm or shealing belonging to Dougal Stewart of Appin, at a remote or solitary place called Koalinacoan; and the said packman, after getting his supper at Aucharn, set out on this errand accordingly that same night:—That, in the mean time, in the afternoon of the said Saturday, the 16th of May last, the said Allan Breck Stewart was seen by the said John Maccol, Appin's bouman, in the heugh of Corrynakeigh, a part of the farm of Koalinacoan; where as the bouman was cutting fire-wood, he heard a whistle, and, looking about, observed a man, at a considerable distance, beckon to him, whom, upon his going up to him, he found to be the said Allan Breck Stewart, who saluted him, by asking him how he did? And the bouman returned the salute, and told the said Allan, he was afraid it was no good action occasioned his being in such a solitary place; upon which the said Allan asked him, what he meant by that? And the bouman answered, that he would, without doubt, be suspected of Glenure's murder, who, he heard, was shot in the wood of Lettermore; and that there were two men seen go from the place where the action was committed; to which the said Allan replied, That, if he was rightly informed, there was but one person concerned in the murder; and talking further of the matter, said, he did not doubt the family of Ardsbiel would be suspected of the murder; and that he believed James Stewart and his son would be taken up, in consequence of their difference with Glenure about the lands; but that their being taken up, would not be of any consequence to them, as there would be no proof, unless their own tongues betrayed them: and, upon the bouman's saying, that he wished he, the said Allan, would leave his neighbourhood, Allan told him he could not, till he was supplied with money and victuals; and insisted with the bouman, that he should go to the Strath of Duror (where the said James Stewart's house of Aucharn lies) for

money, and to the lady Glenco for a peck of meal; both which the bouman appearing to decline, the said Allan added, that he, the bouman, must go to Fort-William with a letter, (which the said Allan then wrote with a wood-pigeon's quill he had gathered among the trees,) to William Stewart, merchant in Maryburgh, who, he said, would give him money upon receipt of the letter; and the bouman having also refused to comply with this proposition, giving for his excuse, that he heard that all that went to Fort-William at that time were taken into custody, the said Allan further told him, that unless he should be supplied, from some other quarter, before next day, that he, the bouman must go to Fort-William, notwithstanding these difficulties, and that he, Allan, was surprised there was no money sent him, though it was promised to be sent him to that place. That very early in the morning of Sunday, the 17th of May last, the said John Maccol, bouman, went out of his house, to look after some cattle that he apprehended were amongst his corns, and then observed, coming towards him from the westward, a man, whom, at a distance, he took to be Allan Breck Stewart; but, upon his nearer approach, found him to be the said Alexander Stewart, packman, who, upon his coming up to him, after the ordinary salutations, asked the bouman, if he had seen Allan Breck Stewart? which the bouman having denied, the said packman told him, that he had money and clothes for the said Allan, which he (Allan) had trusted, (or agreed with some other person) to receive at that place from any one who should be sent after him with it; and then the bouman owned he had seen him, the said Allan, and that he was then in the heugh of Corrynakeigh, and told the packman, that if he went to an eminence, which he pointed out to him, and whistled, that the said Allan Breck would probably appear to him; but this the packman declined, complaining that he was so fatigued with travelling the whole night, that he would not go, having been lately upon his own business at Fort-William, and having been obliged to go there again on the said James Stewart's errand above-mentioned; and therefore desired the said bouman to deliver the five guineas, which he then gave him, to the said Allan Breck Stewart, together with a bundle of clothes, which he, the packman, had left at the root of a fir-tree then in their view, which he pointed out to the said bouman, who promised to deliver both to the said Allan as desired; whereupon the packman, being much fatigued, went to sleep in the bouman's house; and in the evening of the same Sunday, the seventeenth of May last, after the said John Maccol, bouman to Appin, was gone to bed, he was awaked by the said Allan Breck Stewart his knocking at the window of his the said bouman's house, whereby the board or shutter of his said window fell in; whereupon the said bouman got up from his bed, and went out, when he found the said Allan Breck Stewart retired at some distance from his house, who,

first of all, told him, he stood in great need of a drink; upon which the bouman went into his house, and returned with a noggan or dish full of milk and water that had been boiled, which noggan the bouman carried in his hand, in company with the said Allan, till they came together to the brink of a burn or rivulet, not far from the bouman's house; and, at this meeting, the said Allan Breck asked the bouman, whether there had any body come to that place with a message for him? which the bouman answered in the affirmative, and then gave the said Allan the five guineas he had received from Alexander Stewart, the packman; upon which the said Allan Breck Stewart said, he hoped that would do without his sending to William Stewart at Fort-William, and enquired if any thing else had been brought for him? whereupon the bouman delivered to him the bundle of clothes above-mentioned, that had been left by Alexander Stewart the packman, for that purpose at the fir-tree, and then the said Allan requested and intreated the bouman to meet him at that place next morning early, that he might deliver to him the dark coloured coat mounted with silver buttons, and a pair of trousers, which the said Allan then wore, and had upon him, and which he told the bouman were the property of the said James Stewart in Aucharn, to the end that the bouman might restore and deliver these clothes to the said James, or to Margaret Stewart his wife; and the said bouman promised to meet the said Allan next morning, as he desired; and accordingly the bouman repaired next morning before sun-rise to the place appointed, at the side of the rivulet, for the meeting, where he did not find or see the said Allan himself, but found there the black or dark coloured coat and trousers before described, together with his own noggan or dish, in which he had brought the milk and water to the said Allan; and, in one of the pockets of the said short coat, the said bouman found a small powder-horn, of a flat make, with some carving upon the horn, and red wax on the inside thereof, for mending a stir or hole: that from this place the said Allan Breck Stewart withdrew from that country a-cross the moors, as he proposed, by going a-cross mountains and deserts, where there was no dwelling-house for the space of about eighteen computed miles eastward, to the country called Rannoch, in the north-west corner of Perthshire, where the mother of the said Allan Breck Stewart, and other friends or relations of his live; amongst whom he kept himself concealed for a few days, and was there seen with the aforesaid French dress, and a pair of red breeches; after which he withdrew from that country, and has not been since seen or heard of in this kingdom, that the complainers have been able to learn. And in a letter wrote by the said James Stewart, since he was taken into custody on account of the said murder, bearing date at Fort-William the 19th day of May last, and addressed, To Mr. John Macfarlane, writer to the signet; wherein the said James

professes great detestation of the murder, and great desire that the said Allan Breck Stewart might be apprehended, and, for that purpose, describes the person and dress of the said Allan; he, *inter alia*, says, that he, the said Allan, wore a pair of red breeches.

From all which, and other facts and circumstances that will be proved against the said persons complained upon, and particularly the threatenings of death and destruction,* which the said James Stewart, and the said Allan Breck Stewart, above complained upon, have been heard to utter against the said Colin Campbell of Glenure, now bereaved of his life, by the horrid murder and assassination aforesaid, it will be made evident and proved, that the said James Stewart, and Allan Breck Stewart, complained upon, and each of them, are guilty, actors, or art and part of the said horrid murder.

And as a part of this proof, there will be produced certain documents in writing, and other particulars enumerated and contained in an inventory or list thereof, signed by the complainers, or either of them, copies of which list or inventory will be delivered to, or served upon, the persons complained upon, at the time of executing this libel; and the said written documents, and other particulars themselves, will, before trial, be lodged in the hands of the clerk to the circuit court of justiciary, before which the persons complained upon are to be tried, that they may see the same.

At least, at the time and place aforesaid, the said Colin Campbell of Glenure was barbarously murdered, and the said James Stewart, and Allan Breck Stewart, above complained upon, are guilty, actors, or art and part of the said murder.

All which, or part thereof, being found

* The author of the 'Supplement' objects to the admission of proofs of particular threatenings upon this general and ambiguous allegation, which did not afford the pannel sufficient information to enable him to be prepared, either to exculpate himself from the charge, or to elide it by a contrary proof.

As to the allegation of circumstances and presumptions, Mr. Hume (Comm. Trial for Crimes, c. 7, vol. 1, p. 383,) lays it down that,

"The rule of setting forth time and place in a libel has relation to the main act only, or consummation of the crime, and not to the circumstances and presumptions which may be given in evidence of the pannel's guilt, or to infer that he is art and part of the charge. With regard to the detail of these; for instance in a case of murder, the preceding enmity and threats, the procuring of the weapons, the flight of the pannel, his behaviour when taken, the blood found on his clothes, and the like; if the libel set them forth at all, it is matter of pure favour on the prosecutor's part; he cannot therefore be challenged, for failing to relate them with all the accompaniments which the pannel might sometimes desire."

proven by the verdict of an assize, before our lords justice-general, justice-clerk, and commissioners of justiciary, in a circuit court of justiciary, to be holden by them, or any one or more of their number, within the burgh of Inverary, upon the 31st day of September next to come, N. S. the said James Stewart, and Allan Breck Stewart, complained upon, both, or one or other of them, who shall be so convicted, ought to be punished with the pains of law, to the terror of others to commit the like execrable crime in time coming. Our will is, &c.—*Ex deliberatione Dominorum Commissionariorum Justiciarum.*

ROBERT LEITH.

*List of the Persons Names and Designations that are to pass upon the Assize of the said James Stewart, and the said Allan Breck Stewart.**

ARGYLL-SHIRE.

- Donald Campbell of Airds.
Dugald Stewart of Appin.
1. Colin Campbell of Carquhin.
John Maclean of Lochbuie.
Donald Campbell, younger, of Scammadale.
Duncan Campbell in Oban.

* Previously to the death of Campbell of Glenure, there had been a long and bitter feud between the Campbell and the Stewart clans. It is to be noticed, that of the assizers from whom were to be selected the jury for trial of this Stewart, 25 were Campbells.

The justice general, who in deviation from the ordinary practice presided, was the chief of the Campbells, and of the fifteen jurors selected by the Court, eleven were of his grace's clan.

To speak generally and briefly as to the formation of the assize or jury, the course appears to be this: Out of a general roll of the persons liable to be called on to serve as assizers, the clerk of the court makes up a list of 45, of whom the presiding judge selects 15 to pass on the trial of the pannel; these are presented to the pannel, who is asked if he have any objection why they, or any of them, should not pass on his assize. "As to which," says Mr. Hume, "our custom allows him not that freedom, which the prisoner has in England, of setting aside so many" [a certain number] "of the jurymen by a peremptory challenge, or without assigning any cause of dislike, but obliges him to specify with respect to any one whom he challenges, some lawful and just exception, why the man should not be trusted on such an occasion." Fifteen to whom the pannel shall not have successfully objected constitute the assize. See Hume's Commentaries, Trial for Crimes, c. 11, pp. 89. 92. 93. 106.

The 'Supplement to the Trial of James Stewart' mentions, that "the London Evening Post of Dec. 5, [1752] took notice of this trial

- Duncan Campbell at Aross.
Archibald Campbell of Knockhnie.
2. Dugald Macdugal of Gallanach.
Donald Campbell, bailie of Lochinuel.
James Fisher of Duren.
3. Alexander Duncanson of Killa.
Archibald Campbell of Ormsary.
John Richardson, merchant at Inverary.
4. Duncan Campbell of South-Hall.
5. Hector Macniel of Ardmeanish.
Archibald Campbell of Clachansail.
6. James Campbell, late bailie of Inverary.
7. James Campbell of Rascheilly.
8. James Campbell of Redale.
Angus Campbell of Ardlarich.
9. Collin Gillespie of Bailliemoir.
10. Colin Campbell of Skipaish.
11. Duncan Campbell of Glendarran.
Hugh Campbell of Lix.
Alexander Campbell of Ballochiel.
Colin Campbell of Kildalvin.
12. Colin Campbell of Ederlin.
13. Niel Campbell of Duntroon.
Archibald Campbell of Jura.
Duncan Macclachlan of Croich.
John Campbell, younger of Otuir.
14. Archibald Campbell of Dail, in Craignish.
15. Niel Campbell of Dunstaffinsh.

BUTE-SHIRE.

- Archibald Davie in Glenroessie, in Arran.
John Brown in Glenshervig.
Donald Brown there.
Alexander Fullertoun in Brodick.
Thomas Macninch in Clachlands.
Duncan Macmaster in Lamblash.
William Hunter in Letter.
Andrew Macbryde in Monimore.
John Macbryde in Achincairn.
James Stewart in Mid-Kiskidale.
Alexander Stewart in South-Kiskidale.
CH. ARESKINE.
ALEX. FRASER.
HEW DALRYMPLE.

N. B. The execution of the criminal letters, against James Stewart personally, was upon the 31st day of August, 1752; and the executions against Allan Breck Stewart, at Aucharn, was upon the 24th day of the said month of August, and at the Market-cross of Inverary, the 25th day of the said month of August.

in the following words: 'We are informed by a private letter from Argyleshire, that the ancient animosity between the Stewarts and Campbells is likely to revive, on the score of hanging James Stewart at Ballachelish, on account of the murder of Colin Campbell of Glenure. The circumstances of trying James Stewart at Inverary, the seat of the d— of A—, is what his friends fix upon to convince the world that he was hastily and unjustly condemned.'

CURIA ITINERIS JUSTICIARII, S. D. N. Regis, tenta apud burgum de Inverarii, vicesimo primo die Mensis Septembris, Anno Domini millesimo septingentesimo quinquagesimo secundo, N. S. per nobilem et prepotentem Principem Archibaldum Ducem de Argyll, Dominum Justiciarium Generalem, et Patricium Grant de Elchies, armigerum, et Dominum Jacobum Ferguson de Kilkerran, Dominos Commissionarios Justiciarum dicti S. D. N. Regis.

Curia legitime affirmata.

His Majesty's Advocate moved, That the Criminal Letters at his instance, for his majesty's interest, and also at the instance of Janet Mackay, daughter to the honourable Hugh Mackay of Bighouse, esq. and relict of the deceased Colin Campbell of Glenure, for herself, and on behalf of Elizabeth and Lucy Campbells, her infant children, with concurrence of his said majesty's advocate, for his majesty's interest, against James Stewart in Aucharn in Duror of Appin, commonly known or reputed to be the natural brother of Charles Stewart, late of Ardahiel, attainted; and Allan Stewart, commonly called Allan Breck Stewart, son to Donald Stewart, alias Vic Ean Vic Allister, sometime in Inverchomrie in Rannoch, and since, or some time after the 18th day of April, 1746, a cadet or soldier in the French king's service, or reputed in this country to have been such, might be called. And the same being accordingly done, and the above Allan Stewart, commonly called Allan Breck Stewart, being oft and divers times called publicly by the macer of court, and thrice called at the outer door of the court-house, to have compared and underlyen the law for the crime of murder committed by him upon the said deceased Colin Campbell of Glenure, in manner at length mentioned in the said criminal letters, he having been lawfully cited for that effect, but not comparing,—the lord justice general, and lords commissioners of justiciary, decern and adjudge Allan Stewart, commonly called Allan Breck Stewart, son to Donald Stewart, alias Vic Ean Vic Allister, sometime in Inverchomrie in Rannoch, and since, or sometime after the 18th day of April, 1746, a cadet or soldier in the French king's service, or reputed in this country to have been such, to be an outlaw and fugitive from his majesty's laws; and ordain him to be put to the horn, and all his moveable goods and gear to be escheat and inbrought to his majesty's use, for his not comparing this day and place, to underly the law for the crime of murder committed by him upon the deceased Colin Campbell of Glenure, as is more fully mentioned in the criminal letters raised against him thereanent, at the instance of William Grant of Prestongrange, esq. his majesty's advocate, for his majesty's interest, and also at the instance of Janet Mackay, daughter to the honourable Hugh Mackay of Bighouse, esq. and relict of the said deceased Colin Campbell of Glenure, for herself, and on behalf of

Elizabeth and Lucy Campbells, her infant children, with concurrence of his majesty's advocate, for his majesty's interest; the said Allan Stewart, commonly called Allan Breck Stewart, having been lawfully cited for that effect, oft times called, and not comparing.
ARGYLL, I. P. D.

Intran'

James Stewart indicted and accused at the instance of his majesty's advocate, for his majesty's interest, and also at the instance of Janet Mackay, daughter to the honourable Hugh Mackay of Bighouse, esq. and relict of the said deceased Colin Campbell of Glenure, for herself, and on behalf of Elizabeth and Lucy Campbells, her infant children, with concurrence of his majesty's advocate, for his majesty's interest, as guilty, actor, or art and part of the crime of murder, committed in the manner mentioned in the Criminal Letters raised thereanent against him, and Allan Stewart, commonly called Allan Breck Stewart, son to Donald Stewart, alias Vic Ean Vic Allister, sometime in Inverchomrie in Rannoch, and since, or sometime after the 18th day of April, 1746, a cadet or soldier in the French king's service, or reputed in this country to have been such.

Procurators for the Prosecutors.

The right hon. William Grant of Prestongrange, esq. his Majesty's Advocate.

Mr. James Erskine, advocate, sheriff-depute of Perthshire.

Mr. John Campbell younger, of Levenside, advocate.

Mr. Robert Campbell of Asnich, advocate.

Simon Frazer, esq. advocate.

Procurators for the Pannel.

Mr. George Brown of Colstoun, advocate, sheriff-depute of the shire of Forfar.

Mr. Thomas Millar, advocate, sheriff-depute of the stewartry of Kirkcudbright.

Mr. Walter Stewart younger, of Stewart-hall, advocate.

Mr. Robert Macintosh, advocate.

His Majesty's Advocate moved, that the Criminal Letters against the pannel, and the before-named Allan Breck Stewart, might be read. And the same was accordingly done.

Lord Justice General. James Stewart, you have heard the criminal letters against you read. What have you to say to them?

James Stewart. My lords, I am not guilty of the crime of which I am accused, and I refer to my lawyers to make my defence.

Mr. Walter Stewart for the pannel.

My Lord Justice General;—I appear as counsel for this prisoner, James Stewart, who now stands at your lordship's bar, charged as being accessory to one of the foulest and most barbarous murders that has occurred in any country; the murder not only of an innocent gentleman, but, as will be proved, the pannel's

own intimate friend; and that without the smallest provocation, save what greatly enhances his guilt, viz. Glenure's being in the faithful discharge of his duty in an office entrusted to him by the public. He is charged with causing Allan Breck Stewart lie in wait for this unhappy gentleman, and take him off by a base and inhuman assassination. I am sensible, my lord, that the pannel, accused of a murder attended with so many aggravating circumstances, must appear before your lordship, his jury and the world, in a very unfavourable view. A certain indignation naturally arises in every humane breast against one suspected of so horrid a crime; and this must not be a little increased by the malicious stories and insinuations industriously spread, which the pannel, from his close confinement, has had no opportunity of contradicting. But now, as he has put himself for his trial upon God and his country, by pleading not guilty, until that country finds him guilty the presumption is for innocence. This he has a title to demand. All I shall ask, however, is, that as I know his judges, so I hope his jury, and all who now hear me, will lay aside any prejudice against him, and will form no opinion, until the circumstances of the libel, the defences which I am now to offer against it, and the proof of both, be attentively considered. For myself, my lord, I must say (and I believe I may say the same for all the gentlemen on the same side with me), did I, after the strictest inquiry, suspect the pannel to be accessory to this murder, it would be the last action in my life to stand up in his defence. But, my lord, we have gone through this libel with the greatest attention, and have taken a view of the several facts, which, after a pre-cognition of above a thousand witnesses, are set forth to support the charge against the pannel; we have heard from the pannel's own mouth his defences against this charge, which he avers he can prove; we have heard, from the unprejudiced, the general character he bears in the world, and, from the whole, cannot help concluding, that he is not guilty. We look upon ourselves as standing up for innocence, when defending this pannel. It is therefore our duty to defend him with that warmth which innocence claims as its due.

In the entry of this trial, my lord, I cannot help complaining of most intolerable hardships, which this pannel has undergone since May last, when he was first incarcerated. My lord advocate's humanity, his tenderness to pannels, I can, from my own little experience in trials, subscribe to. The unjustifiable steps I am now to complain of, I must therefore lay to the charge of the private prosecutors. I dare say my lord advocate as little knew of them, as he will now, when he hears, approve of them. The pannel, since the month of May last, has been kept in the closest confinement. For the first six weeks, no mortal was allowed access to him: after that, indeed, for some short time, admittance was given to his wife, and one

or two more; but any who could be thought proper persons to prepare defences for his trial, were carefully denied access to him. And again, for a considerable time before his trial, he was close confined, and all admittance refused. When his counsel came to this place, and wanted to see him, we were told that none were to be admitted without a warrant from the duke of Argyll; and a petition was actually drawn, to be presented to your grace, when a message came allowing us access. His sons and his servants too have suffered the same close imprisonment. And all this not only contrary to humanity, but directly in the face of the act of parliament 1701, which discharges close imprisonment after eight days, under the severest penalties. By the prosecution of this private prosecutor too, the bar has been in a manner shut up against this pannel; all the old experienced counsel, though not brought to maintain the charge against him, have been retained from giving him their assistance; otherways, in all probability, I had not now been employed to open his defence. The pannel's house and his repositories have been three several times searched, and papers carried off by near relations of the prosecutors, attended by a military force, and without any warrant. His wife and his sons, who by the laws of God and man cannot be called as witnesses against him, have been examined upon oath; some of them five different times, to catch at any discordance, had there been any, in their declarations; and these very declarations are now proposed to be brought in proof against the pannel, while the declarants themselves are alive, and ought, by the fundamental laws of this kingdom, to be examined in presence of the pannel and jury. These are hardships, my lord, which, thanks be to God! meet with no encouragement in this now a free country. The time was, indeed, when the feeble law was unable to protect the innocent, when the rules of justice were broke to pieces by the ruffian hands of power; then our unhappy country groaned under the intolerable yoke of arbitrary power; then was scarce the form of a trial; the best, the greatest of our country, even an Argyll,* fell a sacrifice to the will of tyranny. But now, my lords, the days which our fathers wished to see, and did not see, we have the happiness to enjoy. A fair trial, which the noblest could not obtain, the meanest are now entitled to, under the protection of laws, guarded by a government ever watchful for the good of its subjects, under which the keenness of private prosecutors will meet with no countenance or encouragement. The pannel, enjoying the privileges of every free-born Briton, is now to stand trial before the judges and jury of his country; and as his judges will shew the greatest impartiality, he expects the same from the gentlemen of the jury. They will judge of the proof brought before

* See the Case of the earl of Argyll, vol. 8, p. 343.

them, having in their eye the example of Almighty God, by whose holy name they have sworn to do justly, before whose awful tribunal there is no judgment formed from names or personal prejudices, but every man is judged according to his works. They will consider, that as they are to answer to God, so they have to answer to the world, who will make a narrow and impartial scrutiny into their verdict. At the same time I cannot help saying, that, amid all the hardships this pannel has suffered, I hope it is one piece of good fortune, that he is to be tried by gentlemen of the same county with himself, who, from their more particular knowledge of the pannel, and his character in the world, should be best judges what proof is necessary to fix upon him so black a crime.

In order that your lordships may more fully understand the defences now to be offered for the pannel, I will beg leave to lay before the Court an account of the facts, which have given rise to this prosecution, as they really happened; and as we have got them from the pannel's own mouth, at a time when it was little his interest to hide the truth from us. The pannel, my lord, was in possession of a farm in the estate of Ardsbiel called Glenduror, and was tacksman of another called Lettermore, which he had sublet for about 70*l*. Scots a year, when Glenure was appointed factor on the estate of Ardsbiel in February 1749. That gentleman continued the friendship which he had before entertained for the pannel in a very particular manner. He gave him the management of the whole estate of Ardsbiel, power to put in and remove tenants, and to raise the rents as he should think proper, and took yearly from the pannel his bill for the rent of the estate, at which it had been surveyed by the barons of exchequer, leaving him to apply the overplus to the use of Ardsbiel's children. This agreement will be instructed by discharges and letters under Glenure's own hand. Sometime before Whitsunday, 1751, Glenure applied to the pannel to yield the farm of Glenduror, which he then possessed, to Mr. Campbell of Bolaveolan, a particular friend of his, who offered an additional rent. This the pannel immediately complied with, without waiting a warning, and took the farm of Aucharn, where he now lives, from Mr. Campbell of Airds, but still continued to uplift the rents of Ardsbiel, in terms of his agreement with Glenure. Sometime in April last, Glenure executed a warning against the subtenant in Lettermore to remove from that farm at Whitsunday 1752; and likewise against several other tenants of the lands of Ardsbiel. The pannel does acknowledge, that he did expostulate with Glenure upon this, telling him, he thought it hard to turn them out, since they offered to give more additional rent than any others would, and likewise to take the oaths to the government. But Glenure still persisted in his resolution; upon which the pannel, being occasionally in Edinburgh, at the desires of the tenants, made out a short memorial

VOL. XIX.

of the fact, and presented it to one of the barons of exchequer, who disapproved greatly of Glenure's procedure; but could do nothing towards putting a stop to the removing, as a quorum of the barons was not to be had until the next exchequer term. But he kept the memorial, promising to represent the case to the whole barons; and added, that he had no doubt, but they would give an order to the factor to continue the tenants in their possessions. The pannel upon this advised with counsel, how the tenants might be kept in possession until the exchequer term; and, by their advice, applied for a suspension of the removing to the court of session: And a bill of suspension being accordingly presented, a sist was obtained, and the bill ordered to be answered; which sist was intimated to Glenure, upon the pannel's returning into the country; and he, not knowing the forms, having carried with him the principal bill of suspension, and Glenure immediately giving in answers, the same were advised without the bill, and it was refused. This scheme of a suspension having failed, and Glenure persisting in his resolution of ejecting the tenants upon the term-day at which they were warned to remove, the pannel, upon a second application from the tenants, wrote to Alexander Stewart, notary public, to come, upon the 15th of May, that they might protest, and take an instrument against Glenure, if he proceeded to ejection; and when Alexander Stewart excused himself, the pannel sent a letter, by express, on the 14th of May, to Charles Stewart, notary in Auchintour, to come on the same errand, and, in a postscript, bid him tell William Stewart to send down 8*l*. sterling, to pay four milk cows which he had bought for his use at Ardsbiel, and which the tenants had refused to deliver until they got the price, though William Stewart had wrote for them. This postscript is laid hold of by the prosecutors, as a circumstance to fix this murder upon the pannel. But this, my lord, I am not surprised at; other letters of his share the same fate, though, if possible, less criminal than this one: By what conjuration, or what mighty magic they can be made so, I own I cannot conjecture.

The pannel, in further prosecution of this plan of taking a protest, on Thursday the 14th, had engaged James Stewart younger of Fasna-cloich, and John Stewart younger of Ballachelish, to be present on the 15th, and witness his protest. But, on the Thursday evening, the pannel received the melancholy accounts of Glenure's being murdered in the wood of Lettermore. These are the facts which gave rise to that inveterate malice, which the libel says induced the pannel to conspire the death of Glenure. The words are: "And, on account of the said Colin Campbell's accepting the said office, and of the above-mentioned and other his proceedings in the faithful discharge of the duty thereof, the said James conceived resentment," &c. How unjust this conclusion is, I do humbly submit to your lordships.

C

After Glenure was made factor, your lordship sees, they continued in the greatest friendship: you see the pannel managing the estate of Ardshiel under Glenure, removing from his possession of Glenduror, at Glenure's desire, without putting him to the trouble of a warning, and going and residing under Mr. Campbell of Airds. He had no possession in Ardshiel estate, as Lettermore was sublet; his management of the estate was not taken from him, and he was still allowed to remit part of the rents to Ardshiel's family. He has no connexion, by blood or otherways, with the tenants warned to remove; there is not so much as one of them of his name. The estate was annexed for ever to the crown, and was in a few months to fall into the hands of commissioners, appointed by his majesty, who would probably restore the tenants, as they offered more rent than those put in by Glenure. Can any mortal believe, that the pannel, because Glenure was to execute a removing against these tenants, should enter into so execrable a design, as to assassinate that gentleman by the hands of Allan Breck, on the 14th, when we see him pursuing quite another scheme, sending for a notary and witnesses to take a protest against him on the 15th? In all cases of murder, I do humbly apprehend, it is of necessity, that there should be malice aforethought, which is the essence of, and constitutes the crime; and all passions, particularly one of so extraordinary a nature as this malice, must have had some cause. I do submit to your lordships, if there is the smallest appearance of that malice, or any thing like a cause assigned for it. But, even taking the story as it stands in the libel, it is a tale that can gain credit with no mortal. What earthly purpose could the pannel serve by such a desperate piece of villainy? Would the murder of Glenure prevent the removal of the tenants? Would not the murder of Glenure deprive him of the liberty which that gentleman had given him to uplift the rents? Would it not put it out of his power to help his brother Ardshiel's family? The pannel is allowed to be a judicious man, prudent in his actions beyond most men of his rank in the world. Can it be believed he would do a thing so directly contrary to his interest? Suppose him capable of the crime, we must suppose him the greatest fool, as well as the greatest monster that ever disgraced humanity. But, is this his character? No, my lord, as he is a sensible man, so all who know him will say, he is a humane, peaceable, good-natured man, looked upon as a father where he lives; strangers were happy to get their children under his care, as in fact he is tutor and curator at this very time to several orphans, who have not the smallest relation to him.

Here, my lord, I will for a little leave the pannel, and give an account of Allan Breck Stewart, who is charged as the committer of this murder, having entered into a wicked conspiracy with the pannel for that purpose. Whether he was the actual murderer or not, the

pannel knows not; neither is it my business to say. I shall only point out what connexions were betwixt the pannel and Allan Breck, leaving it to your lordship, and the jury, to judge if the circumstances of these connexions, as I shall now open them, or even as they are laid in the libel, are sufficient to fix upon the pannel his being a conspirator in this execrable plot. At the same time, there is no question but the prosecutors must fix the actual murder upon Allan Breck, otherwise the charge against the pannel entirely flies off.

This Allan Breck Stewart, my lord, was the son of one Donald Stewart, a particular friend, and distant relation of the pannel's. He died while his children were infants, and, upon his death-bed, committed them to the care of his friend, naming him tutor and curator to them. The pannel faithfully executed this trust, took care of the children's education, and managed their effects to the best advantage. Allan turning extravagant, when he grew up to man's estate, and having spent what was left him by his father, insisted in his majesty's service, without clearing accounts with the pannel, who used to supply him with money, and pay little debts for him, even after he became a soldier, though he knew he had already given him more than his patrimony. This the pannel thought he owed to the memory of his deceased friend. Breck continued in his majesty's service until the battle of Preston, where being taken prisoner by the rebels he insisted with them, continued with them during the rebellion, and afterwards made his escape into France, and insisted in the French service, where he still continues. Since he first went over, he has been in use, now and then, of coming back to Scotland, and staying a few months with his relations; he commonly landed first at Edinburgh, and lodged in the house of one Hugh Stewart. There he seldom went out but in the night, and more than once narrowly escaped being apprehended as a deserter. When he came up to Rannoch or Appin among his relations, he used to stroll about without any settled residence; and where-ever he came, he generally threw off his French clothes, as they were remarkable and improper for that hilly country, and borrowed from any acquaintance, where-ever he happened to be at the time. Among others, he used to visit at the pannel's house, though he came seldomer there than to other places in the neighbourhood, as the pannel used to take a good deal of freedom in blaming his conduct and extravagance. About the beginning of March last he came over from France, was at the houses of Balachallan and Annat, and went from thence to Glenbuck's house, where he continued until the end of March, and while there he threw aside his French clothes, and wore clothes belonging to Glenbuck, or his brother. In the beginning of April he came to the pannel's house, immediately before the pannel went to Edinburgh, and staying a day or two, went off with a dark coloured short coat with clear buttons, and

other parts of the country dress, which he had picked up about the pannel's house, and continued strolling about the country in that dress, until the latter end of April, when he returned to the pannel's house, and stayed a single night. On the 11th of May, about one o'clock afternoon, he returned, and found the pannel upon a field, where his servants were covering potatoes. They continued there about a quarter of an hour in the hearing of the servants, when an express came from Mr. Campbell of Airds to the pannel, desiring him to come to him at Keil upon business; upon which the pannel walked with Breck from the field to the house, at about fifty yards distance, and leaving him there without going in, went directly to Keil; continued there until betwixt ten and eleven at night, when returning home he found there several strangers besides Allan Breck. They supped all together, and continued in one room until they went to bed. Breck lay in the barn with the pannel's sons, and one Archibald Cameron. The pannel had no private conferences with him; they were not one moment by themselves, nor ever in company, but before the family and the strangers. Early in the morning of Tuesday the 12th, before Breck was out of bed, and without seeing or speaking with him, the pannel went to Appin's house, and Breck was gone before he returned, and the pannel has never seen him since. What clothes he carried off, he does not know; but he has authorised me to say, that what is laid in the indictment may be true, that he went off in the short coat which he used before. That he went to Ballachelish, from that to Glenco's house, and then to Callart, and, on Wednesday, came back to Ballachelish, where he stayed all night. On the Thursday, in the forenoon, he assisted Ballachelish's servants in carrying out dung, and, after dinner, he got a roil, and went a fishing, continued some time in sight of Ballachelish and his servants, who were carrying out the dung; but going a little up the water, a rising ground intercepted their view, and they saw no more of him.

This, my lord, is a true account of the connexion betwixt the pannel and Allan Breck preceding the murder, as it will come out upon proof. I will draw this conclusion, that this horrid conspiracy must have been laid and concerted between them in a few seconds, while the pannel was walking from his potatoe ground to his house, at fifty yards distance; for at no other time had they any private conference. The changing the clothes, your lordship sees, was altogether unknown to the pannel, and what Breck was in use to do at the pannel's house, and over the whole country. But taking the story as it stands in the libel, who can possibly believe that the pannel would have given Breck his own clothes to disguise himself for committing this murder, or that Breck would have put on this disguise four days before the murder happened? The libel says, Glenure was certainly expected on the Thursday to return from Fort-William to Ardschiel.

Would Breck then have put on his disguise on the Monday, and gone about publicly in it? No, surely, my lord; children would have conducted a plot better than this; and yet upon this circumstance of changing clothes, as incredible as it is falsely represented, stands one half of the prosecutor's hopes (if the libel contains them all) of fixing this crime upon the prisoner.

I proceed to lay before your lordships the sequel to Glenure's murder. Betwixt six and seven on Thursday evening, Mackenzie, Glenure's servant, called at the pannel's house, and informed him, that his master was shot dead in the wood of Lettermore. The libel says, that the pannel appeared nowise surprised or concerned at the news; and that neither he, or any of his servants, went to look after the corpse. Mackenzie will not, dare not say so. The pannel shewed that surprize, that deep concern, which every innocent man must feel at so unexpected and melancholy an accident. He directed Mackenzie the nearest road to Glenduror, to call Mr. Campbell of Bodelaveolan, Glenure's friend, and, in the mean time, sent such of his family as could be spared, and several of his neighbours, to take care of the corpse. On Friday morning, the day after the murder, the pannel received a message from Allan Breck, by Donald Stewart, nephew to Ballachelish, who had seen him in the fields about nine o'clock in the evening before, when Breck told him, that as Glenure was killed, there would be a strict search for his murderer; and he being a deserter, it was proper for him to keep out of the way; he was therefore resolved to leave the country immediately; that he would hide himself for a day or two in the desert of Koalisnacooan; and as he had no money, he begged of Donald Stewart to go to the pannel, and inform him of this, and intreat him to send a little money to him at Koalisnacooan. Donald Stewart then said to him, that he hoped he had no hand in Glenure's murder himself: upon which he took God to witness he had none; but his being a deserter to the highland army, was the only cause of his absconding, as he was sure he would be hanged, without mercy, if he was seized. Upon receiving this message, the pannel sent Alexander Stewart, packman, to Fort-William, to one William Stewart, a merchant there, to get five guineas from him, telling him, at the same time, that it was for the use of Allan Breck Stewart, who was going off the country, as he was a deserter, to shun the search which would be made for the murderer of Glenure. Upon the packman's return, he found the pannel in the custody of a party of soldiers; and as he had got but three guineas from William Stewart at Fort-William, the pannel gave him other two, and bid him go to Koalisnacooan, where he would find Allan Breck, and give him the five guineas. Upon which the packman went home with the pannel's wife, who, he is since informed, gave him Breck's French clothes, which he had left at the pannel's house the Monday before, but which the pannel

knew nothing of. As to the long episode in the indictment, narrating the conversations betwixt Allan Breck and the bouman, as the pannel knows nothing of them, they shall pass unnoticed by me. Only I beg leave to make this single observation to the gentlemen of the jury, that when this part of the libel comes under their consideration, they will observe, that it can be proven by the oath of but one witness, and that witness swearing only to what he heard Allan Breck say; consequently the mistaking one word must be of the most fatal consequence, for this reason, hearsay evidence is altogether rejected in law. They will likewise consider, that what Allan Breck says, is said by one who wanted to clear himself to the bouman of the murder of Glenure, which the bouman charged him with; for which reason he might be tempted to throw out insinuations against others. Let the jury keep these hints in their eye, and then let them give what weight to this part of the libel their consciences can allow them. The pannel was taken into custody on the 16th; on the 19th it was rumoured in Fort-William, where he was incarcerated, that Allan Breck was the murderer of Glenure. No sooner does the pannel hear this, but he writes a letter to Mr. Macfarlane, writer to the signet, expressing the greatest abhorrence and detestation at the murder; tells him that Allan Breck was suspected to be the committer of it, as he was that day seen near the place where Glenure was killed, and immediately disappeared. He expresses his desire of having him brought to justice; gives a particular description of his looks and dress; and further says, he was probably gone south, to take the first opportunity of going abroad; and that he commonly lodged in the house of Hugh Stewart at the back of the Fountainwell, when he came to Edinburgh.* This letter too is brought as a point of ditty against the pannel. What strange and unaccountable torturing of the most upright actions must there

* "The letter here mentioned from the pannel to Mr. John Macfarlane, writer in Edinburgh, had been shown to the governor of Fort-William, and was received by Mr. Macfarlane at Edinburgh, about a fortnight before any of the two advertisements, (viz. one, by the lords of the regency, and the other by the relations of Glenure, each offering a reward of 100*l.* for apprehending Allan Breck) were published in the news-papers; and really contains a truer and more exact description of Breck than either of them does. But why the proper use was not made of this information from the prisoner, is to this day a secret, and remains to be accounted for by his then doer. It was undoubtedly a great neglect in him, and proved hurtful to the helpless James Stewart: for surely it shewed an early fondness in him to have the murderer discovered, as no guilty person in his senses would direct how to know and find out his accomplice." Supplement to the Trial of James Stewart.

be, to make this criminal? This pupil, this relation, this friend's son of his, whom he had supplied with a little money, to keep him out of the hands of the military law as a deserter, no sooner does he hear him named as being guilty of this horrid murder, but he does all in his power to have him brought to justice: strange it is indeed to make this a crime! What should the pannel have done? Should he have concealed the suspected murderer? No, my lord, he acted a more honourable part, such a part as this court will approve of; such a part as every member of it would have acted himself.*

As I have taken up too much of your lordship's time already, I shall but just mention such defences as occur in point of law, leaving them to be insisted on by the gentlemen who are to support me.

And, in the first place, however willing the pannel may be to stand the issue of his trial, it is our business, as counsel for him, to lay hold of every handle against it. I therefore submit to the Court, whether this pannel, who is only charged as accessory, can be tried before the principal, Allan Breck, be first discussed. I do most humbly contend, he cannot; 1mo, Because, if the contrary practice were allowed, probation might be led against the principal, though absent, contrary to the fundamental law of this nation; and it must first be proven he, the principal, committed the crime, 'primo debet constare de corpore delicti,' before the accessory can be convicted. 2do, If the accessory must defend the absent principal, it may be of the most fatal consequence to both, though innocent. The principal's greatest enemies may be led as witnesses, and such defences as would have been sufficient to exculpate him entirely, may be omitted. 3tio, These principals are followed by the opinions of all lawyers who write upon the criminal law, and likewise by the practice of neighbouring nations, particularly that of England; where the principal must be attainted after verdict or confession, before any judgment can be given against the accessory. But, 4to, What I now plead, I humbly apprehend to be the law of Scotland; for so it is expressly said, Reg. Mag. ch. 26, b. 4. Quon. Attach. ch. 83, and 29 stat. David 2. And, agreeable to these, is the opinion of our great criminal lawyer sir George Mackenzie, laid down in the strongest terms in his title Art. Part. paragraph 9th. 5to, I must object for the pannel to the relevancy of this libel, that the facts and circumstances mentioned in it, though they should be fully proven, are not sufficient to infer his being accessory to this murder. Every libel is a syllogism: the major proposition contains the crime, and the laws against that crime; the minor contains the facts charged against

* "Here Mr. Stewart was stopped by the D— of A— and rebuked for saying that he or any of the other two judges would have acted such a part." Supplement to the Trial of James Stewart.

the pannel; and the conclusion is, that, from these facts, he is guilty of the crime, and deserves to suffer the pains of law. Now, if the facts charged do not amount to the crime, the conclusion must be false, and the libel irrelevant. This, I humbly apprehend, is the present case. From the above narration of the facts, and what observations I have already made upon them, I hope your lordships will be of opinion, that the circumstances charged in the libel are so extremely vague and trivial, that they are not sufficient to bring the pannel under so much as a suspicion of being guilty of this horrid crime laid to his charge.

If your lordships shall think proper to repel these defences, and to remit the pannel on this indictment to the knowledge of an assize, we humbly hope you will allow us a proof of all facts and circumstances that can tend to his exculpation; particularly of his friendship with Glenure; of Allan Brook's being a deserter, and being in use to put off his French clothes, and put on clothes belonging to the family where he happened to be at the time; of the pannel's having no private conference with him preceding the murder; of the message which the pannel got from him after the murder, bidding him send him a little money to Koonnacoon, where he was going; and, in general, of all other defences that may occur as necessary to the pannel in the course of his trial. I will conclude, my lords, with a single word to the gentlemen of the jury, that the more flagrant, the more atrocious any crime is, the more clearly and distinctly they will require it to be made out to them: that as the crime is proposed to be fixed upon the pannel by presumptive evidence alone, they will be cautious in distinguishing betwixt such presumptions as are conclusive, and such as are not so; between such presumptions as can arise from no other cause but the pannel's being in a conspiracy to murder Glenure, and such as are more naturally construed to have arisen from other causes. If they find such presumptions, as that they can, before Almighty God, bring in a verdict Guilty, it is their duty to do so, and the law will have its vengeance. But let them have this always in their eye, that better twenty guilty escape, than that one innocent man should suffer death by their verdict.

Mr. Robert Mackintosh, for the Pannel.

My Lord Justice-General, and Lords Commissioners of Judiciary; I appear also to contribute my small mite towards the defence of this pannel, who has the misfortune to be accused of a crime, which every body must admit to be of the deepest dye; and, as laid in the indictment, attended with the most aggravating circumstances; and I do it, my lords, not out of an opinion of my being in any degree equal to the task, a share of which I have undertaken; but rather that a poor man, standing trial for his life, may not be absolutely destitute of assistance, when uncommon en-

deavours have been used to deprive him of abler help.

My lords, I dare say, every one who speaks in this cause, on whatever side, will begin with expressing a detestation of the crime now charged against the pannel; if not in accusing the pannel, yet in this we shall all agree, to condemn the miserable person, whose conscience accuses himself of it; whether he now stands at the bar, or whether he flies from the avenging sword of justice. I must acknowledge, that if the pannel has been guilty of, or accessory to this murder, beyond all controversy it constitutes him one of the greatest criminals that this or any other country can afford. Murder is a heinous crime, whether it is the fate of the eminent or the obscure. But this murder seems to be a complication of all guilt; and as my duty calls me to plead in defence of one labouring under such an accusation, I cannot do it but with the utmost concern. The very mention of such barbarity and iniquity, as was just now rehearsed, could not fail to move every humane breast; but the reading of an indictment, such as we have a little while ago heard, is enough to inspire horror even in the innocent. It is still harder upon me, when I consider the unhappy sufferer in that dreadful scene, which is now to be the subject of trial; one against whose life I should be the last man to excuse the smallest attempt! one whom I knew, whom I regarded, whom I had the honour to be in friendship with: his death, had it been common, would have affected me; but his murder afflicts me. I sincerely regret it, for his own sake, for the sake of his friends, for the sake of the poor disconsolate lady, who now weeps over her own widowity, and the orphan state of her infant children; I regret it for the sake of the whole land, that stands polluted by the cruel shedding of innocent blood; and, in a particular manner, do I regret it for the sake of the Highlands of Scotland, for which I own, from private connexions, I cannot help having a regard, and which I am afraid have, by this unlucky accident, suffered a deep political wound, that it may take time to rub off the effects of; as being able to furnish so eminent an instance of barbarism, in spite of the noble attempt of the legislature, and of all in the administration, to polish and civilize them, to reduce them to the righteous plan of the government of this country, and to a constitutional equality with the rest of the united kingdom.

My lords, for these reasons do I most heartily join in deploring this fatal catastrophe. At the same time, my lords, the defence I am now to plead, fixes my attention upon a more agreeable prospect; that of innocence, and not of guilt; and the importance of the issue justly challenges my most sanguine efforts. We have before us the life and fortune of a man, a countryman, I believe an innocent, though accused one: I must believe him innocent, not only as I am yet ignorant of any proof that I think should convict him, but more, as I have not

been able, in a very strict investigation, to discover from himself any symptom of guilt; and as the persuasion of innocence may give courage to defend, so I persuade myself I need make no apology, if I am able to speak with that earnestness and freedom that becomes the consequence of what is at stake. And, on the other hand, I hope to be excused, if I fail in that accuracy and distinctness, which I could wish to observe, from a just regard to the dignity of this high court, and to the presence of a crowded, and I dare say, an interested audience, who are ready to swallow with greediness every word that shall be spoke on this subject.

My lords, before I go farther, I cannot omit observing, what I am extremely sensible of, and that is, the disadvantages under which this pannel enters upon a trial for himself, and all that is dear to him in this world, for what concerns all that is precious to him in another; disadvantages which we share in, who appear as his counsel. But when I say so, I would not be understood as meaning to insinuate any reflexion upon the conduct of the honourable gentleman who prosecutes for his majesty: he does the duty of his office, the duty which he owes to his king and country; and gave an early proof in this matter of that candour for which he is remarkable on all occasions, by turning a general indictment into a special and circumstantiate charge. But, to use his own words, when hindered from doing what his humane inclination equally led him to, his lordship is here but half a pursuer: there are others concerned in carrying on this prosecution; and I am afraid their just resentment of a murder, which they had all the reason in the world to be zealous in searching out the committers of, has made them unguarded to measures which I should be sorry to see retaliate; and pushed them beyond the bounds of what I would call humanity, perhaps think justice; and yet, while I cannot approve of their conduct, I am loth, if I could avoid it, to be severe against it, not knowing, whatever I now think, how far rage might have got the ascendant of reason with myself, if in their place. One thing is obvious, that though it is true, that the justice of our law agrees with the common law of reason, in presuming every man innocent till he is proved guilty, yet we have reason to fear we come here oppressed with prejudice, to create and propagate which, against this unfortunate pannel, no pains, no expence has been spared, with manifest intent to prejudge him in his trial; and in this have some people been wise in their generation; well knowing, that as presumed innocence is a great advantage in a trial, so believed guilt is no small step to conviction, and often anticipates the just foundations of it, which can arise only in proof. When I see, and am sorry for this, my lords, in one view, yet do I most rejoice at it in another, as it shews the weakness of the cause that has needed such artificial feet to support it, even in the beginning, and which being removed, as I hope they soon will be, the superstructure

built upon the false basis will also fail. There are other things too, which the law of the land would intitle us to complain of, and which a few years more experience might make it better become me to exclaim against: a close confinement of the pannel, contrary to the sacred charter of liberty, which this nation boasts of; and which illegal proceeding was only removed of late by the interposition of this Court; imprisonment of witnesses to be adduced against him, where none had access to them but the private prosecutors, or their agents, removed at a distance from the check of my Lord Advocate's superintendence, whose office, though it intitles him to investigate the proof of public offences, yet renders a privilege, dangerous to be indulged to every injured party, safe in his hands. The pannel has had but short warning to prepare for his trial, though he was at great distance from the capital, from which only he could have counsel and assistance: and it is but very lately since his counsel had access to see himself; not for some time after we were in this place. These things I only mention, as my brother has already fully opened them; and I mention them, my lords, as what may have some weight with the jury, who are to try the pannel, (and whom I now consider myself as addressing) to remove the prejudices that are so naturally, though insensibly, imbibed without doors, and which especially arise in the mind from the unavoidable, though inconvenient situation, in which a supposed criminal must appear, even when as yet the law presumes him not guilty, loaded with irons, and surrounded with guards.

My lords, I do not mention, as a disadvantage to the pannel, the place of his trial. I think it can be none: there are reasons why this place may be more proper for the trial than any other, whether the pannel be guilty or innocent; that he may be either acquit or condemned, and justice may take place where the crime was committed. And one advantage the pannel most surely profits of by the trial being here, viz. the presence of the prince who presides in it, and who, in a special manner, is the father of his own country, as he justly appears to be of this part of the kingdom. This of itself is more than sufficient to balance a disadvantage, were it possible to suppose any could arise from the opportunity that affords it. At the same time, I would, with great deference, observe (and I hope I may do it without giving offence, which I am sure I do not mean to do), that there may be something in this, which calls upon the jury to be cautious; and I hope an attention to it will have the effect to make them rather lean to the favourable side, than be disposed to make any stretch against the pannel. It is the privilege of the subjects of this country to be tried by one another: yet, when we have this advantage, and it is an inestimable one, still it is to be tried by men of like passions, i. e. like infirmities with ourselves; and all men are more or less susceptible of prejudice. I hope, however, I may

safely trust to the honour of such a jury as will be put upon the pannel's trial, that they will, if any such there are, lay aside all regard to country reliances or connexions, divest themselves of all prejudices, and sit down to the trial with a candid resolution to yield only to the force of truth; desiring rather to see innocence thereby vindicated, than guilt, unwished-for guilt condemned, and inclined to give the cast of favour on the favourable side, unless the proof shall come out very clear and convincing. Trials in this country are open and public, and the eyes of the world are a check both upon judges and jury; and as this murder has been, and justly, the subject of an extended speculation, so will the trial for it: I hope, be the issue of it what it will, it shall be so conducted, as to reflect nothing on any concerned in it; and, I shall only add, that, could I suspect that the law of my country, or the court, could put any on the pannel's jury, who would overlook their obligations to impartiality, which I dare say is impossible in this present case, I would put such in mind, that, if they have no regard to the pannel, they should regard themselves; for, as the old philosopher said, Nobody is happy before he die; what is the pannel's fate to-day, may be our's to-morrow, and what is proof against him, may be against another long after this. Every trial, therefore, though it presently affects only those who are under it, is in a material sense the cause of those who do try, of the public, and of posterity.

My lords, having said so much in general, (and I think I could say no less) it should be my province now to state what has occurred to me for the defence of the pannel against this indictment.

And here, my lords, we have a most barbarous, indeed a shocking murder, charged against two persons; but with this material distinction between the two, that the one is by the indictment charged as the actual murderer, by himself; no mortal along with him at the perpetration of it; and the other is only alleged accessory thereto, as having been in a previous conspiracy with the murderer: and the pannel now to be tried, is this conspirator.

My lords; I do not distinctly see, from the indictment as laid against Breck, what proof there will be of his being the actual murderer. I should at present imagine, from the way in which the story is told, that there can be no proof, at least no direct, no satisfying proof. But be that as it will, one thing I am sure of, from the nature of the thing; it is impossible there can be any direct proof of a conspiracy, to which only the two persons accused were privy: and therefore it is, we see my lord advocate has very properly, and, I think, very candidly, as I said before, specified his charge of accession against the pannel, into these circumstances, from which his lordship infers the accession or conspiracy. And it is upon the relevancy, or import of these circumstances, that I fall to speak to your lordships. For it is not to be imagined, that, by disputing the

relevancy of the indictment, we mean to call in question that murder is a crime: and, for my own part, I as little contest, that, as the law now stands, the charge against the pannel in the general proposition of the libel is relevant, that he is guilty, actor, art and part of the murder of Glenure. And I do farther admit, that, if the pannel has been accessory to, or the former or contriver of a conspiracy for perpetrating this horrid murder, he is truly as much art and part thereof, as the actual murderer: nay, were that the case, I should not hesitate to pronounce him, if possible, a greater criminal than the miscreant by whose hands he accomplished the wicked assassination. But it is my business now to endeavour to shew, that the circumstances condescended upon in the libel, and on which I must suppose the proof is to rest, are not tantamount to the general charge; or, in other words, that the premisses of the indictment, supposing them true, do not infer the conclusion, much less will they support it, when they appear in that light which I hope the proof will place them in, divested of the romantic dress of exaggeration, in which fancy has dressed them. And when I attempt this, I own, my lords, it is not with design to influence your lordships' interlocutor; for, as I have already admitted the general proposition of the libel to be a relevant charge, I suppose the interlocutor of the court will be confined to that. It was the custom, not many years ago, for the court to pronounce special interlocutors upon such indictments as the one now under consideration, finding what facts or circumstances, if proven, would infer the charge: but your lordships' later, and, I think, better practice, has been to evade that, as what, if it had any effect to influence the judgment of the jury, did in so far deprive the pannel of his rightful privilege to be tried by the jury, and not by the court; or as, what indeed was more likely to happen, being a thing that had no effect at all, as the jury would judge over again for themselves, what the court had ineptly judged of for them. I say, therefore, my lords, I do not speak so much for your lordships, as for the jury; willing, so far as I can, to guide their attention to where I apprehend it ought chiefly to be fixed, in the proof they are to hear; and to help them, if I can, to judge on what part of it they ought to lay stress in forming an opinion of this cause.

There is only one thing which I must submit to your lordships, and which I shall but mention, as my brother, who opened the defence, has already offered it, and your lordships may hear more of it in the reply to my lord advocate; and that is, the prejudicial question how far the pannel, charged with an accession to the crime of another, can be tried for it, till the principal is first discussed. Your lordships well know, that an accessory does of its own nature follow a principal; till, then, there be a principal, there can be no accessory, and the principal being removed, the accessory is also taken away; and therefore, till the one is con-

victed, there is no room for trying the other; in like manner as the principal being acquit, the accomplices cannot be condemned. That the law stood formerly so, is most certain; as appears from many authorities, which I forbear citing. How far this is altered by the act of parliament, introducing the law of art and part, will be subject to the judgment of the court, where I leave it. But I must at least inform the jury, that, however the law stands in this matter, it is undoubtedly certain, that they, or any jury, cannot convict an accessory, but upon this supposition, that, if the principal were under trial before them they would convict him, "*Quando proceditur contra aliquem tanquam quod prestiterit auxilium, debet constare principalem deliquisse.*" And the gentlemen of the jury will take heed to this, that if they shall find cause to convict the pannel upon the evidence that shall be brought before them, they do, in the most express manner, declare their opinion, that Breck, and no other, was the murderer of Glenure. Nor must they hold sufficient for this purpose the presumptive conviction, which arises from his flying justice, and being fugitive and outlawed by the sentence we heard this day pronounced. The law says expressly, That no fugitation of a principal is to be held for a conviction against an accessory; and indeed, why should it? for the confession of the principal, were he now here, would not be evidence against the pannel, and much less must his absence or run-away have that effect. So that the jury must here consider, that, before they can convict the pannel, they must have such evidence against Breck, as would condemn him, were he on trial. And so, leaving Mr. Breck till we see what proof comes out against him, the question is at present, upon what is the charge of the pannel's guilt founded? or, are the circumstances alledged in the indictment sufficient to support the accusation of art and part against the pannel?

And here, my lords, I do not propose to entertain your lordships with a nice disquisition on the law of art and part; suffer me only, in three words, to mention that, so far as I can comprehend by the law of Scotland, art and part is inferred from circumstances antecedent to, concomitant with, or subsequent upon the actual commission of a crime. Now, my lords, when I look to the indictment before me, I am able only to perceive two facts condescended upon, from which the pannel's accession to this murder is to be inferred; the clothes alleged to be furnished by the pannel to Breck before the murder, as a disguise to commit it in, and the money sent him after the action, to enable him to go off the country. These, I say, my lords, are, so far as it appears to me, the only two considerable circumstances to infer accession: for your lordships will observe, there is an absolute blank as to the principal period in which guilt ought to appear, the actual commission of the crime; at least, so far as I can gather, there is not one concomitant circumstance al-

leged against the pannel, which connects with the actual murder. And as for the circumstance of the pannel's sending the money to a certain place, where as would appear from the indictment, he had no access to know that Breck was; as to that, I say, and some ones of lesser moment, which I likewise take notice of, I take them to be designed as a key to explain into a connexion with the murder, the two facts already mentioned, by shewing a previous knowledge of the murder, which the facts themselves do not import, and yet without which they have no weight. Upon these two cardinal facts, then, attempted to be supported by the other lesser circumstances, in my apprehension, lies the burden of the prosecutors charge. And I will beg leave to say a few words to each of them.

But, before particulars, give me leave, my lords, as shortly as I can, to make an observation or two upon the nature of proof in general.

And, my lords, I think it is a common, but a well-founded maxim, derived from better authority than mine, that, in proportion to the greatness of a crime, ought the strength of the proof of it to be. The higher a crime is, and the deeper it draws in its consequences, so much the clearer and stronger ought the evidence of it to be: and indeed justly; for, I hope, bad as men are, corrupted as human nature is, it is not come that length, that vice is natural to mankind. I rather persuade myself, that it costs some pains, by rooted habits, to extinguish the sparks of reason, which are the seeds of virtue. Here then, my lords, is a crime of so enormous a size, that it is almost too big to believe; murder, deliberate murder, assassination in face of the sun, in defiance of all law and government. What proof should then be expected of so monstrous an offence? That one should sit down deliberately and coolly to form a conspiracy of bereaving another of his life, in so horrid and barbarous a manner; what degree of flagitiousity must not be proved to suppose one capable of it? Sure, though many circumstances be brought to establish a presumption of guilt, yet to believe it is no easy matter. Must it then depend upon guess-work? Is it to be tried upon questionable evidence? or, is a jury to be persuaded into it by art? No, there must be the most palpable and incontestible proof; and, unless the evidence is full and plain, no credit, I will venture to say, can be given to so black, so detestable, and so unnatural a charge. It would almost require to see the blood of the innocent reeking on the hands of the guilty. But what have we here? Presumptions built upon presumptions; suspicions, and these suspicions supported by others; suspicions without proof, nay disproved. We have first to get over the belly of a good fair character, which this pannel had the happiness to possess, a blameless, moral life in private.* And, should be all at once have

* There is a tradition that here the Lord Justice General interrupted Mr. Mackintosh,

deviated so far from the paths of virtue? Could he so suddenly shake off a regard to all that is sacred? I should have expected to have heard urged against this pannel, the abandoned dissoluteness of his manners, the barbarity of his nature, that his life was one continued course of wickedness; in short, every part of his character devoted to murder; that he was one inured to the practice of it, and distinguished by the most consummated guilt: yet not one of these circumstances so much as alleged in all this aggravated charge; and for a good reason, viz. That the contrary is well known to be true by the prosecutors themselves. Next, my lords, when we seek for a cause of such a malice as could produce this crime, we find a cause that never existed; a cause noways adequate to the effect: resentment; for what? For accepting an office which somebody must have got; and none could have made a more favorable use of, for the friends of the pannel, than this gentleman did: (for which reason they will be proved to have been in good friendship long after that;) resentment for turning out some tenants from an estate forfeit to the crown; irrecoverably lost to the family with which the pannel was connected. This is the foundation; and what is the superstructure? Of a piece with it truly. Why, the murderer had on a coat of the pannel's when he committed the brutal action, and got money from him after it. Here is the proof; a circumstantiate proof it is called.

My lords, I have no objection to circumstantiate proof; what the law calls argumentative evidence. I do admit, that it is a legal and proper sort of evidence, as much as direct proof by witnesses. Every thing is legal evidence, that is such real and certain proof as ought, in natural justice and equity, to be received: for what is evidence of a fact, but such testimony as the nature of the case requires to induce a moral certainty of the thing testified? And an argument is nothing else than what gives faith or credit to a thing in itself doubtful, which perfectly agrees with the law definition of proof or proving, which is *fidem facere*. I will admit further, that circumstantiate evidence, when clear, is perhaps the most satisfying and convincing proof of any. Circumstances are inflexible proofs: they will not bend to the inclination of parties: witnesses may be mistaken; may be corrupted: things can be neither; and therefore, so far as they go, deserve unlimited, unreserved faith.

But then, my lords, the circumstances must be clear, certain, and well connected: no blank in the chain, else all goes for nothing: the

urging with much vehemence, that a fair character and blameless moral life could not belong to any man who had been in rebellion against his king; and that Mr. Mackintosh in the warmth of the moment represented to his grace, that it might be very difficult to say how many of the Argyles had been in rebellion against their kings. See a note to the deposition of Donald Campbell of Airds, in the Proof.

VOL. XIX.

arguments must be perspicuous, nervous, and conclusive. The same law that has said, "*crimina posse probari, vel testibus, vel documentis aut indiciis*," as it requires "*idonei testes*," so does it "*documenta apertissima, indicia indubitata, luce meridianâ clariora*." We must therefore, my lords, carefully distinguish between circumstantiate or argumentative evidence, and bare presumption or even probability; much more suspicion and conjecture, with all which it has a near affinity, and is therefore apt to be confounded with them; for they all depend on facts or circumstances. But, says our great criminal lawyer, sir George Mackenzie, crimes cannot be proved by presumptions; for presumptions are only founded on verisimilitude, and what may be, may not be; whereas all probations, especially in criminals, should be infallible and certain; "*conclusio semper debet sequi debiliorem partem*:" If otherways, says he, judges (or juries now) would be arbitrary. Probabilities, again, says a good reasoner, twenty of them allowed to be such, are not equal to one matter of fact well attested: they may strengthen the fact, but cannot supply it: they cannot be evidence themselves, because one probability may be set against another, and so mutually destroy the force of each other: and as for suspicions and conjectures, who will pretend a right to indulge them, where life and fortune are concerned?

Guarding then, my lords, against these things which are ready to mislead, let us, and let the jury, my lords, examine cautiously and candidly the circumstances I mentioned, on which the burden of the indictment lies: let us see if they approach a proof; if they do not more participate of the nature hardly of presumption, not at all probability, rather suspicion and conjecture; or if they amount to a solid and substantial circumstantiate or argumentative evidence.

My lords, I mentioned first the clothes; and permit me, my lords, once more in general to observe upon this circumstance, as well as the others that follow, that I do, with great submission, apprehend they derive their whole weight from a belief of the pannel's guilt, which it is indeed very natural to entertain from such circumstances as he now appears in. The indictment sets out with laying down this crime in the most ugly colours, as indeed it justly does deserve; and then assumes, that the pannel is guilty of it; and I venture to say, that, take away the influence which too easy a credit to this first position gives to what comes after, all the circumstances brought to support the charge will in a great measure lose their force; so that the assertion of the charge is the very thing which supports the circumstances adduced to prove it, than which nothing can be a more false circle of probation. Prejudice, my lords, is like a jaundiced eye, or a magnifying glass. To the first, every thing it looks at appears yellow; and the last to appearance, increases

D

the bulk of every object to which it is applied. Just so prejudice discolours every circumstance, turns the most trivial into something of importance, and makes what is in itself indifferent, a proof of guilt. Can the truth of this appear more verified in any, than it is in the present case?

My lords, I will not repeat the true fact, as your lordships have already heard it opened, with respect to the clothes: had it been that Breck had really received them from the pannel, sure that of itself would not have proved the pannel's accession to a murder committed by Breck at the distance of so many days. But has it any weight at all, this circumstance, as it has been told your lordships, and as it will be proved to have in fact happened? A man comes to my house, and, without my knowledge, puts on, and goes away with my clothes; and when wearing these, a murder is committed: must I be accessory to this murder, or, must I be presumed accessory to it? Breck, your lordships hear, was in use of changing his dress: he had been six weeks at one time in Rannoch with these very clothes; and because he has them upon him again at the unlucky period, must the pannel for that be guilty with him? My lords, we have heard of villains borrowing, stealing clothes, assuming characters, feigning voices, and such like things, when about to commit crimes, of purpose to deceive, and to throw the suspicion of guilt off from themselves upon the innocent. But surely these are dangerous circumstances, and would need to be supported by better proof, before the life of any man was taken away upon them; or indeed what man is safe? It will not avail that we keep ourselves safe, so long as it is in the power of others thus to bring us into danger. Every man must so be at the mercy of others, and those of the vilest of mankind. The libel indeed says, the pannel furnished Breck with his clothes; but how is that to be proved? Did the pannel give him them? No, my lords, we shall prove he took them, and went with them from the pannel's house, when he was not there, when he knew nothing of it: But though he had known, as he did on former occasions, or though he had with his own hands given them to Breck, would it have been proof against the pannel? I cannot imagine it. I might admit, that had Breck never before changed his dress at the pannel's house, had this been the first time, it might have been a circumstance, and but a weak one too, from which to presume guilt against the pannel: but when he had been in use of doing it, does there from thence arise so much as a distant suspicion against the pannel? Whatever effect it may have against Breck to presume that wicked design, which I shall at present take for granted he soon thereafter executed, (to presume it, I say, against him) that he changed, at so critical a conjuncture, his dress; yet sure it can have no influence against the pannel, who, till it is better proved, cannot be supposed privy to so horrid an under-

taking in Breck. And this, my lords, puts me in mind to make a distinction, which I should have made sooner, that is, betwixt Breck and the pannel. And I must call upon the jury carefully to separate the parts of this indictment, which refer to the one and to the other; for, when they are confounded together, one, in reading or hearing it, is extremely apt equally to apply the effect of all the circumstances to both. The indictment has so chequered them through other, that it costs some pains to distinguish them, and lay to the door of Breck, and of the pannel, what separately applies to each, and seems to support the different charges against them. To shew the necessity of this, I will but mention one paragraph of the libel, where this confusion manifestly prevails. It is there first said, that Breck having come to the pannel's house on the Monday evening, James Stewart the pannel was informed by him, (Breck) or by his son Charles Stewart, or by Fasnacloich's daughter, of Glenure's motions and resolutions. And then it immediately follows, "And there, after receiving such advice, in the evening of the same day, the said Allan Breck Stewart laid aside his own clothes, &c." So your lordships see, that first Breck is said to inform the pannel, and then Breck's receiving such advice or information from the pannel, (just inverting the thing) is laid down as the spring of Breck's actions, with a design, as is plain to extract guilt against the pannel, from his giving information to Breck, which produced his action, when it was truly Breck himself that informed the pannel, as the indictment first asserts. This, my lords, may be an inaccuracy in wording the indictment; but it is not for that I observe it: I mention it, that the jury may see how carefully they must consider and weigh every branch of this complex charge, as being heedless to one branch or circumstance may have bad effect. And surely it is evident in this particular, that the weight of the circumstance, as laid against the pannel, wholly flies off by a just attention to the erroneous connection of the fact as narrated.

There is another circumstance of the indictment, which, though it does not fall so directly within my present view, I cannot omit taking notice of it, as it comes across my thought; it is as to the pannel's behaviour, when the murder of Glenure was first notified to him by Glenure's servant. It is said the pannel appeared noways surprised or concerned. Alas! my lords, what such proof of guilt is this? We have seen doubtful actions by the help of innuendoes construed criminally; but to give that in evidence which was neither said nor done, to construe silence into guilt, is entirely new; and the author of this invention will deserve the glory of the discovery: this is, indeed, to conjure one into a crime. My lords, I could venture to invert the proposition, if the gentlemen please, and maintain, that a contrary behaviour, to any remarkable degree, would have been more suspicious, 'Tremor est sig-

'*num cædis,*' or in the words of the proverb of our own country, 'The greatest thief cries first, fy.' But, my lords, the fact is different from what is in the libel. It will be proved to your lordships and the jury, that the pannel, upon receiving this piece of, I must call it melancholy news, expressed to the messenger a decent concern and regret, though little did he think at that time, that his behaviour then would now be brought into judgment against him.

Of the same kind with this, my lords, is another circumstance, which I remember in the indictment (for I cannot go through them all;) and that is, a letter of the pannels to one Charles Stewart, relating to the price of milk-cows.—I confess, my lords, it is to me mysterious yet, what import this letter is of as a proof against the pannel. If it is, that the subject of it is suspected to be fictitious, that we shall be able to prove real. But what connexion has it with the charge? I own I cannot find it out. It would appear to me that this letter must suffer torture, and not a little of it, before any thing can be squeezed out of it against the pannel. It puts me in mind of a saying of a great but very wicked politician, cardinal Mazarine, who is said to have boasted, that, if he had but two lines of a man's writing, with a few circumstances attested by witnesses, he would cut off any man's head when he pleased. Thank God, we breathe in a climate different from the one that pontiff ruled in: and I hope we do not delight in blood so much as to adopt his cruel scheme.

These things, my lords, I have thrown out by the way; but as to what I was upon, the circumstance of the clothes, I shall only add, that as it is in truth, it appears of no weight at all; and had it been as in the indictment, I should have thought it a circumstance greatly too thin and slender to build any thing upon.

There only then remains the other circumstance of the money, which is posterior to the murder: for, as I have already had occasion to observe, I do not discover a concomitant circumstance alledged, unless the arms be pointed at for this purpose; as I observe, there are two guns mentioned in the list of evidence, as found concealed near the pannel's house, and which possibly the prosecutors will attempt to prove to have been those which the indictment says Breck had brought, or caused to be brought to the place of the murder. Were any thing of this to be proved, I shall fairly admit it would be a strong circumstance, as it is one of these very things which the law points out; '*Opem fert qui, cum crimini patrato non interfuerit, ferramenta tamen, tela, venena commodaverit, sciens ejus rei causâ commodaret.*' But I cannot see where the proof of any thing like this can arise. It does not appear, that any guns were found at the place of murder. I think it is presumable the murderer would carry his arms with him, after using them to his wicked purpose. And as for these found concealed near the pannel's house, we are instructed to say, they were in the pannel's house at the

time of the murder, and were hid after it for fear of an apprehended search for arms, by the military that was expected to come into the country.

This therefore I leave upon the proof, and shall now, in a word or two, take notice of the money sent by the pannel to Breck after the murder. And here, my lords, I must be allowed to observe, in the first place, what air George Mackenzie's doctrine upon this point is. His words are, sect. 7, (tit. Art and Party) "assistance given after the crime is committed, scarce deserves the name of assistance." And cites an authority for this opinion. I will admit, my lords, that, if this pannel did, knowing Breck to be the murderer of Glenure, administer help to his escape, by furnishing him with money, he did a very wrong thing; perhaps was guilty of an offence, which the law would punish.—But it is an offence quite different from that of accession to the murder. It is a species of crime by itself; and, as my lord advocate has not laid his prosecution for that, we have nothing to do with it. At the same time, my lords, however wrong such a conduct might have been, yet it could admit of an excuse. Your lordships have heard this Breck was the pannel's relation. He had been his pupil, brought up in his family till he went into the king's service as a soldier; and we all know, my lords, the strength of compassion on such occasions, especially to our friends, it would perhaps be hard to punish for it. The worthlessness of our relations does not at once dissolve the ties of nature; none of us can be sure, but we may have a wicked son or a brother; and, in a case of this sort, it would be natural to wish to help him out of the way; perhaps it would be wrong, but such is the known force of natural ties, and it, at least, lessens the crime. However, here, my lords, the case does not apply; for we absolutely deny, that the pannel knew any thing of Breck's guilt; and such knowledge can never be presumed; he knew the situation he was in as a deserter, and the hazard of it, when the military were coming into the country to make a search: and to be sure, had he been caught by the military, they would have saved your lordships the trouble of trying him, supposing him to be guilty: a court-martial would have made short work with him, unless it had been (as likely it might) thought more for the end of public justice, to make him suffer for so flagrant an offence as this, than to hang him as a deserter. It was for this reason, my lords, and not from any knowledge of his guilt, that the pannel, upon Breck's message to that purpose, as your lordships have heard, sent him the money to enable him to get off the country, and go where his business called him; his business, I say, my lords; but at the same time I call it his illegal, his unnatural business, as an enemy to his country, and a traitor to his king. And as to the circumstance which I formerly noticed, as tending to point out the pannel's previous know-

ledge of Breck's motions, by his knowing where to send the money, though he had no access to see Breck after the murder; as to this, I say, my lords, your lordships see no stress can be laid upon it, when you have heard that it was by a message from Breck that the pannel learned his motions: so that still something is desiderate here, whereon to fix that circumstance, upon which alone depends the pannel's accession, to wit, his foreknowledge of the murder.

My lords, I have finished what occurred to me on the circumstances of the indictment; and I am unwilling to weary your lordships.

I forbear entering upon the boyman's conversation with Breck; that is but one man's story of what another said. It is but hearing a hearsay, or rather less; and I know no law, no rule, it rather seems contrary to all rule of evidence, that one should suffer for what another said of him; and that the very guilty person, as is here supposed. If he did say so, it might be to throw the suspicion off himself with the better grace: but, be it as it will, it can be no evidence against the pannel.

There is but one other thing in the indictment, which we have to finish this doubtful evidence, if it can be called so much, and that is, the threatenings; but, as they are libelled in general, I cannot argue upon them; nor has the pannel any opportunity to disprove them: they must therefore be left, till the evidence is concluded.

My lords, I have said what I could, from such helps as were in my way, upon the nature and import of this sort of evidence which is now before us. I shall only say further on it, that this sort of evidence, when imprudently handled, may be resembled to the monstrous machine for making havock of enemies which, when invented by a subject, was wisely smothered in the birth by the governor, lest, however convenient it might be when used for him, he might come one day to regret the invention, when he found it applied against himself. And as to this particular case, I take it, that every individual circumstance, as laid in the indictment, so far as we know of it, will be unsupported with evidence; that all put together do not amount to the charge. I think there are no grounds for any private opinion of the pannel's guilt, but what arise from prejudice only. I think prejudice, or even opinion, has nothing to do with judicial proceedings. It is the judgment that must acquit or condemn; and that must, can only be founded on evidence, on proof, not on suspicion or presumption.

I shall now take the liberty to read to your lordships, and the jury, the words of a great criminal writer on the common law, when treating on the subject of argumentative evidence. *Math. de Crim. ad Tit. 15, Cap. 6.* He is speaking of arguments, and says, "*Argumentum est necessarium, cujus consequentia est necessaria, veluti coivisse eam quæ peperit; contingens, cujus consequentia est*

probabilia, veluti cœdem facisse qui cruentatus est." Then he adds, "*Contingentia argumenta, quamvis singula fidem non faciant, plura tamen conjuncta crimen manifestare possunt. Hæc appellantur præsumptiones; præsumptio enim nihil aliud est, quam argumentum verisimile communi sensu percipit, ex eo quod plerumque fit, aut fieri intelligitur.*" And he gives the following example of an argumentative evidence which may condemn, which I beg the jury will attend to, "*Occisus est kalendis Mœvius; Titius perempti inimicus fuit eidem sæpius non solum interminatus, sed et insidiatus est: cum deprehenderetur iisdem kalendis in loco cœdis cruentatus cum gladio oruento, ad mensuram vulneris facto, toto vultu expalluit, interrogatus, nil respondit, trepide fugit. Hic singula (says our author) quidem argumenta infirmiora sunt, universa tamen cœdis auctorem Titium evidenter designant.*" And I most heartily agree with the doctrine, and shall leave it to the jury to judge, how far the proof brought against the pannel comes up to this standard.

I shall conclude with laying before the jury the words of a great judge and lawyer of our own country, on an occasion somewhat similar to this. It is part of my lord Cowper's speech upon the bishop of Rochester's trial, where the evidence depended on circumstances, as it does here. His lordship says, "The wisdom and goodness of our law appears in nothing more remarkably, than in the perspicuity, certainty, and clearness of the evidence it requires to fix a crime upon any man, whereby his life, his liberty, or his property, can be concerned: herein we glory and pride ourselves, and are justly the envy of all our neighbour nations. Our law, in such cases, requires evidence so clear and convincing, that every by-stander, the instant he hears it, must be fully satisfied of the truth (and certainty) of it. It admits of no surmises, innuendoes, forced consequences, or harsh constructions,* nor any thing else to be offered as evidence, but what is real and substantial, according to the rules of natural justice and equity."†

These are my lord Cowper's words as we have them given us; ("It is very true, the judgment of the House of Lords went against his lordship's opinion in that question; but I must presume that the judgment of that august assembly, though against his opinion, proceeded upon the principles established by himself; and though it had been otherwise, the

* Lord Bacon says, "Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of laws." *Fo. Edit. vol. 1, p. 440, 441.*

† See *New Parl. Hist. vol. 8, p. 338.*

‡ "Here the D— of A— said to Mr. Macintosh: 'But that opinion, Sir, was over-ruled;' to which Mr. Macintosh answered, 'It is very true, my lord,' &c. as in the parenthesis." *Supplement to the Trial of James Stewart.*

argument would still be good, as reasoning is not always bad, when it fails in success." I think I may with great propriety adopt what that same noble lord farther said on that occasion, as follows; "In the case before you, the whole charge is built upon circumstances, and these are said to be supported by other circumstances; but all of them are so remote, so general, and I may say so inoffensive, that they might suit any lord here." I think the circumstances charged against the pannel might suit any one here.

My lords, I beg pardon for saying so much; I hope your lordships will excuse it, for the reasons I gave in the entry. I shall only further add, that the pannel is now on trial for his life; he asserts his own innocence; he pleads Not Guilty to the charge. I hope it is the answer of every one present, God give him a good deliverance! And if he falls, let it be as a sacrifice to justice, to expiate guilt, and purge the land of blood, not as a victim to the blind fury of his enemies, or the rage of the deceased's friends, to appease popular prejudices, or ill-founded clamour and outcry.

Mr. Fraser, against the Pannel.

My Lord Justice-General;—I appear as counsel for Mrs. Campbell of Glenure, and her infant children, against James Stewart, now in the pannel, accused as guilty, actor, art and part of the murder of Colin Campbell of Glenure; a murder aggravated by its being committed from a malicious hatred and resentment conceived against Mr. Campbell, on account of the faithful discharge of his duty in an office intrusted to him by his majesty.

This crime, my lord, is in itself so horrid, and in the present instance is attended with aggravating circumstances of such an extraordinary nature, as must rouse the indignation of every worthy member of society, and call loudly for the most severe and exemplary punishment. Murder has always been looked upon as one of the most heinous crimes; but in all civilized countries, at all times, that base, that treacherous species of murder, assassination, has been held in still greater, as more deserved abhorrence:—what then must be the degree of that man's guilt, who deliberately, unprovoked, in cold blood, during times of full peace, and in the most contemptuous despite of government, commits this most treacherous and most abhorred of all murders! Heavy as that load of guilt is, I am sorry to say, my lord, it lies with its utmost weight upon the prisoner now before you; which renders this trial of great importance to every individual, but of still greater to this country in general. If assassins, capable, my lord, of lying in wait with premeditated malice, with malice concealed in their hearts, for hours, for days; if such are suffered to go unpunished, who of us all is safe, what individual, however innocent, however brave, however particularly intitled to the public protection! But what, I hope, my lord, we all hold of greater importance than the

safety of individuals, the interest, the honour of this country is very nearly concerned, not to suffer the most daring and bare-faced insult to be offered to his majesty's authority and government; and offered at a time when we, in common with his majesty's other subjects, are reaping the fruits of his most benign reign: I say, my lord, our interest, our honour is concerned, not to suffer this without endeavouring to wipe off the stain from the country, to shew the king, and to shew the world, that this is the bloody deed of one or two wicked and desperate men; a deed which the country abhors, and which it will not suffer to go unpunished.

The gentleman who opened the defence, my lord, has been as good as his word, and has given indeed a plausible account of this affair, which makes me think it necessary to lay before the Court, as distinctly and as concisely as I can, that state of the facts which there is the greatest reason to believe the proof will establish. And, in doing so, I hope to give your lordships a more just view of this extraordinary case; and, at the same time, to be of some use in leading the gentlemen of the jury to those parts of the proof which deserve most their attention.

The pannel, James Stewart, my lord, is natural brother to Mr. Stewart of Ardschiel, who commanded the men of that name that were engaged in the late rebellion, and, by means of that, he acquired their affections and attachment. When Ardschiel was obliged to leave the country, his brother (the pannel) set himself at the head of the family interest; and it not appearing in that part of the world a forced transition, he was allowed to take this authority upon him. In a short time, therefore, he came to be a leading man, and to have the chief influence over the common people. Such, my lord, was the state of that corner of the country in the year 1749, when Mr. Campbell of Glenure was appointed factor for his majesty upon the estate of Ardschiel, and some other forfeited estates in that neighbourhood. James Stewart soon foresaw how much this factory must interfere with the plan which he had laid, and with the interest which he wanted to establish; Glenure, therefore, very early became the object of his ill-will. But it did not long rest there; for in the year 1751, Glenure having, in consequence of orders from the barons of exchequer, caused Mr. Stewart to be removed from the farm which he possessed upon the Ardschiel estate, what was before but ill-will, was now turned into hatred and resentment. This led him to oppose all Glenure's measures, and particularly to play the volunteer in the service of some other tenants upon the same estate, whom Glenure was about to remove at the ensuing term: for this purpose, he repaired in person to Edinburgh, and, in name of these tenants, though without the smallest commission or authority from them, made be presented to the lords of session, a bill of suspension of the intended removal, and obtained a sight of cer-

tion; this sist he prevailed upon the tenants to intimate to Glenure, who was put to the trouble and expence of a journey to Edinburgh, before he could have the groundless bill of suspension answered; which was indeed all that was necessary in order to make it be refused.

Mr. Stewart, my lord, little satisfied with this unsuccessful attempt, which confirmed Glenure's influence at the expence of his own, and finding himself forced to quit the country, and to abandon his favourite plan of popularity, formed a most desperate scheme of revenge, no less than a plot to take away the life of Glenure in the basest manner. In pursuance of this scheme, he was at pains, over all the country, to represent Glenure's conduct in the most disadvantageous light; and, when he thought there was a general odium raised, he had recourse, in a more particular manner, to those in whom he could most certainly confide, to those who were most easy to be stirred up, and most inclined to any desperate deed.* Different sets of such men, my lord, he assembled at different times, and, after expatiating against Glenure's ill conduct, he used all his art to convince them, that it was their duty to free the country of what he was pleased to call Glenure's oppression; telling them, that he had once seen commoners in Appin, who would, long ere then, have stopped his career; and that he could assure any of them, who was hardy enough to undertake it, a certain escape to France, and a handsome pension afterwards! By those methods, my lord, Mr. Stewart used his utmost endeavours to stir up some hot-headed ruffian to the execution of his plot! but his endeavours were long used in vain, till at length Allan Breck Stewart was thrown in his way, a man marked out for such a purpose; a deserter from our service to that of the French; one who, in both countries, was a man of desperate fortune, but who, in this, had not only lost all title to the protection of the law, but was become obnoxious to its severest penalties. This man James Stewart immediately laid hold of and cherished. It was easy to stir him up to resentment. To him therefore he communicated the whole of his design, and with him he concerted the execution of it. Allan had nothing to lose; therefore it was determined he should be the actor, whilst James should lie by to protect him, and to turn the mischief as much as possible to his own advantage. Happily, my lord, keenness and resentment, as usual in crimes, got here the better of caution, not only with Allan, but even with the more sagacious James; for, in the midst of their most cunning contrivances, they could not refrain from uttering such strong and particular threats against Glenure, as immediately pointed them out for the objects

of general suspicion. Both of them have many times threatened him with death, and both of them have even gone beyond general terms; for Allan declared he would, on the first occasion, shoot him as he would a black cock; an expression very applicable to the base manner which he afterwards made use of: and James, still more inveterate, swore, in the fullness of his heart, that he would shoot Glenure, even if he himself was so disabled, as to be obliged to go upon his knees to a window in order to do it. These are instances of the threats which they made use of, which first pointed them out, and which must still go a great way in convincing every thinking man that they, and they only, were his murderers.

In consequence of the last resolution, that Allan should act whilst James stood at the helm, Allan laid himself out to get particular information of Glenure's motions; and, for that purpose he contrived to make a visit at Fasnacloich, the very next house to Glenure, and within a mile of it; there he remained upon the look-out till Monday the 11th, when Glenure set out from his own house for Fort-William. Upon which Allan immediately repaired to his associate James to communicate the intelligence he had got, viz. That Glenure was gone to Lochaber; that he was resolved to persist in removing the tenants of Ardschiel, and was certainly to return for that purpose before the term-day, the 15th. Having upon this information consulted together, and settled the plan of operations, the pannel furnished his friend with a dress more proper for what he was going about, giving him a suit of his own clothes, a black short coat, trousers, and a blue bonnet; and thus equipped, he set out the next morning, Tuesday the 12th; but, knowing that Glenure might possibly not return for a day or two, in order to avoid suspicion, he made a tour among his relations, going first to Ballachelish, from thence to Glenco, from thence to Callart, where he staid Tuesday night, and on Wednesday the 13th he went back, by the same route, to Ballachelish; in all which circuit, he was at hand to lay wait for Glenure, at whatever time he should return from Lochaber. On Thursday the 14th, when there was a moral certainty that Glenure would return, (he having appointed a meeting with several gentlemen in the country of Appin that evening) Allan left Ballachelish's house under pretence of fishing, and, very soon after, appeared at the ferry of Ballachelish, by which Glenure must necessarily pass, in his way from Lochaber to Appin: there he met the ferry-man, and, hastily calling him aside, inquired, with more than ordinary earnestness and anxiety* if Glenure had passed there that day; and, being answered that he had not, Allan immediately

* This I conjecture to be the passage referred to in the observations subjoined to the pannel's dying declarations in the 'Supplement to the Trial of James Stewart,' and inserted at the end of this case.

* It is observed in the 'Supplement,' that the expressions 'hastily, more than ordinary earnestness and anxiety,' are not supported by the evidence of the ferry-man. See in the proof the deposition of Archibald Mac Innes.

ran up the hill, towards the high grounds above the house; from whence he had a view of the country around, on both sides of the Loch, and a short passage into the wood of Lettermore. In this wood, my lord, it was, that he marked out a most proper station for the execution of his desperate design; a little thicket, on a rising ground, within a few paces of the high-way, along which every traveller must necessarily pass; from whence, himself unseen, he could distinctly see the road leading to the ferry of Ballachelish on the Lochaber side, and the road on the Appin side, leading from thence to the wood of Lettermore. Here, my lord, he posted himself with one or two loaded guns provided for the purpose; and here he lay in wait till Mr. Campbell of Glenure had passed the ferry, and was riding along the road through the wood. It was then, my lord, that Allan Breck seized this long wished-for opportunity, and when Glenure was come within convenient distance, this abandoned assassin shot him dead with two balls from behind: a deed as cowardly, as it was barbarous and inhuman! a deed of which there is hardly an example in this part of the kingdom, whose inhabitants, however rash they may be to brave dangers in an open manner, have never, till this atrocious crime of their unworthy countrymen, been branded with the ignominy of base and cowardly assassination!

Allan having thus executed his deadly purpose, immediately disappeared, in order to betake himself to the concealment provided for him, calling in his way, after a hidden manner, and at midnight, at Glenco's house, where he informed the lady and her son that Glenure was murdered, and, without any more conversation of either side, added, as a consequence of what he supposed known, that he himself was immediately to leave the country. Soon after this, he arrived at his allotted retreat, the shealing of Koalisnacoon, the habitation of the trusty bouman; and, in a conversation which he and the bouman had there, he talked of the murder in a more remarkable manner than he had even done to lady Glenco; for, after faintly enough denying his own concern in it, he told his friend that he was sure the family of Ardsheel would be suspected, particularly James Stewart and his son Allan; using this remarkable expression, That there would be no fear of them if their own tongues did not betray them, especially Allan's, who, he feared, was more open-mouthed than his father.

All this while, my lord, the pannel remained at home undisturbed; and when the accounts came of Glenure's murder, and every body else in the neighbourhood was hastening to go to look after the corpse, he never offered to stir, nay, he would not suffer any one of his family to go near it. He, my lord, had other things to mind; not the unhappy murdered, but the barbarous murderer was the object of his attention; his own preservation was so closely linked with Allan Breck's, that there was a necessity for Allan's being kept out of the way at any

rate; James therefore immediately dispatched Alexander Stewart packman, his relation, and a person in whom he had entire confidence, to Fort-William, with a most pressing demand, as he himself acknowledges, for money to supply his friend Allan, and to enable him to make his escape from justice; and when the packman returned with a less sum than was expected, James, in the most critical juncture of his own affairs, added two-thirds of the money which he had for his own support to the sum brought from Fort-William, and sent away the faithful packman, with this money, and his French clothes, to Allan Breck, giving particular directions with regard to the place of his concealment; a circumstance no one can well be supposed to have known who was not in the secret, who was not originally privy to the crime for which he was obliged to have recourse to that concealment.

These, my lord, are the facts which, I have reason to believe, will soon be proved to your lordship. The gentleman has been pleased to express his surprise, that, after so strict an enquiry, this should be all that is made appear; and to say that these facts are trivial, and not relevant to infer the crime; but I cannot think any impartial man who has read the indictment now in my hand, will join in the gentleman's surprise; on the contrary, I believe every such person must join with me, in thinking no small praise due to the very proper encouragement and assistance of the crown, and to the very uncommon diligence and activity of the private prosecutors, which together have been able to throw so much light upon so dark a scene. Your lordship has been told, that the facts mentioned are not sufficient to infer the crime libelled. I need hardly observe, my lord, that such crimes are particularly villainous and destructive, from the hidden and concealed manner in which they are committed, which allows of no defence, and too often screens from punishment: their very nature does not admit of such a proof as may be expected in other cases; a proof by circumstances is all that can be looked for; indeed, when that is conclusive, it is of all others the most convincing. Witnesses may be partial, they may be perjured; but a closely connected chain of circumstances is liable to none of those objections. Now, my lord, I humbly apprehend, no chain of circumstances can be stronger nor more closely connected, than that which I have just laid before your lordship. You see a discontent rationally, nay probably accounted for; the strongest and most particular threats following that discontent, and the commission of the crime as immediately following these threats; the clearest instance of the "*malum minatum, et damnatum secutum*." But it does not rest here; you see, my lord, the murderer traced from day to day, from hour to hour, from place to place, to the very day, the very hour, almost to the very spot in which the murder was committed; and you see his associate in the strictest connexion and intimacy

with him, caballing in private, and furnishing him with a proper dress, before the murder, and, after it, furnishing him with clothes and money, to enable him to fly from justice; and what deserves particular attention, you see his associate minutely acquainted with the place of his concealment, the place previously pointed out for his retreat, and the murderer, in that retreat where he thought himself in safety, expressing his concern for his friend in very remarkable terms, in terms which carry a strong conviction of their guilty conspiracy, but, at the same time, shew the cunning with which they were conscious of having contrived it. I cannot doubt, but your lordship will think this a chain of circumstances, more than sufficient to infer the crime libelled: at the same time, I must beg leave to observe, that, in such an indictment as this, there was no necessity of mentioning any one circumstance; it would have been sufficient in law, and the gentlemen acknowledge it, to have libelled art and part in general terms; that is, that time and place libelled, the crime was committed, and that the pannel was guilty art or part of that crime. Now, if my lord advocate, from the humanity of his disposition, from a desire that every offender, however heinous his offence, should have the fairest trial, and every opportunity of making his defence; if, from these motives, he has given a very long and particular indictment, when only a very short and general one was necessary, it is somewhat invidious in the gentlemen of the other side, to turn this into an objection to the relevancy. But let them, my lord; the point is fixed, as well by law, as by uniform practice; and therefore, whilst we contend that the circumstances, as particularized in the indictment, are fully relevant, we at the same time humbly hope from your lordship an interlocutor upon the general point of art and part, independent of these circumstances.

It has been objected to this indictment, that an accessory is here brought to trial before the principal is convicted, which is attended with these bad consequences; that proof must be led against the principal in absence; that his greatest enemies may be produced as witnesses, and the proper exculpatory defences may be omitted. And further your lordship has been told, that this is contrary to the laws of neighbouring nations, particularly that of England, and contrary to the law of Scotland, as handed down to us in the books of Reg. Maj. Quon. Attach. stat. Dav. 2, and sir George Mackenzie. There might, my lord, have been some room for such an objection, if no former notice had been taken of the principal; but I can hardly think any objection will be admitted in the present case; when the principal is indicted, when every legal step is taken by the prosecutors for bringing him to justice, and when the only conviction which our law admits of in such cases, is gone against him. The inconveniences which it was said might follow from the present practice, are trifling, compared to those which must be the necessary conse-

quence, if the laws allowed not an accessory to be tried, whilst the principal, conscious of his own guilt, dared not to appear. It is but finding out some desperate fellow for the execution who can afterwards be easily kept out of the way; and the most inhuman acts must go unpunished, the most abandoned villains may laugh at justice. The authorities produced in point of law are, no doubt, great; but times and circumstances derogate from the greatest authorities. If what sir George Mackenzie has given us as his opinion was once law, it is beyond all doubt, by later practice, no longer held as such; and it signifies as little what is the law of neighbouring nations, as what was once our own law, if custom, the justice of all legislators, directed by common sense and equity, has now enacted the contrary.*

The hardships, my lord, which it is pretended the pannel underwent, can never be admitted as objections to this indictment. That they may not, however, leave any impression upon the gentlemen of the jury, or even upon this audience, I shall give your lordships the true account of what are called hardships; and they will no longer appear to be such. That upon which most stress seems to be laid is, that the pannel's wife and his children, who, by law, cannot be called as witnesses against him, have been precognosed, or judicially examined, and that their declarations are proposed to be produced in this trial. The fact is true; and nothing is more easily accounted for. When this murder was committed, all was confusion and ignorance; and every method that could be imagined was found necessary, in order to get to the bottom of the deep-laid plot. It was at that time that James Stewart's family, in common with all in that neighbourhood, were called before a judge, and examined upon what they knew of Glenure's murder: it was more than probable, that some one of that country committed the murder, and that many in that country were in the secret of it: but when these people were examined, neither of these acts of guilt was charged upon any particular person: Allan Breck was not then accused of the actual murder, nor James Stewart of being accessory to it. So that his wife and children were really not examined with any view to him; they were examined, to discover the truth in general, before it was known upon what particular person the accusation would fall. Whether their declarations will be produced in this trial, may be a question afterwards; but, in the mean while, it appears not contrary to law or equity, that they should be produced: it is confounding things to say that this is making the pannel's wife and children witnesses against him: the declarations will not be produced to prove the truth of any thing contained in them, of which they would

* As to proceeding against an accessory without a previous conviction of the principal, see Burnet on the Criminal Law of Scotland, chap. 14, pp. 288, *et seq.*

not be legal evidence; they are only to prove, that the persons who emitted the declarations, avowed these things; and if any words of theirs could give cause of suspicion against the pannel, it would be surely competent to prove such words by the testimony of third parties.* Does it not then come altogether to the same purpose, to prove them by production of the words themselves judicially committed to writing? The close confinement of the pannel, as well as that of some others, who were then taken up upon suspicion of guilt, but are now to be produced as witnesses, was owing to the rules of the place where they were confined. His majesty's garrisons have been used as prisons, more for the custody of state prisoners than of common criminals: it is not to be wondered at, then, if military officers, unacquainted with the distinctions of law, applied to the latter the orders which they were in use to receive for the former: as soon as the law was explained, it was obeyed; nor is it pretended, that the pannel, or any other, was closely confined one hour after the commanding officer was informed that the law forbade it. It is true, a new commanding officer came, to whom the law was not immediately explained, which occasioned the second close confinement complained of; but he, as well as his predecessor, paid obedience to the law, as soon as it was made known to him. That it was not therefore made known to both, as soon as might have been, the pannel's counsel must account for. That it was altogether their business; and the consequence, whatever it be, which may arise from the neglect of it, ought not to fall upon the prosecutors, far less upon the gentlemen of the army, who the pannel himself acknowledges, have all, in any charge they had of him, done their duty with the utmost humanity, always like soldiers, and like men. It is surprising, the gentlemen should mention, as a hardship, their being refused access to the pannel, after they came to Inverary; they must be conscious that this was a hardship of not an hour's duration. They required admittance from the chief magistrate, who not caring, as the duke of Argyll was upon the spot, to take any step without his grace's approbation, sent directly to acquaint him of the demand; and his grace gave immediate orders for their admittance. The gentleman who spoke first, mentioned one thing, which, I dare to say, he alone will think a hardship upon the pannel; I mean, my lord, its having fallen to that gentleman's share to open his defence; and I cannot help thinking

* As to objections to witnesses arising from relationship to the pannel, see Hume's Commentaries, Trial for Crimes, vol. 2, c. 13, p. 148. The author of the 'Supplement' observes, "By law and practice the declarants themselves could not be brought as witnesses against the pannel; yet their declarations were brought as proofs of his guilt; most inconsistently to be sure."

the complaint of the pannel's want of able assistance, coming from that side to this, looks like banter: for, setting aside my lord advocate, whose office obliges him to assist the prosecutors; I need only beg your lordship will cast your eye first to the one side of this table, and then to the other, in order to judge where the advantage lies in age and experience.

Upon the whole, my lord, I cannot doubt but your lordship will find this libel relevant to infer the most severe pains of law, as the crime libelled is of the most heinous nature; and that you will remit the pannel to the knowledge of an assize, who, I find from the list in my hand, must be men above the imputation of any other prejudice, but what every good man must feel against so horrid a crime; a prejudice, which, I am sure, they will carefully distinguish, as I hope we all do, from any personal prejudice against the pannel, who has an undoubted right to demand their most impartial attention to the proof, by which alone his innocence must stand confessed, or his guilt meet with its deserved punishment.

Mr. Erskine, against the pannel.

My lords; I have likewise the honour to be of counsel for the prosecutors on this trial, and as such it is my duty to support the charge exhibited in the libel; which has been just now very fully and distinctly opened.

The importance of the trial, the respect I have for the honourable court and this audience, were alone sufficient to have laid me under great uneasiness: but that uneasiness is greatly increased, when I find myself engaged in a task, which I am at present but ill prepared to execute.

Though I early and willingly engaged to take a part in this trial, an unexpected distress, which has, for some days, dissipated my attention to business, made me hope the prosecutors would have relieved me of an engagement which I was unfit to perform, and dispensed with my attendance, which, I apprehended, could not be material to them; but in this I have been disappointed by the indisposition of a gentleman of great abilities and experience, which has unhappily deprived them of his abler assistance.

For this reason I will beg leave to confine myself entirely to make the proper answers to the arguments which have been urged by the learned gentlemen in defence of the prisoner.

I shall forbear to enlarge upon the many aggravating circumstances that appear in the horrid scene just now opened to your lordships.

I will not attempt to inflame the jury, by giving loose reins to an imagination, warmed by a real regard for the gentleman deceased, compassion for the widow and the fatherless, under peculiar circumstances of distress, a high concern for the interest of this country, and the preservation of our present happy constitution; all which appear to have been struck at by the hand that gave this wound.

These considerations cannot fail to kindle indignation in every breast; and I am confident they have already had the effect to rouse the attention of the Court, and balance a misplaced compassion, not unnatural to humane minds, which sometimes blunts even the sword of justice: but the prosecutors do not expect to obtain a judgment against the prisoner in this court, upon any other foundation than a real conviction of his guilt, arising from evidence clear, unexceptionable, and agreeable to the laws of this country.

The laws of this country are favourable, particularly favourable to persons under trial for their life; and the prosecutors are willing to allow the prisoner the full benefit of every advantage that these laws, or the practice of the court, can give him a title to.

This being the case, I cannot omit observing how improperly the prisoner has rested the greatest weight of his defence upon clamorous assertions of unfair advantages, and unlawful oppression upon the part of the prosecutors.

For, 1mo, Though they were founded on truth, they would not amount to a defence against the libel: one crime cannot compensate another, nor an injury received from the prosecutor wipe away the guilt of the prisoner.

But, 2do, These are measures so inconsistent with that glorious spirit of liberty that reigns even among the rulers in this age and nation, so inconsistent with the known mildness and clemency of his majesty's government, and the unfortunate circumstances of the private prosecutors in this trial, that I can hardly persuade myself it would be necessary to make a more particular answer to these complaints.

Nevertheless, as I am sensible that nothing is more inseparable from noble and generous minds, than a desire to throw every atom into the balance on the side of the distressed, while there remains a possibility of their innocence; and that a simple suspicion that the prisoner had suffered any unnecessary hardship, or been deprived of any means of defending himself, might avail him more in the event of this trial, than the best defence in the mouth of the ablest advocate; for that reason, I will beg leave, in a few words, to shew the Court what foundation there is for such complaints.

The first was, that the prosecutors had deprived him of the benefit of counsel, by retaining most of the ablest lawyers at the bar.

To this I can make no stronger answer, than what the Court has just now heard from the very gentlemen who make the complaint, and will be confirmed by these who are to support them. I am confident they will convince the Court, and all who hear them, of the absurdity of such a complaint, when urged by four gentlemen of such abilities.

In the second place, it has been said, that the prisoner had been deprived of his liberty, and kept in close confinement contrary to law, debarred the conversation of his family and

friends, and denied access to speak either to his agents or witnesses.

To all which it may be answered in the general, that the laws of every well-governed realm certainly allow the confinement of persons charged with capital offences, in such manner as they may be secured, till they can be brought to trial. That no limitation of this rule has been introduced, either by law or practice, in Scotland, other than what is contained in that valuable and salutary statute of parli. 1, sess. 9, of king William, for preventing wrongous imprisonment.* No part of which has been infringed in the present case. That the prisoner has been, since he came to this place, strictly confined, cannot appear unreasonable or oppressive to those who know that of late, in spite of the vigilance of the magistrates, several criminals have escaped from their gaol, whose cases were less desperate than his, and who had no formidable tribe of friends or accomplices to assist their escape.

It will not appear surprising or unjust, that the magistrates were cautious to give access to any persons, under the colour of their being agents or witnesses, without a proper warrant, when it appears from the proof to be brought in the trial, that, during the prisoner's confinement in the garrison at Fort-William, he found means to tamper with the principal evidences, (though also in custody, in order to prevent such undue influence) by emissaries, who carried repeated messages in his name.

This, I think, might likewise appear to be a

* A late writer on Scots law, Mr. Burnett, (Treatise on various branches of the Criminal Law of Scotland, chap. 16) gives an abstract of the enactments of this statute; and after contrasting its provisions, particularly those concerning bail, with those of the Habeas Corpus Act (stat. 31 Car. 2), proceeds, "When in addition to all this it is considered that the act 1701 provides most effectually for a due and regular commitment in order to trial, that the penalty on a judge for a breach of the statute is both higher and more precise, and the period fixed for commencing and carrying through the trial more determinate, it may justly be considered as more favourable to the subject than the boasted Habeas Corpus Act of England, notwithstanding one summary application for liberation may not in every case afford so speedy a remedy as the proceedings under the writ of Habeas Corpus."

In the same chapter, however, he notices that this same act of 1701, "has been called the worst penned and the most obscure act in our statute book, and some have even gone so far as to maintain, that it was purposely made obscure."

So in the case of Andrew against Murdoch, June 1806 (reported in the Appendix to Burnett, N° XVI) Hope, lord justice-clerk, said, "Our act 1701 is greatly more favourable to the liberty of the subject in every respect than the Habeas Corpus Act of England."

good reason for the officer commanding at Fort-William, to be particularly careful to interrupt and prevent these practices, by denying access to the persons by whose means they were known to be carried on.

But, as the prisoner's complaint has been loud upon this head, I must beg leave to recal the attention of your lordships and the jury to one of the facts libelled, from which the accession to the murder is inferred; it is the supplying the murderer with money to enable him to fly from justice; let it be remembered in what manner it was executed; the prisoner was indulged by the officer commanding the party that apprehended him, to speak with his wife apart, before he was carried off: the use he made of that indulgence, was to give her the greatest part of the money in his pocket, with instructions to send it, and the murderer's clothes, to the place where it had been concerted he should wait for them.

The indulgence upon the part of the officer was natural and humane; from the circumstances that were then known, there was no reason to suspect that such use would have been made of it, and by God's good providence it is become a material circumstance in the investigation of the source of the horrid scene of iniquity before the Court.

Now, as this fact is admitted to be true, I must submit what foundation there is to complain of severity: whether the commanding officer had reason to repeat such indulgences, or to give unlimited access to his family and relations? Nevertheless, I am well authorised to say, that, at Fort-William, the prisoner had many and great indulgences of this kind; that he was allowed to take the air in the garrison, and to converse with his friends and relations in such manner as was consistent with the safe custody of his person, and the inquiries which were then carrying on by the proper officers: and both before and since he was brought to this place, his agent and lawyers have had access to be with him as often as applied for in a proper way. He was not indeed allowed access to some of his servants and dependants, from whom material evidence was expected, with whom he had been tampering, and who had declared, they were over-awed by his authority: but for that I apprehend no apology is necessary.

In the last place, your lordships have heard much from the counsel for the prisoner, of unfair means that have been used to traduce his character in the country, and to prepossess the world with an opinion of his guilt, by which he is said to be, in some measure, condemned before he is brought to trial.

I must beg your lordships and the jury to consider the circumstances of the prosecutors who are charged with these practices. Has the disconsolate widow, who has no relation, and scarce an acquaintance in this corner of the island, been so successful in prepossessing the country with an opinion of the prisoner's guilt? or, are her children, as yet incapable

of speech, fit to assist her in traducing his character?

If the relations of the deceased had attempted it without foundation, they would have gained no credit with the impartial world; or would have been counterbalanced by the numerous relations of the prisoner, at least in this country. Nevertheless, my lords, I will admit that he labours under great disadvantages upon this head; a general opinion of his guilt has prevailed; and I am sorry to say, that he has many and strong adversaries, who have been busy to establish it. "*Magna est veritas, et praevalabit.*" The horror of the crime with which he is charged, has raised the attention of every impartial person, and made them industrious to discover the authors of it.

The blood of the innocent has called aloud to heaven for justice; and, by a remarkable concurrence of many circumstances, brought to light by the declarations of a cloud of witnesses, the prisoner is clearly pointed out, not indeed as the executioner, but the contriver of the murder, and the aider and abettor of the murderer.

I will not say, that his character in private life concurs against him; I have no authority from my employers to assert it; nor will I assert what is not supported by evidence. But I must say, that his family and connections, his character and conduct in public life, are so many circumstances forming a presumption almost equal to a proof, in support of the charge brought against him. These are the most powerful adversaries he has to struggle with, and from them that general opinion of his guilt has taken its rise, which is unjustly ascribed to the prosecutors.

What has been said, my lords, would naturally lead me, in the next place, to lay open, to the consideration of the Court, the particular circumstances set forth in the libel, from which the prisoner's guilt is inferred; and to take notice of what has been said in his defence upon that head: but in this I have been well prevented by the gentleman who spoke last; and therefore I shall only beg leave to add a few observations to what has been said by him.

The Court has been informed that Mr. Campbell of Glenure was appointed factor on the forfeited estate of Ardsziel; that the prisoner is natural brother to the forfeiting person, in whose absence he fell to have the leading of his dependants, and the protection of his family: under that character, as he had an interest, so he had opportunities of opposing the factor in the execution of his office: that this opposition grew by degrees to the height of premeditated malice, which soon after broke out in repeated threatening, and at last ended in assassination and murder.

On the other hand, the counsel for the prisoner have asserted, that there was no enmity or malice between Glenure and him; but contrary-wise, a confidence and friendship, which they offer to support by letters written by Glenure to him. Now, as this must appear to be

inconsistent with the charge in the libel, I must beg leave, in a few words, to reconcile them.

When Glenure was appointed factor on the estate of Ardschiel, he was so far from shewing any disposition to be severe upon the tenants, or to put hardships on the family and friends of the forfeiting person, that he treated them with the utmost humanity: and the prisoner in particular had the address to insinuate himself so far into his confidence, as to be employed in collecting the rents, and advised with in the letting of the farms; and, during this period, the letters referred to were written. But as the prisoner undoubtedly took advantage of this confidence, to bring tenants into the estate that were entirely under his influence, and to make separate agreements with them in favour of the forfeited person and his family, in fraud of his majesty and the public; the barons of exchequer justly took exception against this part of Glenure's conduct; and, to prevent such abuses for the future, gave him particular instructions in writing, to remove the prisoner from a beneficial farm which he possessed, and also any other of the tenants who were connected with, or under the influence of, the forfeiting person and his family.

These instructions were executed in part at Whitsunday 1751, by the removal of the prisoner from his farm; but as he easily procured another in the neighbourhood, and retained his influence over the estate by the means of the tenants he had placed there, he discovered no resentment at that time.

But so soon as the factor, in the farther execution of his instructions, began to take the proper measures for removing, at Whitsunday 1752, some of these tenants, he then took the alarm: that was to pluck up his interest by the root, and entirely to put an end to his influence. He therefore made the cause of the tenants his own, and every method of opposition was tried to prevent their removal.

He no longer affected any intimacy or friendship with Glenure, but took every occasion to raise discontent and jealousies against him, and represent him as an oppressor in the country. At last, without any authority from the tenants who were to be removed, he took a journey to Edinburgh, on his own expence, and applied, by a bill of suspension, to the court of session in their names; in which the factor's conduct was set forth in such false and odious colours, as procured a sist or stop of execution of the decree of removing, pronounced by the sheriff, at the factor's suit; and, by the same false suggestions, he so far imposed upon such of the barons, as were then in town, as to make them listen to his complaints against Glenure.

When Glenure was informed of all this, he went directly to Edinburgh by great journeys; and, as soon as he had an opportunity of being heard, he obtained a removal of the sist from the court of session; and satisfied the barons, that he had conducted himself entirely by their instructions. And, having been only two days in town, he returned with expedition to the

country, Whitsunday being then near at hand.

This scheme being frustrated by the diligence and activity of the factor, measures of a different nature became necessary.

The prisoner had no hopes of being able to keep up his influence and interest in the estate, while Glenure continued to have the management of it; and if he should be able to get the better of him, he had reason to think no other would be so hardy as to undertake it. It was therefore resolved to take him off, and that before he should remove the tenants.

For the execution of his scheme, a very proper assistant was at hand; Allan Breck Stewart, a person in desperate circumstances, who had already forfeited his life to the laws, and enlisted himself an enemy to the liberties of his country; a dependant of the family of Ardschiel; brought up from his infancy under the care and authority of the prisoner.

With this assistance, no method was left unattempted to stir up the populace, or some of the hardiest among them, to cut off Glenure by violence. Their attachment to their chief was made use of for that purpose. The preservation of his family, the welfare of their country, and even the very being of the clan, were represented as inconsistent with allowing Glenure to live. Reproaches were used to some, rewards offered to others, and strong insinuations made by the prisoner to his own domestic servants: but all this had not the desired effect.

Wherefore, on Monday the 11th of May, Allan Breck, who had no other occupation but wandering from house to house amongst his friends, and was thereby well able to trace all Glenure's motions, came to the prisoner's house, when the resolution appears to have been taken, that Allan himself should set out early next morning to way-lay Glenure, and take the first opportunity to perpetrate the murder.

This was no difficult task to one who knew the country. There were but three days to run to the term for the removing. In that period, it was known that Glenure was to go from his own house, to the sheriff's court at Fort-William, and return to the lands from whence the tenants were to be removed. The nature of the country, and the several forries which he could not avoid, made it certain what road he must take; and a wood near the lands afforded a proper place for the bloody deed. But Allan's dress, being the French uniform, was too remarkable for an executioner of the works of darkness; he was therefore supplied with another, of the usual colour and fashion of the country, by the prisoner. The Court has heard how he then took his station at a place within sight of Glenure's house, till he saw him set out for Fort-William, and then how he retired towards a ferry, where it was known Glenure must pass in his return.

In the mean time, messenger after messenger is sent to Fort-William by the prisoner, to get more particular intelligence of Glenure's

motions. On the night of the 13th, Allan came to a place adjacent to the ferry, and retired in the morning into the wood, from which he only came out to enquire if Glenure was past. About this very time a gun, belonging to the prisoner, was a-missing; and, in the evening, Glenure was shot in the wood.

When the horror of the murder threw all the neighbourhood into confusion and consternation, no surprize appeared upon the prisoner, or in his family. Their attention was entirely fixed upon the execution of the measures that had been concerted for facilitating the murderer's escape: for that purpose, a messenger was dispatched to procure money: upon the return of that messenger (though the prisoner was then in custody) the money he brought, with what more the prisoner could afford, and also the French clothes, were, by the prisoner's direction, carried to a remote place in the mountains, where Allan Breck had for some time waited in expectation of them. At the same time the prisoner's arms, which had been concealed near his house, were discovered; and the very gun, which had been missing on the day of the murder, was found amongst them, with such marks as shewed that it had been lately discharged.

Thus, my lords, as I had occasion to mention some of the facts to be proved, I could not resist shortly running over the whole, in order to lay them in one view before your lordships and the jury.

And, from this view, I apprehend it will now appear, 1mo, That the friendship mentioned by the counsel for the prisoner, does not derogate from the probability of his guilt. It is a natural, and even a necessary link of the chain upon which the whole depends.

2do, It must occur to every one who hears these facts, that though it is possible, barely possible, that several of them might have happened, though the prisoner had been innocent of the crime that is charged upon him; yet it is impossible to conceive, that such a long series of circumstances, connected and corresponding with one another, all concurring to answer the same end, should be the mere effect of chance, and not the consequence of intention and design.

To take an instance, it is very easy to believe, that Allan Breck might have changed his clothes, though he had not intended to murder Glenure; and that he might have lodged for some nights near Glenure's house, though he had not intended to lie in wait for his life: but when we find the same Allan Breck himself threatening to murder Glenure, and instigating others to do it; afterwards changing his clothes, lying in wait at different times and in secret places, appearing and anxiously inquiring for Glenure near the time and place of the murder, and as soon as it was committed, flying with terror and precipitation, who can doubt that he was the murderer?

In the same manner it may be well supposed, that the prisoner might have lent Allan Breck

a suit of clothes, or given him entertainment in his house, though he had not instigated him to commit the murder. But if it is considered, that Allan Breck had no quarrel with Glenure, other than what he was engaged in by the influence and authority of the prisoner; that he carried the resentment, on the prisoner's account, to such a height as to threaten to shoot Glenure, and joined the prisoner in prompting others to do it; that when Glenure returned unexpectedly from Edinburgh, Allan Breck went immediately with the intelligence to the prisoner; that when he set out to lie in wait for Glenure, it was after a consultation with, and being accounted for that purpose by, the prisoner; that the gun with which he shot Glenure, appears to have been the property of the prisoner; that, after the murder was committed, the murderer relied for money and clothes for his escape, and actually did receive them from the prisoner; I say, let all these concurring circumstances be laid together, and who will doubt that he was instigated, aided and abetted by the prisoner?

It is therefore in vain to urge, that one or more of these facts, when taken separately, are not relevant to infer the conclusion of his guilt. It is from the connexion and concurrence of the whole, that the conviction of his guilt does arise: and it is only from a proof of the whole, that the prosecutors expect a judgment against him.

In the last place, the counsel for the prisoner have urged a point of law in his defence, viz. That supposing the facts which have been set forth, to be relevant to infer his guilt; as he is only charged as an accessory, he cannot be brought to trial for the crime, until the principal be first convicted. In supporting of this, texts have been quoted from the old law-books, *Quoniam Attachamenta et Regiam Majestatem*. It has been said that this is the law of England at this day, and that sir George Mackenzie, in his *Treatise of Crimes*, has laid it down to be the law of this country.

As the word 'accessary' is a relative, which cannot be without a principal to which it relates; it must be admitted, that no evidence will be sufficient to convict an accessory, which does not prove that the crime was committed by the principal, who is thereby convicted, to the effect that justice may be executed against the accessory.

In this sense the maxim is just; but in the sense in which it is pleaded for the prisoner, I will take upon me to say, it is not supported by the law of this country: it is inconsistent with the principles of public policy, and subversive of all civil society.

It is indeed a maxim, and a good one, in the law of Scotland, that no person can be condemned, so as to suffer the punishment appointed by law for any crime, unless he be present in court, and have opportunity to object to the evidence by which it is to be proved against him. But in the present case, it is not alleged, that Allan Breck could be condemned, and

brought to justice, upon the evidence that is to be brought in his absence against the prisoner. If he shall afterwards appear, and stand his trial, the proof, in so far as it relates to him, must again be repeated in his presence, and it will be competent to him to object to every part of it. But at present, as the evidence is brought only to the effect that the prisoner may be punished, it is he only that can plead the benefit of this maxim; and it is competent to him to object, as well to that part of the evidence which fixes the crime upon the principal, as to that which proves his accession.

As to the law of England, I will not take upon me to argue from it; I do not pretend to be versant in it; nor do I apprehend it will be decisive in this case. Nevertheless I have reason to believe, that it is the practice in that part of the kingdom to proceed to the trial of the accessory, after the outlawry of the principal; from which I would infer, that, in our practice, either the fugitation has the effect of the outlawry, or there is no argument to be drawn from the one law to the other.

With regard to the old law-books mentioned, it is well known to your lordships, that they are generally believed to have been transcribed from the laws of England, at a time, indeed, when many salutary alterations are thought to have been introduced into our practice from thence; but that it is by no means admitted, that they were ever ingrossed into the body of our laws, or that every part of them has been confirmed by our practice; many instances of the contrary might be mentioned. But I forbear to consume the time of the Court upon this question, because the only ground I can find to suspect, that it ever was held to be a doubt in our practice, is the 153 act, 12 parl. Ja. 6, which appears to have been made with a view to take away all doubt for the future. The words of this statute are, "That in all time cumming, all criminal libeles sall containe, that perones compleined on are airt and pairt of the crimes libelled; quhilk sall be relevant to accuse them thereof; swa that na exception or objection take awaie that part of the libell in time cumming." Which, in more modern language, imports, that, for the future, no objection shall be sustained against a libel, which charges the person accused of being contriver, adviser, aiding, abetting or assisting, in a crime that is otherwise relevant.

And sir Geo. Mackenzie, in that very passage of his Treatise on Crimes, which has been quoted in behalf of the prisoner, though he lays down the arguments which have been suggested on both sides by the authors who have treated this question, he concludes with observing, that, in Robertson's case, the Court found upon this act, that an accomplice might be tried, though the principal had not been convicted nor fugitated.

Upon these principles, the practice has been uniform for many years; and the present circumstances of the case do not seem to afford any reason to deviate from it. For your lord-

ships and the jury must be convinced, from the facts which have been opened, that as the murder was committed with the advice, and at the instigation of the prisoner; so, but for his aiding, abetting and assisting, the murderer had been now also prisoner at your bar.

Lord Advocate (right hon. W. Grant):

My Lord Justice General; I stand up at this time, to support the reply that hath been made by the learned and ingenious gentlemen on the same side with me, to the defences that have been offered for this pannel; but as it hath not been frequently practised by my predecessors in office to attend in person at circuit courts of justiciary, I beg leave, first of all, to say a few words for myself, to give the reason of my being now here: and I am persuaded that every one who now hears me, will believe me, when I declare, that, negatively, that hath not proceeded from any particular animosity against this unhappy man in the pannel, whom I never saw until this day when he appeared there; neither is it singly because it is a horrid and atrocious murder that is to be now tried; or that the trial is to proceed upon indirect and circumstantial evidence, because such cases have often occurred. But the truth is, that upon my first hearing of this murder, in the month of May last, of a gentleman of this country, the king's factor upon certain of the forfeited estates that had been but a few weeks before annexed to the crown unalienably, and the produce of them appropriated by law to the most salutary and beneficial purposes, for the future tranquillity of the united kingdom in general, and for the immediate advantage and improvement of these highland parts of Scotland in particular; I was greatly shocked, and considered the murderers, whoever they were, as having been guilty not only of a most horrid crime against the laws of God and humanity, but, together with this, of a most audacious insult against the most gracious and beneficent acts of the king's government, and of the whole legislature; and, as far as in them lay, had endeavoured to make the world or the public believe, that the civilizing of the Highlands of Scotland was a vain and impracticable attempt; and under this impression, I then resolved, whenever a discovery should be made of any persons concerned in this wickedness, to attend at the trial where-ever it should be, and to do all that in me lay, consistently with law and justice, to convince the disaffected part of the Highlands of Scotland, that they must submit to this government, which they have several times in vain endeavoured to subvert.

And now, as to this trial itself, your lordships have heard the libel read, and some parts of the evidence which we expect to bring in support of it, more particularly opened by the gentlemen who spoke of the same side with me; and none of these things shall I now repeat; but only make a few observations upon what hath been offered by the counsel for the pannel by way of defence.

And, first of all, in order to lay out of the case what is foreign to the merits of the trial, the pannel's counsel have been pleased to take notice of certain hardships, or grievances, that he has laid under, during his confinement in the garrison of Fort-William; and that, by the precaution of the private prosecutor, all the old experienced counsel have been retained from giving him their assistance. As to the former of which supposed grievances, I am truly ignorant of the particular facts upon which the complaint is founded; but if it be true, that the pannel was longer kept in close confinement than he should have been, or until the commanding officer was informed how the law stood, the pannel can be under no real disadvantage on that account in his present trial; because he was first taken into custody on Saturday the 16th of May, that is, about four months ago: and supposing it true, that for some few days of so long a period, people had not access to him whom he had a mind to see, he has had full time, when all these are deducted, to make the necessary provision for his defence.*

* Upon this and other passages respecting hardships, of which complaint was made in this case, the following remarks are made in the Supplement to the Trial of James Stewart:

"For the better understanding this matter, it will be proper here to insert a clause or two of this same act of parliament" [the act against wrongous imprisonment, see p. 52], "being the 6th of the 8th and 9th sessions of king William, and justly called the *palladium* of our liberty. In the preamble of which it is said, 'That our sovereign lord, considering 'it is the interest of all his good subjects, that 'the liberty of their persons be duly secured; 'and that it is declared by the Claim of Right, 'that the imprisonment of persons, without expressing the reasons thereof, and delaying to 'put them to trial, is contrary to law: therefore his majesty, with advice and consent of 'the estates of parliament, statutes, enacts, and 'ordains, That all informers shall sign their 'informations; and that no person shall hereafter be imprisoned for custody, in order to 'trial, for any crime or offence, without a warrant in writ, expressing the particular cause 'for which he is imprisoned: and of which 'warrant the messenger, or executor thereof, 'before imprisonment, or the keeper of the prison receiving the same, is hereby ordained to 'give a just double immediately under his hand 'to the prisoner himself, for the end after specified,' &c. viz. to be produced by the prisoner's doer at his application for trial, when it is delayed. And near the end of this act— 'And further discharges all close imprisonments, beyond the space of eight days from 'the commitment, under the pains of wrongous imprisonment.' Likewise, to insert a clause of a later act of parliament, viz. that of the 21st year of king George 2, intituled, 'Act for the 'more effectual Trial and Punishment of High

As for the other alleged grievance, I myself know certainly the foundation of that; and so far is true, that after I had expected, for some time, to receive from the sheriff-depute of this

'Treason and Misprision of High Treason in 'the Highlands of Scotland, &c.—And it is 'hereby further enacted, That the several forts 'erected, or hereafter to be erected by his majesty, his heirs or successors, within the said 'shires of Dumbarton, Stirling, Perth, Inverness, Argyle, &c. or any of them, shall be, 'and they are hereby declared to be lawful 'prisons, for the commitment and safe custody 'of offenders; and the several and respective 'officers commanding for the time being, in 'any such fort or forts, are hereby empowered 'and required to obey and execute all legal 'orders and warrants that shall be to them directed, for the receiving and detaining, or releasing and liberating any person or persons 'committed to their charge or custody by the 'civil magistrate.' Which laws, as they are supposed to be known to every subject, so are they more especially to the governors of forts and keepers of prisons; who, if they transgress the law, are to be reckoned oppressors, and are punishable accordingly. To say, that military men are to be excused, as being ignorant of the law, is no better than to make a joke of liberty, and laugh at the oppressed. But ignorance of the law is the plea; and, thank God, they dare not as yet avow any other: a plea which may as well be urged by the perpetrators of the greatest of crimes; and I do not hold him as guilty of the least, who shakes the foundation of public liberty, by removing, though for an instant, the corner-stone upon which it rests. How far that was done here, will appear from the trial.

"The true state of the case, as to the taking up and detaining James Stewart in prison, is as follows:—Glenure having been murdered on the 14th of May, James Stewart and his eldest son Allan were made prisoners on the 16th in the afternoon, by a party of soldiers, and carried next day to Fort-William; where they were imprisoned, without any signed information against them, or warrant for so doing; though the law, as just now shewn, most expressly directs both. It is true, there appeared afterwards, viz. July 6, a warrant signed by the Lord Justice-Clerk, and dated at Edinburgh, May 17. But as Edinburgh is three days journey, or 88 computed miles, from Fort-William, it can never be pretended, that the imprisonment could have been made in virtue of this warrant. From the 17th of May to the 21st of August, James Stewart was kept in close confinement (as to admittance to others to see him), excepting once, towards the end of June, when a letter of directions to his wife, with the foresaid act of parliament against wrongous imprisonment, were shewn to colonel Crawford, the then commanding officer at Fort-William; who thereupon allowed Mrs. Stewart, and her two sisters, to see

county the result of his inquiries concerning the murder of Glenure, and the examinations he had taken on that subject; these were, at length, brought to me at Edinburgh by certain

the prisoner; but refused admittance to every male friend, or person capable of advising and assisting him in bringing on his trial. At the same time the prisoner sent one to Barcaldine, Glenure's eldest brother, to demand a copy of the warrant for his imprisonment; and received for answer, that he might get it from the jailer of Fort-William. All this I have seen in a letter under James Stewart's hand, dated June 25. Agreeable to the directions sent to Mrs. Stewart, she required Charles Stewart notary at Banavie, first to shew the act of parliament to colonel Crawford, and then demand, under protestation, a double of the warrant for committing her husband. But the timid notary declined the employment, and left the place. The cause of which behaviour in him may be discovered, by looking at his disposition; where he says, 'That he had formerly declined to act (viz. at the execution), because he did not care to disoblige Glenure.' And if this was thought by him to be a good reason before for not acting, it was become a stronger one now; when not only James Stewart's friends were menaced, but the whole country put under terror. For Mr. Stewart younger of Ballachelish had asked from Barcaldine, at the house of Glenure, a copy of the warrant of commitment; and was not only refused it, but told by Barcaldine, that it was none of his (Mr. Stewart's) business; and if he acted any further in this matter, he himself should be taken up and imprisoned likewise. This young gentleman however, seeing himself the only person that had courage to speak or act for the prisoner, went to Maryburgh, adjoining to Fort William, and from thence wrote a letter to colonel Crawford, earnestly begging to be allowed to converse with the prisoner about express business, and in the presence and hearing of any officer the colonel should be pleased to appoint. To this letter Mr. Stewart received the following answer.—'Fort-William, 3 o'clock. Sir; colonel Crawford desires me to acquaint you, that you are represented to him as a person entirely in the confidence and secrets of Allan Breck Stewart; and that the intercourse you are said to have held with the supposed murderer of Glenure, at the time immediately preceding the murder, makes it (in his opinion) improper for your being admitted either to the prisoners, or as a friend into the garrison.—The colonel's illness he hopes will be an excuse for not writing himself. I am, Sir, your humble servant, (signed) TWO. WELDON.'

"Now, without saying any thing in particular of this extraordinary letter of adjutant Weldon, is it not evident, that the foresaid act of parliament, the only security of the liberty of our persons in North-Britain, was despised and disobeyed in a most illegal and arbitrary

of the family of the deceased, who had taken upon them, as it was very just and natural, to be managers and conductors of the inquiry, and to cause to be brought before the sheriff to

manner, by the governor of the fort, even after it had been put into his hands, as above mentioned, and was undoubtedly read by him? But this happened in the highlands of Scotland, at a place governed by military persons, and remote from help, check, and every other control.—Soon thereafter, col. Crawford being removed from Fort-William, Mr. Leighton took his place; to whom the prisoner's wife applied, desiring access to her husband. But this her legal privilege was not only denied her by the new governor, but she was told, that if she did not immediately depart from the town of Maryburgh, she would be put in prison herself. Thus this poor and almost distracted woman is driven from the place and neighbourhood of her husband's confinement, and obliged to leave him in a friendless and forlorn state. And some time after this, the same Mr. Leighton having allowed James Stewart to write a letter to one of his acquaintances about necessities, James ventured, in a postscript, to complain to his friend of the closeness of his confinement, and other hardships put upon him. But the letter being carried to the governor, to be read by him before it was sent off, he went in a passion to the window of the prison, and there scolded James for daring to write such a postscript; and throwing the letter into the prison, assured James, that if he did not write him letter over again, and keep out the postscript, no letter should be allowed to go from him out of the garrison.

—Pudet hæc opprobria vobis,
Et dici potuisse, et non potuisse refelli.

"At length, on the 6th of July, after a close confinement of fifty days, a double of the forementioned warrant from the lord justice-clerk was delivered to the prisoner. And that it was on this day, and no sooner, can be instructed by a letter under the prisoner's hand, conveying this double to one of his friends. By this delay, and the hitherto close confinement of the prisoner, did the prosecutors secure a most consequential point; the putting it, to wit, out of the prisoner's power to bring on his trial in the judiciary-court at Edinburgh; by running his letters; where his agent would have had daily access to him, and the assistance of lawyers could have easily been got, in order to his defence. Whereas, by the forementioned artful and unlawful methods, he did not see either agent or lawyer till at Inverary, within two days of the trial; unless it was at Tyndrom, where, in the road from Fort-William to Inverary, he accidentally met with his agent, and conversed with him for about an hour, as shall afterwards be more particularly taken notice of. Still the prosecutors had it in their power to have given him notice of his trial, and time for his agent and lawyers to

be examined, all persons, who, according to their information, could give any light in the affair; and, with the examinations so taken, they brought along with them to me three learned counsel, which was also very reasonable and usual, and, as in all other cases, was

prepare for it, by bringing it on in the way of presentment, or what is commonly called the porteous-roll. But they were not so disposed, being determined at any rate to have the trial at Inverary; though contrary to the opinion of some, that on all other occasions used to direct the conduct of the chiefest person among the private prosecutors. The reason will readily occur to the reader, on considering, who was to be tried, at what place, and by what jury.

"After all, criminal letters were raised, and printed at Edinburgh. James Stewart's agent being informed of it, earnestly begged a copy of the libel, which, he said, was a favour that no person of the least humanity could refuse, considering how short a time it now was to the sitting of the court; and that if no copy of the indictment was given him, and advantage was to be taken of executing it at Fort-William, three of the fifteen days allowed by the law must be elapsed, before it could be transmitted from the prisoner at Fort-William to his agent at Edinburgh: so no sufficient time would be left him for finding lawyers of character and experience, and making the other necessary preparations; as most of the noted counsel in Edinburgh had been industriously taken up by the private prosecutors long before; and it being vacation-time, the rest of them were gone into the country, or engaged to attend the other circuit-courts. Add to these reasons, the time it would require to write out copies of the libel for the several lawyers that might be prevailed upon to appear as counsel for the pannel, in order to their considering it duly before they should meet at Inverary; otherwise it might look liker going there to witness the form of a trial, than to be of any service to the pannel; which they could not be, unless timely prepared for it. Yet, strange to tell! even this small and usual favour, a copy, to wit, of the printed libel, was absolutely refused by the agent for the prosecutors; who always shewed (to his praise be it said) the greatest diligence in carrying on this good work. Nay, a person of great distinction was threatened with a complaint against him, if he, in compassion, to which he was much inclined, should give or order a copy for the pannel's agent. A copy however was, procured, by mere accident. It happened thus.—Such care was taken by the private prosecutors at Mr. Fleming's printing-house, while the libel was in the press, that one for them stood by all the time; and so soon as it was finished, the types were broke down, or discomposed, and all the copies carried away. It happened providentially, as was then thought, that the proof-copy, which had been thrown into a corner, was picked up by a curious stranger, who most kindly carried

VOL. XIX.

to myself most acceptable, that we might jointly consult and deliberate, whether from these examinations, and the discoveries thereby made, there was matter sufficient for bringing this pannel to trial; upon which question we all agreed in the affirmative: But these three

it to the pannel's agent; who caused reprint it immediately. This coming to the knowledge of the private prosecutors, complaint thereof was made to the magistrates of Edinburgh: the foresaid stranger was called before them, in order to be prosecuted, and the servants of the printing-house were threatened with punishment. But a certain gentleman, of more prudence as well as interest, hearing of this intended process, advised it to be dropt. In this by-way, then, the pannel's agent being furnished with a copy of the libel, and observing in it some extraordinary articles, especially the general one relating to threatenings, was put into a most alarming hurry, to prepare for the defence of his client. He had expresses to send to different lawyers in distant places, and rode about himself night and day, to try and persuade two able counsel at least to undertake the office. Of the men of greatest note most were pre-engaged by the agents of the other side; some were afraid of the rainy weather, and the length of the journey; others of resentment from a certain quarter; and many refused altogether. In this perplexing state, the pannel's agent, almost ready to give up the cause of his poor client, went to one of the first counsel against him, and declared, that he was to advise the pannel to throw himself upon the court, and to plead his own cause in the best way he could; seeing no lawyers of weight could be found to speak for him. But this, he was told, would be a desperate course, and was advised by no means to take it. At last, four very sufficient lawyers (two elder, two younger) were prevailed upon to go to Inverary. And the agent having succeeded so far, resolved next to go to the pannel at Fort-William, in order to learn from himself what he had to say in his own defence. But being informed, in a direct manner, that not only the pannel himself was kept in illegal close confinement, but that likewise his two sons, his two servants the Maccolls, and others in the list of witnesses against him, were all confined in the same illegal way in the prison of Fort-William; and particularly, that the said two Maccolls had been kept there in shackles, or hand-cuffs, for the space of three months, and a third Maccoll (the bouman) shackled in the same way some shorter time; he, the agent, judged it proper to ask an order from the lord justice clerk to the keepers of the prison where these witnesses were detained, to give access to the agent, to see and inform these prisoners, (in the presence of the officers of the garrison, or of any of the justices of the peace or minister of the gospel he might find there), not to be terrified by the cruel and illegal treatment they had met with, and to swear nothing but what was true. With

F

gentlemen, though very able in their profession, were not all the experienced counsel. And as it is my constant wish to see every pannel as ably defended as his cause will bear, it is

this view Mr. Stewart, the pannel's agent, gave in the following Petition:

"Unto the Right Honourable the Lord Justice-Clerk:

"The PETITION of JAMES STEWART in Aucharn, Allan and Charles Stewart his sons, Dougal and John Maccolls his servants, Alexander Stewart packman in Appin, John Maccoll bouman to Appin in Koalishacoan, and John Carnichael miller in Kinlochleven, all prisoners in Fort-William, or transported from that to Inverary.

"Humbly sheweth; That your petitioners were in May last apprehended, and incarcerated in Fort-William, upon suspicion of being art and part in the murder of Colin Campbell of Glenure, deceased; and have been close confined, and no admittance allowed to them, since they were incarcerated, though frequently required; notwithstanding the act of parliament, in the year 1700, anent wrongous imprisonment, prohibits and discharges close confinement of any prisoners after eight days from the time of commitment.

"May it therefore please your lordship, to grant warrant and ordain the governor of Fort-William, and all other keepers of prisons where your petitioners are, or may be sent, to give free access and admittance to all persons who shall desire to see and converse with your petitioners, for their defence, or any other lawful affairs.—According to justice, &c.

"(Signed) A. STEWART, doer for the petitioners.

"On this Petition the following deliverance was given:

"The Lord Justice-Clerk having considered the above Petition, and having interrogated Mr. Stewart who signs the same, whether he had instructions from all or any of the prisoners in whose name the petition is offered, to complain of their being confined otherwise than agreeably to the directions of the act of parliament anent wrongous imprisonment? and he having answered, That he had written instructions from James Stewart, one of the petitioners, to set forth as above, but no direct order from the other persons themselves*; grants warrant to, and requires the keepers of the prison at Fort-William, and recommends to the commanding officer, to give access to the friends and lawyers, at all proper and convenient times, to see and converse with the said James Stewart, in order to prepare for his defence; a criminal

* "Mr. Stewart offered to give oath upon it, that he was properly instructed to make this application, but did not chuse to shew his letter of instructions, it containing things not yet proper to be known."

with pleasure that I now see this pannel attended by four of my brethren, who I am sure will omit nothing material for his service.

Upon the cause itself, there is, in reality, no

libel having issued against him, in order to his trial at the circuit-court to be held at Inverary: but refuses to interpose as to those who have given no express direction to complain of the keepers of the prison where they are said to be confined, or to give any orders as to keepers of prisons, who are not accused as having done any thing contrary to the duty of their office.—Given at Edinburgh the 20th of August 1752.—(Signed) CH. ARESKINE.

"And here let it be remarked, as an occurrence in these proceedings, not the least extraordinary, that a British subject was obliged to sue, as a favour from a judge, for what he had a right to by his birth. But it was still more extraordinary, that that favour was refused in some parts, and scarce granted in any. The great officer of justice who was applied to, expressly refuses to interpose as to some, viz. those who have given no directions, though he owns they are said to be confined, (and whose confinement prevented them from giving directions); and refuses to give any orders to jailors who are not accused of having done any thing contrary to the duty of their office; as if the very application to him did not import a breach of their duty in the grossest manner, in defiance of law, nay of a law the most sacred barrier of the rights of the subject. This is what he refuses: let us see what he grants. He grants an order to the jailor, and he recommends to the commanding officer of Fort-William, to give free access to James Stewart, one of the prisoners, a criminal libel having issued against him, as if that circumstance was the reason of the admission. The words of the act are free, as the natural rights of mankind, from which it was derived, and which it was calculated to ascertain. It is an inhumane restraint on the most valuable of human blessings, liberty, that that law meant to ward off: and all that are imprisoned, are equally entitled to its protection. It is not to the pannel, nor to the witness, but to the prisoner, under whatever denomination, that it extends its relief. And surely, if any distinction had ever been intended, witnesses would have been the last to have been included in it; whose information is more necessary to the agent, than even that of the accused himself. But, restrained as this part of the order already appears, this is not all: for it was directed to the jailor of one particular prison only; a restriction of so much the more consequence, as it will appear the prisoner was removed from that prison before the agent could well reach it, nay and in consequence of a warrant sent from Edinburgh for that very purpose. As this affair will suggest sufficient matter of observation of itself, I shall make upon it but this short remark, That ignorance

place for a debate on the relevancy of the libel ; nor does there appear to me to be any difference betwixt us concerning the interlocutor that we desire or expect to receive from your lordships ; for the gentlemen of counsel for the pannel have admitted the atrocity of the crime charged upon him as strongly as I am able to

of the law cannot be pleaded in this case, as it was in that of the military jailors. Nor let these gentlemen take offence at this appellation ; for since they submit to the drudgery (to say no worse) of the office, let them bear the dishonour of the name : for little is the difference between being exhorted by recommendations, or compelled by orders, to the exercise of the function, since exercise it they do. But to return from a digression, which its importance will, it is hoped, excuse :

"The above deliverance was sent by express to Fort William, the pannel was served with the criminal letters on the 21st of August, just nineteen days before the trial came on ; and allowing four of these days for the troops to march with their prisoner from Fort William to Inverary, and the three Sundays that intervened, there remained only twelve free, and now most precious days.

"The pannel's agent having taken at Edinburgh what previous steps the shortness of the time allowed him to do, set out for Fort William on the last day of August ; and, on the 2d of September, met accidentally with the pannel at Tyndrom, guarded by a party of soldiers, in their way from Fort William to Inverary. He instantly applied to the commanding officer, and desired leave to speak with the prisoner. This was at first refused him by the officer, because of his orders, and the confined warrant that was shown him by the agent : but at last, with great difficulty, he was allowed to converse with the prisoner for about an hour. The agent then found himself obliged to ride on, even into the country of Appin, that he might there search the pannel's papers, and be informed of facts, &c. But what was his surprise, when arriving at Aucharn, the pannel's dwelling house, he found that his repositories had been opened and examined, three different times, and without any warrant, by near relations of the prosecutors, assisted by a military force ; who carried away whatever papers they thought might suit their purpose. He thence travelled to Inverary, where he met with some of the pannel's lawyers on Monday night, the 7th of September O. S. or the 18th N. S. They were at first refused access to the pannel ; but got it next day in the forenoon, when there remained but a day and a half to the pannel to inform his agent for the drawing a state of his case, and to his counsel for preparing their pleadings, and the proper interrogatories for the witnesses. This was a work that surely required a much longer time, as every person of the least experience in these matters will see ; and for which the law has allotted fifteen days at least."

express it : and they farther admitted, as they must have done, that the charging the pannel as being guilty, or art and part of that crime, is relevant to infer the conclusion, and necessarily requires his being remitted to the knowledge of an assize, whether he is so guilty or not.

And, on the other hand, I readily admit to them, that the laudable and just practice of this court, of later years, hath been, not to find or determine a particular relevancy upon certain facts or circumstances set forth in the assumption, or minor proposition of the libel, which is indeed, in some measure, to pre-occupy the province of the jury*, who are the judges of the fact, and is also dangerous to the course of justice ; because, when a number of facts and circumstances were found jointly relevant to infer the pannel's guilt, if the least material of these should not be proved, although a more pregnant circumstance, that was not specially libelled or expressed in the interlocutor, should come out upon the evidence, if the jury followed the directions of that interlocutor, and adapted their verdict to it, the pannel behaved to be acquitted, though in reality, and in their opinion, he was guilty.

It was not, therefore, with intent that your lordships should give your opinion upon the relevancy and sufficiency of the facts and circumstances set forth in this libel, that these were so particularly there inserted ; but this was done agreeably to some of the best precedents in the records of this court, for the furtherance of justice, both in respect of the prosecutors and of the pannel : for the former, that as the evidence to be brought is circumstantial, the jury may be the better enabled to ponder the several circumstances, and connect them together, and attend to the evidence that shall be brought for proof of them ; and for the sake of the pannel, that he, knowing the

* As to the usurpation in this respect upon the province of the jury which was practised in Scotland for a period terminating not very many years before the time of this Trial, see in Mr. Hume's Commentaries on the Law of Scotland respecting Trial for Crimes, the history of the charge of Art and Part (chap. 7), and more particularly the history of the interlocutory of Relevancy (chap. 10). See also Arnot's observations, (in his Collection of Criminal Cases, p. 174.) already quoted, upon the usurpations which the Courts in Scotland after the Restoration exercised upon the province of the jury.

By this usurpation, if I rightly understand the matter, the jury were precluded from considering not only the legal guilt of the offence charged, but also the sufficiency of the *indicia* alleged to prove that fact ; and their province was confined to the consideration whether those *indicia* had been proved. See, as connected with this, the passage from Mr. Hume cited in a note to the conclusion of Mr. Brown's reply, in favour of the pannel.

principal facts that were to be proved in support of the charge against him, might prepare the evidence for his vindication, and for explaining those appearances of guilt with which he was loaded, in the best manner he should be able.

Another thing concerning the interlocutor to be pronounced by your lordships, in which I most readily agree with the pannel's counsel, is, that he should be allowed to prove the several facts alleged for his defence, and every pertinent fact or circumstance, that he or his counsel think, may be available for proving his innocence.

And thus far we seem to be agreed on the terms of the interlocutor, if the trial is at all to proceed; against which one previous objection hath been made, namely, That this pannel, who is only said to be charged as accessory, cannot be tried before the principal, Allan Breck, be first discussed: in support of which objection, they have alleged certain passages in the old books of the law, and sir Geo. Mackenzie in his *Criminals*, title Art and Part, parag. 9.

But to this I answer, first of all, that sir George Mackenzie himself, in the passage referred to, furnishes an answer to the objection; for, after stating the question, whether accessories can be sued till the chief actors be first discussed, and quoting the passages in the *Regiam Majestatem*, and other old books that favour the negative, he adds a decision of that question in this court in these words: "notwithstanding all which, Charles Robertson being pursued as accessory to the casting down of a house, which was libelled to have been cast down by his sons and servants at his command, the justices found, that he might be put to the knowledge of an inquest, although the children and servants were not first discussed; because the act appointing a libel to be relevant, bearing art and part, did abrogate the foresaid; 4th verse, 26th chap. l. 4. R. M. since such as are pursued, as art and part, are all principals." This was the decision of the Court and the reason of it, founded on the act 1592, chap. 153, which enacts, "That, in time coming, all criminal libels shall contain, that persons complained on are art and part of the crimes libelled; which shall be relevant to accuse them thereof; so that no exception or objection take away that part of the libel in time coming."

The author proceeds in the same passage to recite some part of the argument previous to this decision; and says, "That the advocate alleged, it were absurd, that the king should be prejudged by the absence of the principal party; to which it was answered, that the king was not prejudged, seeing, if the principal party were discussed and denounced fugitive, the accessory might be proceeded against."

Ndw this is what hath been done in the present case: Allan Breck Stewart hath been called upon to stand trial for his part in the same offence, and hath been denounced fugitive for not appearing to abide his trial;

which is discussing him as far as the laws of this land admit of, when his person is not in custody.

But further, it is to be observed, that Allan Breck is not charged in this libel with being the principal, and this pannel as only accessory to the murder of the deceased Glenure; they are both charged in the same words with being guilty, actors, or art and part of the said heinous crime; that is, in the terms of the statute of king Ja. 6, just mentioned: and though it be true, that in the subsumption or recital of the facts, it is said, that the actual murder, or firing upon the deceased, was committed by Allan Breck, it is also said, that this was done in revenge of the quarrel which this pannel took up against the deceased, and in pursuance of a concert or conspiracy betwixt the pannel and Allan Breck, to take away the life of Glenure; and such being the case, they are in reality both principals. By the law itself (l. 15 ad legem Corneliam de sicariis) "mandator cædis pro homicidâ habetur;" and the learned Matheus, de Criminibus, in his prolegomena, c. 1, § 12. "qui mandant scelus, quique mandatum exequentur, utrique rei sunt, et ordinariæ quidem poenæ subjugandi," and for proof of this, brings many arguments and authorities; and *inter alia*, "cum quis alicui mandat scelus, mandantem quidem caput esse; mandatarium vero manum, et instrumentum mandantis. Hinc sacro quoque oraculo cædes Uriæ Davidi impingitur," 2 Sam. xii. 9. in which text the words of Nathan the prophet to David are, "Thou hast killed Uriah the Hittite with the sword."

And indeed it seems not to be agreeable to reason or natural justice, to hold, that, if this Allan Breck, for instance, the actual manslayer in the present case, instead of making his escape beyond sea, as probably he hath, had died a natural death, and so become out of the reach of all human laws, before this trial could be brought on; and supposing the most direct and positive evidence could be brought, that Breck committed the murder libelled, by the counsel, command, or direction of this pannel, or, as our old laws express it, 'out-bounded' by him, that yet this pannel could not be brought to justice, because truly, though the author, he was not the very actor cædis.

But that such is not the law of Scotland at this day, besides the case mentioned by sir George Mackenzie, I need only remind your lordships of the very last trial in the Court of Justiciary at Edinburgh, of James Drummond Macgregor, for being guilty, or art and part of the crimes of hamesucken, forcible marriage, and rape: for all which the trial proceeded against him; and though, in the crime of hamesucken, he and his accomplices might be all equally principals; yet, in the forcible marriage and rape, Robert his younger brother, to provide whom with a wife and fortune that wickedness was committed, was no doubt the principal party and actor; and yet Robert had been no otherwise discussed than Allan Breck

has been in the present case, that is, called upon to abide his trial for these offences, and pronounced a fugitive for not so doing.

As for the argument which the counsel for the pannel have chiefly insisted upon, and which they have professedly, and I think not improperly, calculated for the jurors who now hear us, namely, to impugn the relevancy or sufficiency of the several facts and circumstances libelled to infer the pannel's being guilty, or art and part of the murder in question; I do not chuse at present to enter particularly into that argument, but to reserve that till we come to sum up the evidence to the jury, such as it shall come out in their presence; which may possibly in some articles be weaker, and in others stronger, than what is set forth in the libel from the materials that we then had before us; but in order to shorten our work at the end of a long trial, and to engage the attention of the jury to the evidence that shall be brought before them, in support of this libel, I beg leave now to make a general observation or two for their sake.

It hath been admitted by the counsel for the pannel, that even in the trial of crimes, circumstantial evidence, when clear, is not only competent, but perhaps the most satisfying and convincing proof of any; and it was well said, 'that circumstances are inflexible proofs; that witnesses may be mistaken or corrupted; but things can be neither:'* to which I will add,

* See Burnett's Treatise on Various Branches of the Criminal Law of Scotland, chap. xxi.

See also to the same effect Paley's Principles of Moral and Political Philosophy, book 6, chap. 9, vol. 2, p. 299, 8vo ed. of 1811.

I confess, it seems to me, that the comparative cogency of circumstantial evidence has been sometimes estimated too highly, and not stated with perfect justice. "In this," says Mr. Burnett, "circumstantial evidence (the witnesses being all credible) differs from positive, that in the former there is not the same risk of error and falsehood. Witnesses to the fact may be mistaken, or may falsify—they may err,' as lord Stair says, 'through inadvertence or precipitancy, and through the secret insinuations of favour and hatred which they themselves do not perceive.'"

"Circumstances," says Paley, "cannot lie."

If the alleged circumstances, from which a jury is called upon to infer guilt, were to be witnessed by the jurors themselves, these commendations of circumstantial as contrasted with direct evidence, would be much nearer, than they are, to the truth.

Mr. Hume, (Comm. Trial for Crimes, vol. 2, chap. xv, p. 237), treats the subject with much judgment and fairness:

"I have assumed it," he says, "as a lawful thing to convict on circumstances only: and I will not here multiply cases in proof of a position which is not only vouched by the whole series of our criminal records, but

that the competency of such evidence, for inferring the ordinary capital punishment for murder, was solemnly decided in the Court of Justiciary at Edinburgh, in February 1718, in the trial of Stewart Abercrombie, for the mur-

also is grounded in reason and necessity, and the law and practice of all other civilized realms. Certainly it must be allowed on the one side, that in any case of pure circumstantial evidence, it is always possible that the prisoner may be innocent, though every particular be true, to which the witnesses have sworn; a thing that cannot happen, where they swear directly to the deed, as done in their own presence. But on the other side, such is the difficulty of contriving an apt and coherent train of circumstances, that perjury is far more easily detected in cases of this description: and the just influence of the former consideration is not utterly to exclude a sort of evidence, which is often irresistible to the mind, and which, with respect to many crimes is the only sort of evidence that can ordinarily be obtained; but to recommend to jurymen the propriety of caution and reserve, in which indeed they are seldom wanting, as to the sufficiency of the presumptions of guilt, on which they are to condemn."

Undoubtedly, each sort of evidence furnishes cases of very various degrees of strength; but in considering the merits of the two sorts, it seems not to be a legitimate procedure, to state on the one hand a very strong or a very weak case, without stating on the other, a case as nearly as may be, of correspondent strength or weakness. When it is said, "witnesses to the fact may be mistaken, may falsify, may err through inadvertence," &c. it should be recollected that all this is not confined to witnesses of direct facts, but extends also to the witnesses of circumstantial facts; when it is said that circumstances cannot lie, it should be recollected that the relators of circumstances can lie, and that circumstances themselves may deceive; when it is said that the concert of a number of persons to impose on a court of justice a tissue of manifold falsehoods is improbable of contrivance, difficult of execution, and easy of detection, it should be recollected that circumstantial evidence contains not always either numerous circumstances, or circumstances which are attested by numerous witnesses; when it is said that circumstances trifling in themselves may by concurrence superinduce decided conviction, it should be recollected that the more trifling in itself is any circumstance, the greater is the probability that it was inaccurately observed, and has been erroneously remembered. It is to be hoped, that false witness is not often, either by design or through mistake, given against culprits. It should however always be recollected, that this is the only fallacy to which a judgment founded upon direct evidence is liable; whereas judgment founded upon circumstantial evidence is liable not only to this fallacy of false witness,

der of Alexander Hay, son to Mr. Robert Hay of Naughton; in which the argument was treated with great learning, and full informations on the debate written by the now lord president of the court of session, who was the prosecutor, and by the now lord justice-clerk, who was of counsel for the pannel. And I mention that case, which I have lately perused in the record, to give your lordships and the jury a specimen of a circumstantial evidence of murder, that, in its general nature or complexion, was very similar to the present: the case, there, in short, was, that some days before the murder, Mr. Hay, the deceased, and Stewart Abercrombie the pannel, had been in company, when Hay complained of an affront given him by Abercrombie; upon which no-

but also to those of false inferences—in other words, that direct evidence, if true, cannot possibly mislead, whereas circumstantial evidence, though in all its parts most strictly true, may yet mislead most grossly and most fatally.

Mr. Burnett, in his chapter (xxi) on Presumptive Evidence (p. 528), notices that,

“Beccaria mentions a singular practice which prevailed in the parliament of Thoulouse of admitting fanciful numerical estimates of inconclusive circumstances to make out a legal proof; thus, a hearsay might be a quarter; another hearsay, perhaps more vague, an eighth of a proof; and thus, what is no evidence, might, by this artificial and absurd combination, be made to amount to legal proof.”

It is observable, that from about 1690 to about 1725 (see Hume's Comm. Trial for Crimes, chap 10, vol. 2, pp. 49—67.) a practice of a nature somewhat similar to that of the practice which Beccaria relates of the parliament of Thoulouse, seems to have prevailed in the courts of Scotland. It is thus exhibited by Mr. Hume (p. 62). “I cannot properly omit to mention, that this fashion of weighing articulately the several presumptions in a libel proved the ground (at least I can find no other account of it) of a still more irregular ground of judgment, which was thus: At the same time, that the whole presumptions libelled were found jointly relevant to infer the pannel's guilt of the crime charged, and to subject him to the full pains of law; separate relevancies were found of arbitrary and inferior punishment on these presumptions severally, or certain more limited combinations of them. In some situations a judgment of this sort may no doubt be proper, and suitable to the case; because it may happen that a part only of the particulars libelled are sufficient, of themselves, to infer some lower degree of guilt, and constitute an offence of its own kind, such as deserves and may warrantably receive punishment under the libel which is in court, if it be laid in the proper form. If a libel set forth the crime of wilful fire-raising, and also that of attempting or threatening to raise fire, and if it bear a detail of circumstances cor-

thing then ensued: but, just before the murder, which happened about nine at night of the 6th of December 1717, Abercrombie was drinking in a tavern near the head of Black-Friars wynd, when Mr. Hay came into the house, and made one of the servants call him out into another room; Abercrombie went to Hay, leaving his hat in the room where his company were; they went out together near to a lamp at the head of the wynd, where a scuffle ensued betwixt them, without either of them drawing, though they had both swords; and, during this scuffle, Abercrombie drew his sword, and run Hay through the body, who was heard cry, He was murdered, and had got foul play, his sword not having been drawn; and soon after dropt down dead: Abercrombie was still without

responding to these several charges, certainly such of these presumptions, as amount to evidence of the attempt only, may regularly be sustained to infer some inferior correction, as well as the charge of fire-raising to infer the higher pains of death and confiscation of goods. But the practice to which I now allude was something of a quite different character, and far more difficult to be defended, viz. the finding of a relevancy for arbitrary punishment, in respect of each or several of the presumptions of guilt related in the libel, considering them as grounds only of suspicion, or circumstances of evidence, of the capital and only crime laid in the libel. Strange as it may seem, the lawyers of those times appear to have reasoned thus: that if all the presumptions libelled were jointly sufficient to convict the pannel of the full charge, and to forfeit his life; certainly each of these, of itself, implied at least some sort of concern in the guilty deed, and justly exposed him to chastisement less or more.”

See something concerning circumstantial evidence, vol. 16, p. 650. Vol. 17, p. 1450. See also the Case of Barbot, vol. 18, p. 1430.

The general opinion in Scotland seems to be, that Campbell was not killed by Allan Brock Stewart, but by Charles Stewart the pannel's son, who afterwards became a shoe-maker in Edinburgh, where he died. It appeared to me that some doubt was entertained in Scotland whether the pannel had any participation in the slaughter.

As to the maxim, “It is better that ten guilty men should escape than one innocent suffer,” see vol. 7, p. 1529, and particularly sir Samuel Romilly's admirable remarks. “Unless,” says Johnson, “civil institutions ensure protection to the innocent, all the confidence which mankind should have in them would be lost.” See Boswell's Life of him, vol. 2, p. 473, 4to, 1st ed.

In a note to Eunomus, Dialogue III, p. 263, line 18, 1st edition, reference is made to “an excellent Tract on the subject of presumptive evidence, said by hp. Burnet to have been written by lord Sommers.” I recollect not to have seen this Tract.

his hat, and was seen by no person who knew him during the scuffle; they only saw the man without the hat stab the other who had one; and, after he had given the wound, instead of returning to his company where he had left his hat, called at another tavern, where he borrowed a hat, and went directly to his own house, and to bed, where he was, that same night apprehended.

In the libel against him, all the circumstances are particularly set forth; and, in the information for the prosecutor, there is the following passage, which I have extracted, and beg leave here to read: "The pannel trusted to the darkness of the night, and secrecy in which he had committed this crime, as sufficient to cover him from the eye of justice, and prevent his punishment; but that same wise providence, which sometimes leaves men to execute their wicked designs in such a manner, and under such circumstances, as emboldens them to go on with hopes of impunity, frequently brings those very crimes to light, by a wonderful discovery of unforeseen incidents and circumstances, concurring to fix the guilt upon the criminal, with more force of conviction and strength of evidence, than two concurring witnesses could give, on purpose to convince the world how little darkness or secrecy are to be relied on, either as covers or encouragements to wickedness.

"Such is the case of this pannel: had it not been by the small chance of his leaving his hat in the room with the company where he was, when he came forth to perpetrate this crime, he might have gone off undiscovered.—But that small accident, first indeed taken notice of by a child, who observed the hat in the cellar, and knew it to be Mr. Abercrombie's, led those concerned to a full discovery of such other concurring circumstances, as supposing no positive proof of the fact should appear, are more than sufficient to condemn the pannel in the eyes of every judge and jury, and of every person else who will lay himself open to receive impressions from truth."*

* The interlocutor of relevancy in this Case of Abercrombie (Feb. 6, 1718) is thus given by Mr. Hume (Comm. Trial for Crimes, chap. 10, vol. 2, p. 54.) "The Lords, &c. find the said pannel his having about the time and place libeled given Alexander Hay the defunct, with a sword or some deadly weapon, a mortal wound, whereof the said defunct within a short time, died, or that the said pannel was art and part thereof, relevant to infer the pain of death, and confiscation of moveables: and *separatim*, find that there being a previous quarrel betwixt the defunct and the pannel some few days before the defunct was killed, and that the pannel, with the defunct, were, a little before the murder, seen together in the house or cellar of Mrs. Lindsay, and no other person in the room with them; and that the pannel, where he left Mr. Chiesley and the other company with whom he was in the said cellar, did leave be-

The jury in his case were of that disposition; he was convicted of the murder, and suffered for it.

Another remarkable instance of this nature, was the case of Alexander Macgowan, who was tried by two of your lordships here present, at the circuit held at Perth in May 1750, for the most horrid murder of Margaret Maclean, and of Margaret his own child by her, an infant of about three or four years of age, committed in August 1749, not far from Crief, in the shire of Perth, in a thicket of wood, where he left their bodies, after having carried away the money and clothes which the said Margaret had along with her in a bundle. Before the bodies were discovered, they were so mangled, that they could not be known, otherwise than by the clothes which were on the body of the woman, which her relations could swear to: the evidence against the pannel was wholly circumstantial, and consisted chiefly of there being found in his possession, after the murder, a pair of stockings, a linnen shirt, and a muslin stock, that were proved to have been in possession of the deceased when she set out for Edinburgh, where she had told her relations, she had been invited by the pannel to go along with him, in order to their being married together; and, upon this evidence, he was convicted of this double murder and robbery; and, upon your lordships' sentence, suffered the punishment that he so well deserved.

My lords, it appears to me, that the present case affords a fresh instance, similar to these I have mentioned, of a providential discovery of circumstances, serving to fix the guilt of accession to this murder upon the now pannel, notwithstanding all the precautions by him used to conceal it: his enmity against Glenure, for removing him from his own possession in May 1751, and discontinuing to employ him in the management of the Ardshiel estate, was well known; as likewise the various efforts he made to prevent the removing of certain tenants

hind him his hat in that room where the company was, where the same remained till after the defunct came in wounded into the cellar, and that two persons were seen come out of the said cellar; and after they came out, were seen go on quarrelling, one of whom wanted his hat, and had a light or brown coloured coat, with clear buttons upon it, and that the pannel had on him such a coat that night, and that the person without his hat, and with such a coat as said is, was he that gave the other a stab or wound; and that the person wounded, and returning back to the said cellar, were [So Mr. Hume] the defunct, and soon after of his wound died; and the pannel, about that time, called at Mrs. Johnson's house in Niddrie's Wynd, without his hat, and there borrowed one, and soon thereafter was seized in his own house, and a sword found by him in the room, bowed, and with fresh blood in the hollow parts of it, all jointly relevant to infer the foresaid pains, and repel the bail defences proposed for the pannel."

of Ardsheil in the month of May last; and also his intimacy and close connexion with Allan Breck Stewart, who disappeared abruptly immediately after the murder, and to whom the voice of the whole country imputed the actual murder itself: but as, when that happened, this pannel was at his own house, at the distance of one mile from the place of the murder, the more direct and immediate evidence of his accession to it was long concealed: his wife and his daughter being examined upon oath before the sheriff depute of this county, on the 23d and 25th of May last, touching what they knew concerning the murder, deposed, That Breck Stewart left the pannel's house on the morning of Tuesday the 13th of May, dressed in his French clothes, and that the pannel had on such black or dark-coloured short coat, as Breck had truly left his house dressed in, for three quarters of a year before that time; but at length, above a month after his examination, namely, on the 30th of June last, Alexander Stewart the packman, being examined before the sheriff-substitute at Fort William, and after being confronted with a friend of his own, to whom he had been muttering some part of the truth, spoke out the whole truth, as it is set forth in the libel; and particularly, that from this very wife of the pannel he received, on the evening of Saturday the 16th, at the pannel's house, Allan Breck's French clothes, to be carried to him at the place of his retreat, together with the five guineas, which the pannel had been at great pains to scrape together, after sending the packman express, for that purpose, to his friend William Stewart at Fort William, and which he sent to Breck at the place of his retreat, with a declared intent to put him in condition to make his escape, for that he must be suspected of the murder: this discovery was the first thread which the kindred of the deceased got hold of to lead them to a more full detection; and was afterwards confirmed by the examination of the bouman, who told the particulars in the libel recited, and about whose house the very clothes were found, the property of the pannel, which Breck had brought from the pannel's, and left with the bouman.

And as for the importance of these particular discoveries, which the pannel's counsel have endeavoured to diminish in the manner that circumstantial evidence is always impugned, by observing that each article taken by itself is inconclusive; I may readily admit this, and yet, from the result of the whole circumstances, there may be convincing and irresistible evidence. And to mention, at present, only these two material ones, of the clothes furnished, and the money sent to Breck Stewart, before and after the murder respectively; I do not say, that if a man lends his neighbour a coat, in which the borrower being dressed, two or three days after commits a murder of a person who was his own enemy in time past, that this will afford any evidence of privity, or accession to that murder in the lender of the coat; neither do I say, that if a

man's friend or relation has unfortunately committed a murder, and one shall aid him, by money, or otherwise, to make his escape, that this will render such friend accessory to, or chargeable with the crime of murder, though he is doubtless guilty of an offence or misdemeanor in its own kind;* but the force of these united circumstances in the present case, with the others charged in the libel against this pannel, consists in the connexion of the whole together. It was the pannel's proper quarrel that rendered the deceased obnoxious to Breck Stewart; the pannel had discovered and expressed his enmity against the deceased, and had uttered threatenings against his life; Breck Stewart, his intimate friend, was a fit instrument for such wicked purpose; he had espoused all the pannel's opinions and dispositions towards Glenure; he was, himself, not in condition to remain in this country, and was already provided with the means of subsistence in foreign service; and to this man it was, in the very heat of a contest with the deceased about removing certain tenants which this pannel had put in, that he furnished the dress, and, as we likewise believe, the arms wherewith he perpetrated this foul murder; immediately after which he retires to a desert place, not far off, there to wait for a supply of money that was to be sent him; and it is especially to be remarked by your lordships, and the jury, that, as the libel bears, at this place, Breck told the bouman, that he must go to Fort-William with a letter to William Stewart, merchant there, who he said would give him money upon receipt of the letter; and this William Stewart was another intimate friend of the pannel's, and the very person to whom, the day after the murder, the pannel sent the packman express to get five guineas for the use of Breck, who was about to leave the country. This circumstance affords a demonstration of a concert betwixt the pannel and Breck before they last parted at the pannel's house on the Monday night, or Tuesday morning preceding; after which the pannel allows he never saw Breck; for how otherwise could Breck have known, that, for such a small sum as he wanted, the pannel was to have recourse to this William Stewart, who lived twenty miles distant from him? And this circumstance serves to connect the facts which immediately preceded the murder, with those which immediately ensued it.

But I am going too far at present, on the considerations that will be proper for the jury after the proof shall have been brought before them; and shall now conclude, hoping it will appear to your lordships, that no sufficient objection hath been offered on the part of the pannel, why his trial should not proceed; and that you will make such interlocutor as, upon that supposition, the counsel on both sides appear to be agreed in.

* See Burnett on the Criminal Law of Scotland, pp. 286, *et seq.*

Mr. Millar for the Pannel.

My Lord Justice-General;—I appear as counsel for the prisoner at the bar: and, as I am sensible this trial must draw out to a very great length, and occasion a great deal of necessary trouble to your lordships, and the jury, I shall endeavour, in what I am to offer, to avoid repetition; and I shall confine myself to such observations as most affected my own mind upon reading the indictment, which is the only rule by which I can judge of their importance. And, 2dly, I shall offer a few considerations by way of reply to what has been said by my lord advocate and his assistants, in support of the indictment.

The prisoner is charged before your lordships as accessory, art and part of the murder of the late Mr. Campbell of Glenure; a crime of so foul and black a nature, and attended with such particular circumstances, as has not only justly excited the attention of the public, but also a more than ordinary keenness and ardour in the numerous friends and relations of the deceased, in carrying on this prosecution.

I would not chuse to make any reflections upon their conduct. I sincerely sympathize with them for their loss, and feel the full force of their just revenge against the guilty person, whoever he is. But, my lord, in such a case, the passion which we at first cherish as just and honourable, may get the better of us; and if the restraints of reason and strict honour are not applied, will insensibly rise into rage, and precipitate us into measures inconsistent with law, and the dictates of cool humanity.

My lord, it is in such circumstances as these, that even the innocent may sometimes be brought into danger. And in such circumstances it becomes the duty, and an honourable part of the duty of one of my profession, to appear for the accused, to assist him in his just defence, and to obviate, by all the remedies which the law has provided for the security of innocence, any disadvantage he may be brought under, by public prejudice, or by the number, power, or superior address of his private prosecutors.

This consideration determined me to appear in this trial, and to give my poor assistance in the defence of the prisoner; to which I was further prompted by my lord advocate himself, who had the generosity so far to interest himself for the pannel, as to recommend it to me, amongst others, to appear in his defence.

And first, I observe, that it is admitted by the prosecutors in their indictment, that the barbarous murder therein charged was perpetrated by one person, to wit, by Allan Breck Stewart: and taking him to be the guilty person, his life is, no doubt, justly forfeited to public justice, though in the mean time he may have escaped from the execution of the law. The first question therefore that must naturally occur, is, what are the circumstances in this case, which should lead your lordships or the jury to believe, that any other person than

Allan Breck, and particularly the prisoner at the bar, was also guilty of this foul and detestable murder?

It is a rule in philosophy, in all our inquiries into natural causes and effects, to rest satisfied so soon as one cause or principle is discovered, sufficient for answering and solving all appearances in the effect. This rule, I am sure, with great propriety may, and ought to be applied to any moral or judicial inquiry, such as the present. If a crime is committed, there must, no doubt, be a criminal; and if the crime itself, or the circumstances which attended the commission of it, are of such a nature, as must necessarily infer the aid and assistance of others towards the commission of it; as the appearances in such case will not be answered by the discovery of one guilty person, the mind will remain unsatisfied till further discovery is made of the supposed partners of the crime.

But, my lord, where the guilt of one will account for the whole appearances, for every circumstance connected with the crime, I apprehend it as a rule in morals, it is a rule in law, and in sound reason, to presume, that no other but that one person was concerned in the commission of the crime.

This presumption is founded in the respect which we owe to human nature. For, my lord, wicked and corrupted as mankind are, thank God, a murderer, a wilful deliberate murderer is still a monster in the species; and it is undutiful in us, and against all the rules of right reason, to carry our suspicions, far more our prejudices, further than the *corpus delicti*, and the circumstances attending it, do necessarily point out.

From this consideration, I hope, the prisoner comes to your lordships' bar, attended and aided not only by the general, legal presumption of innocence, but with this other more special presumption, that no other person was concerned in this horrid murder but that one person, whoever he was, who gave the fatal shot by which Glenure died. And this presumption, I flatter myself, will be present with your lordships, and in the mind of every jurymen, till contrary proof and evidence shall beat it out: which we flatter ourselves will be so far from happening, that, on the contrary, in the course of the evidence, it will gather strength, and at last terminate in that issue, which from the holy providence of God, the innocent may with confidence expect.

My lord, it is not my intention to anticipate, or to argue upon evidence which has not yet been brought: but, as my Lord Advocate has set forth, in his printed indictment, a variety of circumstances, from which he would infer the prisoner's accession to this murder; I must beg leave to take notice of some of them, in order, if possible, to dispel that popular and illegal prejudice, which I observe in most cases, especially in the more atrocious crimes, does attend the unhappy person who is brought to your lordships' bar.

G

When the mind is enraged to a high degree, it naturally seeks after, and is impatient to find, an object for its resentment. The prisoner first occurs, and there we are too apt to fix our opinion of guilt, and along with it our resentment; especially when our confidence in the public prosecutor is so great, as it justly is at present in the honourable gentleman who fills that office.

This, if I mistake not, is the source of popular prejudice against the unhappy prisoner. All of us are subject to it, because it arises from, or at least is incident to human nature; but however innocent it may be in the crowd that surrounds us, it is dangerous, it is criminal, if received and entertained in the mind of a jurymen. For their sakes, therefore, I will beg leave to make a few observations upon the facts charged in the indictment, that so the jury, who for some time have had the printed indictment in their hands, may, before they proceed to trial, be also possessed of such facts and observations for the pannel, as will, if attended to, entirely take off the force of the circumstances which are charged against him.

And first, it will be observed, that the murder is not said to have been committed from sudden passion, or *chaud melle*, as the law expresses it, but to have been premeditated and resolved upon for some days before it was committed. Now, to render malice of so high a nature probable, some very strong ground or cause ought to have been assigned for it; and what cause is here mentioned? Why, 1st, Because Glenure had accepted of a factory from the crown upon the forfeited estate of Ardsheel. 2dly, Because Glenure had removed the pannel from the farm of Glenduror at Whitsunday 1751. And lastly, Because he was proceeding to remove certain other of the tenants of Ardsheel, at the Whitsunday 1752.

The first of these could not be the ground of the resentment which gave occasion to the murder; because Glenure had been in that office for more than three years before the murder; during the greatest part of which time, the pannel and he lived in friendship and intimacy together; as will be clearly proved by a long course of letters which passed betwixt them. The pannel's own removal from Glenduror could as little be the cause of such preposse malice; for the removal was voluntary, and the possession yielded to the succeeding tenant, in consequence of a previous concert between the pannel and Glenure. And far less could the intended removal of the other tenants at Whitsunday last, give occasion to the conspiracy and murder charged against the pannel. Such deep resentment could not have arisen from so trifling a cause in the mind even of a wicked man, much less one of the pannel's disposition and character.

3dly, The circumstance of Allan Breck's having changed his clothes at the pannel's house before the murder, though it has been chiefly insisted on for inferring the pannel's accession to the murder, is equally inconclusive.

Allan Breck's situation, as a deserter from his majesty's service to the rebels, and afterwards to the service of France, made it necessary, so often as he came into this country, to skulk amongst his friends, of which the pannel unfortunately happened to be one. It will be proven, that for this purpose, he used to lay aside his French dress, and borrow the dress of the country, such as is described in the indictment, from any of his friends, where he happened to visit or reside; and that he had gone about from house to house, changing his dress in this manner, since the beginning of March last, and particularly had been furnished with such change of dress at the pannel's house, about the beginning of April, where he happened to be for a night or two, in the course of his visits through the country.

My lord, if these facts are proven, it is impossible any weight can be laid upon the circumstance of his having also changed his dress at the pannel's house, upon the Monday and Tuesday before the murder happened. If a disguise had been intended, would the pannel, who is admitted to be a man of more than ordinary discernment, have furnished his own clothes, which were known to the whole neighbourhood, and by which, if the murderer was apprehended, he himself behoved infallibly to be discovered? Would he have dressed up the assassin before his numerous family and servants, in the very dress which was to serve for his disguise, two different days before the plot was to be executed? Or would he have allowed him to traverse the country for some miles round, from Tuesday when he left the pannel's, till Thursday when the murder was committed, in the very dress which was intended to disguise and conceal him? Such a conduct is unaccountable, and cannot be ascribed to the pannel, whom the prosecutors themselves represent as a man of the deepest design and artifice.

My lord, the next material circumstance in the indictment, which I would beg leave to take notice of for the sake of the jury, is the correspondence which passed betwixt the pannel and Allan Breck the supposed murderer, after his retreat to Koahsuacoan.

This circumstance, I own, at first sight, seems to carry great weight against the pannel, because it imports not only aid and assistance given by the pannel to the supposed murderer in order to enable him to make his escape, but also a previous knowledge of the place to which he retired immediately after committing the murder. But your lordships and the jury have heard how the force of this circumstance is taken off. The pannel knew nothing of the place of Allan Breck's retreat till the day after the murder, when he received a message from him by Donald Stewart, giving him notice of the place to which he had retired, and beseeching the pannel to send him a small supply of money, in order to carry him off the country. This message the pannel has undertaken, and hopes to prove by a train of unquestionable evidence; and if he shall be able to bring a satis-

fying proof the fact, it will at once strip the indictment of the only circumstance in it, which points at a previous conspiracy betwixt the pannel and Allan Breck the supposed murderer.

And indeed, my lord, independant of the proof which is proposed to be brought by the pannel, it cannot but appear unaccountable to your lordships and the jury, that a person of the pannel's sagacity, if he had been in concert with Allan Breck for several days before the commission of the murder, should not have provided the necessary means of Breck's escape till after the crime was committed, when he could no longer correspond with him, without the interposition of others, and consequently without the hazard of a discovery. The pannel could have had no difficulty to have furnished Allan Breck with a little money before the commission of the murder, in order to make his escape immediately. He knew Breck's circumstances, and that he had nothing to carry him off the country, and Breck would not have engaged in such a service without receiving from his employer the necessary supplies for his own safety; and supposing the pannel had not been in cash upon the Monday, when they last parted, yet he would have taken care before the Friday to have been sufficiently provided for answering Breck's demands. And yet, upon the Friday after the murder, when the message came from Breck, we find from the indictment, that the pannel was obliged to send into Fort-William, at a considerable distance from his own house, in order to borrow the trifle of money which was wanted, and sent the day following to Allan Breck.

How far the pannel was to blame in sending money to Allan Breck, who was his relation, and had been his ward, in order to enable him to make his escape, depends upon the opinion he then had of his being guilty or innocent of the murder. If he believed him guilty, it was no doubt a very great crime in the eye of law; but such assistance furnished for the escape of a murderer, though knowingly, will not, in law, or in the nature of the thing, infer accessions to the murder, unless it had been previously promised as an encouragement to the commission of the murder, which, from what has been said, appears could not have been the case.

With regard to the threatenings, which is the only remaining branch of the indictment of any weight against the pannel, I could have wished my lord advocate had been so good, as to have condescended upon the particular expressions, and upon the times and places when and where these were uttered. As that is not done, it is impossible the pannel can make any other answer but a general denial of this part of the charge: and as he is conscious he never entertained the barbarous resolution, he hopes, and is persuaded, no proof will be brought of any expression uttered by him, which could import a deliberate threatening to take away the life of an innocent gentleman.

My lord, having touched upon a few of the most material circumstances in the indictment, which I thought material for the jury to have in their view, in order to direct their attention, during the course of the evidence, to the plan of the pannel's defence, I shall next proceed to what at present falls more immediately under your lordship's consideration, and that is, the objection which has been moved to the competency of this prosecution.

It has been objected, that the indictment does not charge the pannel as a principal in the murder of Glenure, but only as a remote accessory, by previous counsel, and subsequent aid and assistance given to the murderer in his escape; and that though such accessory is equally criminal and punishable with the principal, yet that he cannot be brought to trial, till the principal be first tried and convicted.

This objection was stated to your lordships upon the authority of the old books of our law, sir George Mackenzie, our only author upon crimes, and of several of the foreign doctors who treat of this subject; and, with your lordships' permission, I will read some of the passages upon which the objection is founded, as I have taken them down from the books.

Reg. Maj. lib. 4. cap. 26, de ordine cognitionis in criminibus.—“Si duo homines fuerint implacitati, unus de principali furto, et alter de præcepto, primò debet ille qui defamatur de facto, quam ille qui factum illud committit præcepit, implacitari.”

To which the learned sir John Skeene subjoins the following annotation: “Complices criminis non possunt accusari ante principalem malefactorem, nam sicut remoto principali removetur accessorium, ita absoluto malefactore absolvuntur complices et consentientes.”

Quoniam attachiamenta, cap. 83, de receptatione latrocinii.—“Nullus defamatus tanquam receptator latrocinii debet puniri, antequam malefactor fuerit convictus vel attayntus de latrocinio illo; et hinc fiet ut dicitur consentientes et agentes pari pœnâ puniuntur.”

Statuta Davidis 2di, cap. 19, Complices non debent puniri ante principalem malefactorem.—“Ordinatum fuit coram rege in pleno parlamento apud Sconam per regem et communitatem regni, quod supersedendum est de receptatore alicujus malefactoris judicandi sive appellandi, quousque receptatus judicetur. Et si receptatus quietus fuerit, receptator quietus sit sine aliquâ aliâ assisâ. Si autem receptatus damnatus fuerit, receptator habet assisam.”

And, agreeable to the doctrine laid down in these old statutes, sir George Mackenzie, in his Criminals, tit. Art and Part, § 9, gives it as his opinion, “That the chief actor must be first discussed, and either found guilty or acquitted, before such as are accessory can be pursued.” Which he supports not only by the authority of the old books of our law, already quoted, but also of many of the foreign doctors.

It is true, he adds, that notwithstanding

what is there laid down, Charles Robertson was tried before the justices as accessory to the casting down a house, though his sons and servants who cast down the same, escaped, and were not tried. But sir George is far from approving of that decision, and urges many strong reasons against it, and in support of the doctrine he had formerly laid down.

The foreign doctors also have generally gone into this distinction, with respect to the order of trying the principal and accessory. I shall only quote the words of Julius Clarus, *quest.* 90, n. 6. who lays it down as a rule, "*Quando proceditur contra aliquem tanquam quod præstiterit auxilium delicto, debet primo in processu constare principalem deliquisse.*"

To all these allow me to add the authority of the law of England, which, upon a point of this nature, supposing it not fixed by any statute or custom of our own, will, no doubt, have greater weight with your lordships than the opinions of any private lawyers.

Thus sir Matthew Hale, in his *Pleas of the Crown*, ch. 57, concerning the order of proceeding against accessories, lays down the following propositions, as fixed rules in the law of England: "The accessory may be indicted in the same indictment with the principal, and that is the best and most usual way.

"The accessory shall not be constrained to answer to his indictment, till the principal be tried, unless he waive that benefit; in which case, his acquittal or conviction upon such trial is good. But it seems necessary in such case to respite judgment, till the principal be convicted and attainted: for if the principal be afterwards acquitted, that conviction of the accessory is annulled.

"If A be indicted as principal, and B as accessory, they may be both arraigned together, and plead together, and tried by the same jury; and the jury shall be charged, first to inquire of the principal; and if they find him not guilty, then to acquit the accessory; and if they find him guilty, then to inquire of the accessory."

The reason of this distinction in the order of trying principals and accessories, is very well laid down by sir George Mackenzie, in the place above quoted, and will no doubt occur to your lordships: for guilt in the accessory necessarily presupposes, that the crime was committed by the principal, which can only be made appear by the trial and conviction of the principal. Neither is it sufficient to say, that, in the trial of the accessory, such evidence may be brought of the guiltiness of the principal, as would be sufficient to convict him, if he were present. For as no man can, by the law of Scotland, be convicted of any felony in absence, it is impossible to say or determine from evidence, adduced in absence of the supposed criminal, what would have been sufficient to have convicted him, if he had been present. He might have had defences against the indictment, objections against the witnesses adduced for the prosecutor, and witnesses to adduce for his own

exculpation, which the accessory doth not know, or cannot prove.

The answers made by my Lord Advocate to this preliminary objection to the order of the trial, have been three. First, That it is against the interest of society, that crimes should pass unpunished; which often must be the case, if the escape or death of the principal actor shall be understood to be a perpetual bar to the trial and punishment of those who are accessory, and no less guilty in the commission of the crime. 2dly, That Allan Breck Stewart hath been called upon to stand trial for this crime, and hath been denounced a fugitive and outlaw for not appearing to abide his trial, which is discussing him, as far as the laws of the land admit. And, 3dly, That both Allan Breck and the pannel are charged by the indictment in the same words, as being guilty, actors, or art and part of the same heinous crimes; which being in the precise terms of the act 153, part. 12th of James 6, nothing can be objected to the relevancy of that part of the libel.

To these I will offer but a word or two in reply. As to the first, founded upon the public expediency, and the dangerous consequences which may result from this distinction in the order of trial of principals and accessories, it is sufficient for me to say, "*incommodum non solvit argumentum.*" The law has been more anxious in providing for the defence and safety of the lives of the subjects, in the trial of crimes, than for the conviction and punishment of the guilty. And hence it has become an axiom in the law, better that ten guilty persons should escape, than that one innocent person should suffer.

To the second, with regard to the fugitation of Allan Breck, I answer, That such fugitation does not imply a conviction of the crime, which, by the law of Scotland, can only proceed upon evidence brought against the criminal present in court upon his trial. An act of fugitation is no more than a judgment of the court, awarding the escheat of moveables against the defender, for his contempt in not appearing to stand trial upon his indictment; and neither proceeds upon, nor implies the absent person's guiltiness of the crimes charged against him. If he were present, his voluntary confession would be no probation of his having committed the crime, so far as concerned the accessory; and far less can his absence imply or amount to such conviction. And this is agreeable to the opinion of sir George Mackenzie and Julius Clarus, in the places above quoted.

As to the third answer to the objection, founded upon the statute of James 6, it will occur to your lordships, as it did to sir John Skeene and sir George Mackenzie, who both wrote after the date of that act, That it could not be the intention of that law to abolish the distinction betwixt principals and accessories, and the order of proceeding in their trials: all that was meant by that statute was, to allow a defender, whether principal or accessory in a crime, to be charged under the general words

of art and part, without obliging the prosecutor to condescend upon the whole particular acts from which the crime was to be inferred. But if a prosecutor, as in the present case, has brought a special indictment, charging a pannel, not as actor *cadis*, but as a remote accessory thereto, the general words of art and part, subjoined to the minor proposition of the libel, can never be understood to imply a charge against the pannel, as principal actor, in contradiction to the special facts charged in the indictment, but only as accessory; and consequently, in the sense of law, actor, art and part in the commission of the crime.

What is laid down by the learned sir Matthew Hale in his fifty-fifth chapter of principals and accessaries in felony, is applicable to the present subject. "In treason, says he, all are principals; but yet, as to the course of proceeding, it hath been, and indeed ought to be the course, that those who did actually commit the very fact of treason should be first tried, before those that are principals in the second degree, because otherwise, this inconvenience might follow, that the principals in the second degree might be convicted, and yet the principals in the first degree might be acquitted, which would be absurd." And it is humbly thought, that this absurdity would be much greater in the case of a remote accessory.

Nor does the decision in the Case of James Drummond Macgregor apply to the point in hand; for though the crime was, in that case, committed with a view to procure a marriage for Robert the younger brother; yet, as James was present, and aiding and assisting in the hamesucken and forcible abduction, consequently he was a principal in the first degree, being an immediate actor in the whole crimes libelled; and, therefore, could not be intitled to plead the defence which has been offered for this pannel.

What we therefore humbly submit to your lordships' consideration is, that though an accessory is equally guilty and punishable with the principal, yet, as the law hath laid down a certain order, in point of time, as to the trials of principals and accessaries in crimes, and as this order is not abolished by the statute of James 6, therefore the trial of this pannel cannot proceed, until Allan Breck Stewart, the sole actor in the commission of the murder, is first tried and convicted.

But, if your lordships shall find reason for over-ruling this objection, the pannel hopes and expects, from your lordships' justice, that he will be allowed, by the interlocutor, a proof, at large, of all facts and circumstances that may tend to exculpate him from the charge exhibited against him in this indictment.

The Lords, upon bearing the Criminal Letters read, and the Debate thereupon, pronounced the following

INTERLOCUTOR:

"The Lord Justice-General, and Lords Commissioners of Justiciary, having considered

the criminal libel, pursued at the instance of William Grant of Prestongrange, esq. his majesty's advocate, for his majesty's interest; and also at the instance of Janet Mackay, daughter to the hon. Hugh Mackay of Bighouse, esq. and relict of the deceased Colin Campbell of Glenure, for herself, and on behalf of Elizabeth and Lucy Campbells, her infant children, with concurrence of his majesty's advocate, for his majesty's interest, against James Stewart pannel, with the foregoing debate thereupon, repel the objections to the libel, and find the libel relevant to infer the pains of law: that, time and place libelled, the deceased Colin Campbell of Glenure was murdered, and that the pannel James Stewart was guilty, actor, or art and part thereof; but allow the pannel to prove all facts and circumstances that may tend to exculpate him; and remit the pannel, with the libel as found relevant, to the knowledge of an assize.

"ARGYLL, I. P. D."

Thereafter the Lords continued the diet against the above James Stewart pannel, till to-morrow morning at six o'clock precisely, and ordained the parties, witnesses, assizers, and others concerned, to attend at that time, and the pannel to be carried back to prison.

CURIA ITINERIS JUSTICIARIE, S. D. N. Regis tenta apud burgum de Inverarii, vicesimo secundo die mensis Septembris, anno Domini millesimo septingentesimo quinquagesimo secundo, N. S. per nobilem et potentem Principem Archibaldum Ducem de Argyll, Dominum Justiciarium Generalem, et Patricium Grant de Elchies, armigerum, et Dominum Jacobum Ferguson de Kilkerran, Dominos Commissionarios Justiciarj dicti S. D. N. Regis,

Curia legitime affirmata.

Intrat.

James Stewart pannel, indicted and accused as in the former sederunt.

Thereafter the Lords proceeded to make choice of the following persons, to pass upon the Assize of the said James Stewart, pannel:

1. Colin Campbell of Carwhin.
2. Dougal Macdougall of Gallanah.
3. Alexander Duncanson of Kiles.
4. Duncan Campbell of South-Hall.
5. Hector Macneil of Ardmeanish.
6. James Campbell, late bailie of Inverary.
7. James Campbell of Rasheilly.
8. James Campbell of Rudale.
9. Colin Gillespie of Balimore.
10. Colin Campbell of Skipnish.
11. Duncan Campbell of Glendaroul.
12. Colin Campbell of Ederline.
13. Niel Campbell of Duntroon.
14. Archibald Campbell of Dale in Craignish.
15. Niel Campbell of Dunstaffish.

The above Assize all lawfully sworn, and no objection to the contrary.

Thereafter the Prosecutors, for proving the criminal Libel, called the Witnesses cited by them; and the Pannel, for proving his Defences, called the Witnesses cited by him; and the prosecutors caused to be read, in presence of the jury, the Writings produced by way of evidence for them; and the pannel's counsel caused to be read, in presence of the jury, the Writings produced for him; all which Depositions and Writings are as follows:

THE WHOLE PROOF BROUGHT BOTH ON THE PART OF THE PROSECUTORS, AND ON THE PART OF THE PANNEL.

James Stewart, pannel, does admit the truth of all the writings contained in the inventory of writings subjoined to the criminal letters, and which inventory was delivered to him at executing the said letters against him, excepting two of the said writings which he does not admit, viz. the writing, number 7, intituled, Principal holograph letter by Allan Stewart, son to the said James Stewart, addressed to Duncan Stewart of Glenbuckie, dated at Aucharn, the 1st of April, 1752; and the writing, number 12, intituled, Draught, letter by the said James Stewart, and of an instrument of protest at the tenants instance, relative to the said decret of removing and suspension thereof; but the said draught letter and instrument being again shewn to the pannel in court, the pannel admits the truth and authenticity of these also; and therefore admits the truth of the whole writings, except the writing before-mentioned, number 7; but does not admit the writings subjoined to the said inventory, being two principal declarations by Allan Stewart, son to the said James Stewart, five principal declarations by Charles Stewart, also son to the said James Stewart, three principal declarations by Margaret Stewart, spouse to the said James Stewart, and two by Elizabeth Stewart, his daughter.

P. GRANT. (Signed) JAMES STEWART.

Thereafter the Prosecutors for proving the above criminal Libel, adduced the following Witnesses:

Mr. Archibald Campbell of Stonefield, sheriff-depute of the shire of Argyll, aged 56 years, married, being solemnly sworn, purged of malice, partial counsel, examined and interrogate, and being shewn the writings following; viz. four principal declarations by Charles Stewart, son to the pannel, bearing to have been emitted in the deponent's presence, and dated the 22d, 23d, and 25th days of May last, and three declarations by Margaret Stewart, spouse to the pannel, and two declarations by Elizabeth Stewart, his daughter, all of them bearing to have been emitted in the deponent's presence, as sheriff of Argyll-shire, and dated the 22d and 25th days of May last; depones, That all these declarations were emitted by the respective persons therein mentioned, in presence of the deponent, and of the respective dates therein con-

tained, and were all subscribed by the respective declarants in the deponent's presence, excepting only, that the declarations by the said Margaret Stewart and Elizabeth Stewart were not signed by them, but were signed by the deponent for them, because they declared they could not write. And there being also shewn to the deponent two declarations by Allan Stewart, son to the pannel, bearing to have been emitted in presence of George Douglas, sheriff-substitute of Inverness, dated the 3d of June last, and a declaration bearing to be emitted by the said Charles Stewart, son to the pannel, in presence of the said George Douglas, sheriff-substitute, dated the 4th of June last, depones, That the deponent was present, and saw and heard the said declarations by the said Allan and Charles Stewarts, emitted in presence of, and taken down in writing by the sheriff-substitute; and they were at the sheriff-substitute's desire, dictated by the deponent to the clerk; and the deponent saw the said declarations subscribed by the said Allan and Charles Stewarts respective, of the several dates therein contained, voluntarily and freely, without any compulsion or coercion. *Causa scientie patet.* And this is the truth as he shall answer to God. (Signed)

P. GRANT.

ARCH. CAMPBELL.

After emitting of the above Deposition by Mr. Archibald Campbell of Stonefield, to save the time of the Court, in bringing further proof of the declarations therein mentioned, the Pannel judicially declared, that he admitted the truth of all the several declarations contained in the said oath, that is, that these declarations were emitted by the respective persons therein mentioned, and in presence of the respective judges, and at the respective times therein contained, voluntarily and freely; but does not admit the truth of the facts as declared by the said declarants.

P. GRANT. (Signed) JAMES STEWART.

Mungo Campbell, writer in Edinburgh, aged 34 years, unmarried, sworn, purged and examined *ut supra*, depones, That, in the beginning of May last, the deceased Colin Campbell of Glenure applied to the deponent, to go with him to Lochaber, to assist him in conducting the ejecting of some of the tenants of the estate of Stewart of Ardschiel, and of the tenants of Mamore, part of the estate of Lochiel, over which the said Colin Campbell was factor, and which tenants, he apprehended, would not voluntarily remove, without being legally ejected: that they set out from Edinburgh together, upon the 7th of May last, and arrived at Glenure upon Saturday the 9th of that month; that they set out together for Fort-William upon Monday the 11th, about ten o'clock forenoon, and remained at Fort-William till Thursday the 14th, when they returned, in order to execute the next day the ejection against some of the tenants of Ardschiel: That, when they came to the Ferry of Ballachelish, the defunct waited there about an hour, commencing with

some of the tenants, and crossed the ferry betwixt four and five in the afternoon: that, after crossing the ferry, Alexander Stewart of Ballachelish, elder, met with the defunct, and they travelled together on foot, about the space of half a mile, till they came to the skirts of the wood of Lettermore: that, while they were communing together on foot, the deponent was at some little distance before them on horseback, and the sheriff-officer, Donald Kennedy, was on foot before the deponent, and Glenure's servant, John Mackenzie, was on horseback a little before Glenure; and, the servant happening to drop a coat, Ballachelish called to him, and the servant returned, and thereby fell behind Glenure and Ballachelish: that Ballachelish parted from Glenure at their entering into the wood of Lettermore, or the wood of Ballachelish, a part of the wood being called by that name; and Glenure mounted his horse, and came up to the deponent: that the deponent asked Glenure, whether Ballachelish had said any thing to him touching removing the tenants? And Glenure said, that nothing passed betwixt them on that subject: that coming to a part of the road that was rough and narrow, so as they could not ride conveniently two horses a-breast, the deponent and Glenure separated, and the deponent went before, and might have been about twice the length of the road where the Court now sits before Glenure, when the deponent heard a shot behind him, and heard Glenure several times repeat these words, Oh! I am dead. Depones, that the deponent thereupon returned to Glenure, and heard him repeat the same words; and thinks, but is not positive, that he added, Take care of yourself, for he's going to shoot you: that the deponent immediately lighted, and ran up the hill from the road, to see who had shot Glenure, and saw at some distance from him, a man, with a short dark-coloured coat, and a gun in his hand, going away from him; and as the deponent came nearer him, he mended his pace, and disappeared by high ground interjected betwixt him and the deponent; and he was at so great a distance, that the deponent thinks he could not have known him, though he had seen his face: that the deponent thereupon returned to Glenure; and either at that time, or before the deponent ran up the hill as above deponed, (the deponent cannot be positive which) he took Glenure from off his horse. Depones, that, after taking Glenure from his horse, he leaned a little upon the deponent's shoulder, and endeavoured to have opened his breast, to see where the bullets, wherewith he was shot, came out of his body, but was not able; but saw, in his waistcoat, two holes in his belly where the bullets had come out. Depones, that Glenure intended to have been that night at Kintalline, where he expected Mr. Campbell of Ballieveolan was to meet him; wherefore the deponent sent Mackenzie, the servant above-mentioned, forward to Kintalline, to acquaint Ballieveolan what had happened, and to bring him to his assistance: that

Glenure continued in agonies for about half an hour, or a little more, after sending off Mackenzie, and then died; and night coming on, and no appearance of Mackenzie's returning, the deponent sent back the sheriff-officer above-named to Ballachelish, to desire Mr. Stewart's assistance, and some of his people: that in a little more than an hour, Ballachelish, and some of his people, with the sheriff-officer, came to the deponent's assistance, and carried Glenure's corpse that night to Kintalline, by sea; and next day carried it to Glenure, where some surgeons came, and inspected his body; and the deponent saw there the two wounds in his belly made by the balls coming out of his body. Depones, that when the deponent laid Glenure upon the ground, a great deal of blood issued from his body, and his clothes were all stained with blood, particularly the small of his back, having been laid on his back upon the ground: that Mackenzie the servant also returned, before they carried the corpse off the ground, and some people with him, particularly Ballieveolan's sons; and, being shewn a coat and waistcoat, and a shirt, depones, that these are the coat and vest that Glenure had on when he was murdered; and believes also, it is the same shirt. Depones, that, at the place where Glenure was shot, the wood is pretty thick on both sides, and, on the side from which he was shot, very rugged and stony, and bushes in which the murderer could have easily hid and concealed himself: that the ground there rises up-hill towards the south, though there are places in it where the murderer might be pretty nearly upon a level with Glenure; and there are also places there so situate, as a person standing there might see the most part of the road from the ferry to the wood, and even a part of the road betwixt Fort William and the ferry; and which place is not a musket shot from the spot where Glenure was murdered. Depones, that neither the defunct, nor the deponent, nor any of their company, had any sort of arms with them. Depones, that it was betwixt 5 and 6 o'clock in the afternoon, as he thinks, when Glenure was murdered as aforesaid; and remembers, when Glenure was dying, the deponent looked at his own watch, and found it was then about 6 o'clock. And depones, that, upon recollection, he cannot be positive whether he observed both the wounds in the defunct's belly, or only one of them. And being interrogate for the pannel, depones, that, some days after the murder, the deponent sent a serjeant and a party of soldiers to the pannel's house at Aucharn, with orders to search, and particularly to search for writings: that the serjeant reported to the deponent, that he had searched, and delivered to the deponent one paper which he found there, being a scroll of a letter by the pannel, and of an instrument of protest, being the number 12 of the inventory subjoined to the libel, and which is now in the clerk's hands; and being shewn to the deponent, depones, that it is the same writing that was delivered to him by the

serjeant. Depones, that the serjeant gave him no more papers but that one; and said that he had brought away no more. *Causa scientie patet.* And this is truth, as he shall answer to God. (Signed)

P. GRANT.

MUNGO CAMPBELL.

John Mackenzie, late servant to Glenure, unmarried, aged 19 years, witness cited, sworn, purged and examined *ut supra*, depones, That, upon the 14th of May last, he came, with his master the deceased Colin Campbell of Glenure, from Fort-William, by the horse-road leading to the ferry of Ballachelish, which road coincides, a little way next to Fort-William, with the new road commonly called the King's road: that they passed the ferry of Ballachelish, and came along the high road, which leads to Kintalline through the wood of Lettermore: that, coming up with Alexander Stewart elder of Ballachelish, who was on foot, Glenure alighted from his horse to walk a little with Ballachelish, and desired Mungo Campbell, writer in Edinburgh, who was in company with Glenure, as also the deponent, to step on, which accordingly they did; but coming up to a place where they were stopt by the tide, they were obliged to alight, and lead their horses across a rock; and, upon that occasion, and by which means it happened that the deponent dropt a great coat belonging to Donald Kennedy, sheriff-officer, who was also along on foot, and which he had got from him to carry when they passed the ferry of Ballachelish; and Glenure and Ballachelish coming up, and finding the great coat lying on the road, one or the other of them cried out, To whom this coat belonged? which the deponent, being within distance to hear, said, it belonged to Donald Kennedy, and that he had been carrying it, and had dropt it; whereupon he returned to fetch the coat, by which means Glenure, who had parted with Ballachelish at the rock that has been just mentioned, got before the deponent, and, when about a musket-shot before him in the wood of Lettermore, he heard a shot which he took to be from a firelock, which he did not much mind, nor know from what quarter it had come; but when he came up, he saw Mungo Campbell wringing his hands, and his master lying on the ground with a great deal of blood about him, just breathing, and not able to speak; and Donald Kennedy, the sheriff-officer, was at that time standing by him; and, as near as the deponent could guess, this was about five o'clock in the afternoon. Depones, That Mungo Campbell directed the deponent to ride forward with all speed to Kintalline, and to see if John Campbell of Ballieveolan, or his sons, were there; and, if they were, to acquaint them what had happened, and to come up immediately. Accordingly he went, but found neither Ballieveolan nor his sons there: but being told by one of the tenants of Achinlaroch, that probably James Stewart in Aucharn, who is now the pannel, might give him some account of Ballieveolan; that accordingly he

went to James Stewart's house in Duror; and James seeing him weeping, asked what the matter was? The deponent told him, his master was killed; whereupon James Stewart asked him, by whom and how it was done? To which he, the deponent, answered, That he did not know by whom, and believed it to be by a shot from a gun or pistol: that the deponent then asked him, what was the nearest road to Glenduror, where he expected to find Ballieveolan? Which accordingly James Stewart having pointed out to him, he followed; and meeting with one Allan Dow, whom he had seen several times before, he prevailed with him to go to Glenduror, and acquaint Ballieveolan of what had happened, and to desire him to come up where his master was, and which the said Allan Dow could do more expeditiously on foot, than the deponent could do in that cross-way on horseback; and the deponent immediately returned where his master lay, and brought no person along with him: that his master was then dead, and that the people of Ballachelish were at this time come up, and were standing about him. Depones, that he was then sent off a second time with a horse by the road Ballieveolan was expected to come, in order to hasten him; and having accordingly met Ballieveolan, he, at Ballieveolan's desire, went and acquainted captain Campbell, younger, of Barcaldine, of what had happened. Depones, That when his master and he came, as has been said, from Fort-William, on the 14th of May last, they met the foresaid John Maccoll going to Fort-William at the foot of the three-mile water, which is about three miles from Fort-William; and that the said Maccoll came to the ferry of Ballachelish much about the same time with the deponent, but before Glenure, who had stayed some time talking with the tenants of Ballachelish; and further adds, that his master had stayed at Coorychorrachan, which is about five miles from Fort-William, about an hour and a half, or two hours. Depones, That when Maccoll desired the ferryman to carry him over, the ferryman begged to be excused till Glenure's horses should go over; and that he was then employed in gathering wreck: but Maccoll would not delay; and accordingly was ferried over, as he thinks, about half an hour before Glenure, whose horses were first ferried over, and along with them the sheriff-officer, and afterwards Glenure and Mungo Campbell. And depones, That neither Glenure, nor any in his company, had arms of any sort along with them. And a coat, waistcoat, and bloody shirt, referred to in the list of evidence, being shewn to the deponent, depones, that they were the very clothes and shirt Glenure had on when he was killed as aforesaid. And further depones, That, when he saw the pannel at his house in Aucharn as aforesaid, the pannel wrung his hands, expressed great concern at what had happened, as what might bring innocent people to trouble; and prayed that innocent people might not be brought to trouble. And being

interrogate for the pannel, depones, That beside that road by which he and his master came from Fort-William to Ballachelish, there is another road by which people travel, both by horseback and on foot, which is computed to be the shortest by a mile, and by which he supposes Maccoll came. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)

JA. FERGUSON, JOHN MACKENZIE.

Donald Kennedy, sheriff-officer in Inverary, married, aged 48 years, witness cited, sworn, purged, and examined *ut supra*, depones, That, upon the 11th day of May last, he was employed by James Campbell, writer in Inverary, to carry a packet to Glenure, then at Fort-William; and when he delivered the packet to him, told him, that it contained a warrant for ejecting certain possessors of the lands of Ardahiel: that, upon the 13th day of May, he came to Maryburgh or Fort-William, where he found the deceased Glenure, and delivered the packet to him, who told him, as James Campbell had before done, what the packet contained; and that he, the deponent, was to be employed in executing the ejection: that, upon the 14th day of May, Glenure, as also the deponent, left Fort-William, and, at Glenure's desire, the deponent went before, being on foot, and waited at the ferry of Ballachelish till Glenure came up to him: that Glenure crossed the ferry from the north to the south of Appin side, and along with him a young gentleman, Mungo Campbell, said to be a writer in Edinburgh, and his own servant John Mackenzie: that Mackenzie and the horses went first over; that the boat again returned, and brought over Glenure, Mungo Campbell, and the deponent: that the deponent being on foot, as has been said, went on the high road leading to Kintalline, where he understood Glenure intended to quarter that night: but was past on the road by Glenure, Mungo Campbell, and Glenure's servant, whom the deponent could not keep up with; but as Glenure happened to find, upon the road, Alexander Stewart elder of Ballachelish on foot, he lighted from his horse, and walked a little on the way with Ballachelish, whereby the deponent got the start of Glenure, and the two riders that were in company with him; and the deponent walking on through the wood of Lettermore, and after he was about half a mile or so within the wood, he heard a shot, and at the same time heard the aforesaid Mungo Campbell make a great noise as of one weeping, the deponent being at that time but about two-penny stone-cast before the said Mungo, who was riding foremost, as he afterwards told the deponent. The deponent immediately upon hearing the noise returned, for he had gone a little without minding the shot, till once he heard the noise, and when he came back to Mungo Campbell, Mungo said to him, The villain has killed my dear uncle, adding, that he had only seen one man; and that he, the deponent, asked no questions,

VOL. XIX.

being in confusion, and dreading for the same fate himself. Depones, That he saw Glenure lying upon the ground, with great plenty of blood about him, and, as the breast of his waistcoat had been opened before the deponent came up, he saw a hole in his shirt, through which he supposed a bullet had come; and that the deponent stayed at the place till Glenure expired. Depones, that John Mackenzie, Glenure's servant, was dispatched by Mungo Campbell to the house of Kintalline, where Glenure was to lodge that night, and Ballieveolan along with him, with orders to bring Ballieveolan, and some other gentlemen that were expected to be there; Mungo Campbell also desired the deponent to go for other people, which the deponent at first declined, giving this reason for it, that he would stay and run the same risk with Mungo Campbell; but at last was prevailed upon to go by Mungo Campbell, whom he left alone with the corpse, and the deponent brought Alexander Stewart elder of Ballachelish, and several other people of the town of Ballachelish. Depones, that while Glenure and his company were at the ferry of Ballachelish, as aforesaid, he saw a man, who seemed to be in a hurry to get over the ferry, who proved to be John Maccoll, servant to the pannel; to whom Glenure said, in the deponent's hearing, Sir, you travel better than I do. To which he answered, I am in a haste, and so went over the ferry about an hour before Glenure passed it, who had some business to do with tenants there. Depones, that, when the people were gathered about the corpse, as aforesaid, the said John Maccoll was among them. And Mungo Campbell then told the deponent, that when Glenure and he were come three miles from Fort William, they met the said John Maccoll going to Fort William, and that he was back at the ferry of Ballachelish, though on foot, as soon as they. Depones, that Glenure was shot about half an hour after five in the evening, and died, as he thinks, about six, Mungo Campbell having then looked at his watch. Depones, that this John Maccoll was none of the people that this deponent had called upon: that the corpse was carried that night to Kintalline by water, the place where they lay being but a short distance down through a rugged part of the road towards the Loch. And being interrogate for the pannel, depones, that there are two roads leading from Fort William to the ferry of Ballachelish, one of them being a horse-road, by which Glenure came, the other a foot-road, which is the shortest of the two by about a mile. *Causa scientie patet.* And this is the truth, as he shall answer to God. And being further interrogate for the pursuers, depones, that neither Glenure, nor any in his company, had arms along with them of any kind. And being also further interrogate for the pannel, depones, that John Maccoll was at the ferry before Glenure came up. And this is truth, as he shall answer to God. (Signed)

JA. FERGUSON.

DONALD KENNEDY.

H

John Roy Livingstone, alias Macanure, in Ballachelish, married, aged 40, who being sworn by Archibald Campbell, sheriff-substitute of Argyllshire, sworn interpreter, purged of malice and partial counsel, depones, That, upon Thursday the 14th day of May last, he saw Allan Breck Stewart in Ballachelish, in the forenoon, dressed in a dannaish big coat; but had no conversation with him: that, upon the evening of the said day, he saw John Beg Maccoll, servant to the pannel, travelling at a good rate from the ferry of Ballachelish, towards his master's house. The deponent joined him upon the high road, and asked him where he had been? To which John Maccoll replied, That he had been at Maryburgh for Charles Stewart, notary public, but did not find him at home: that, during this conversation, the deponent travelled the road along with the said John Maccoll, and only stopped for a very short time; and that the said John Maccoll told the deponent, that Glenure that night was to be at Kintalline. Depones, that, about an hour and a half, or two hours thereafter, the deponent went to the wood of Ballachelish, adjoining to Lettermore, to cut some sticks he wanted: that, while he was in the wood, he saw Donald Kennedy, sheriff-officer at Inverary, passing along the high road below him, and a little after him Mungo Campbell, and John Mackenzie, Glenure's servant, and a little after them Glenure on horseback, and Alexander Stewart elder of Ballachelish along with him; and, as the deponent observed Glenure and Ballachelish, they found a big coat upon the high road, and called to the said John Mackenzie the servant, and the servant came back for the big coat, and Glenure and Ballachelish parted: that the deponent came down to the road, and entered into conversation with the said John Mackenzie, and, after a few questions, the said John Mackenzie went on after his master; and immediately thereafter the deponent heard a noise, which he imagined to be a shot, but was not sure. Depones, that, some time thereafter, he went along with Ballachelish to the wood of Lettermore, where he found Glenure dead, and was one of the people that assisted to carry the corpse to Kintalline. *Causa scientie patet.* And this is the truth as he shall answer to God. And depones he cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

Alexander Campbell, surgeon in Lorn, aged 40 years, unmarried, sworn, purged and examined *ut supra*, depones, That he was called to the house of Glenure, upon the 15th day of May last, to inspect the body of the then deceased Colin Campbell of Glenure, who, the deponent was informed, had been shot the day before; and, having accordingly inspected the body, he found, that he had been shot by two bullets entering at his back, one on each side of the back-bone; one of which had come out about half an inch below the navel, and

the other about two inches from it, towards the right side. And depones, that they were mortal wounds, of which the deponent believes Glenure died. *Causa scientie patet.* And this is truth as he shall answer to God.

(Signed)

JA. FERGUSON.

ALEX. CAMPBELL.

Angus Macdonald, walk-miller* in Auchnacragan, married, aged 63, witness cited, sworn, purged and examined *ut supra*, depones, That, in April last, Allan Breck Stewart, and John Stewart in Auchnacragan, came into the deponent's house, and sat down; and, at the same time, Duncan Campbell (the succeeding witness) came in, and sat down also; and which Allan asked John Stewart, who that was? And John answered, That he was an honest man in the neighbourhood, Duncan Campbell, naming him; to which Allan answered, That he did not like any of the sort or name: for that Glenure had wrote to colonel Crawford, that he had come from France, and to take him up as a deserter; but that he was not in his reverence; for he had general Churchill's pass: that John Stewart said, that he did not so much blame Glenure for turning out the possessors of Ardschiel; for that he was but doing the king's service; and that, if he had not the factory, another would, who would do the same thing; to which Allan answered, That he rather the unickie devil had it than Glenure. And being interrogate for the pannel, depones, that Allan was then dressed in a blue side coat, a red vest, and feathered hat. Depones, that the deponent saw him again about the 8th of May in the same dress: that, at that time, the deponent, and the foresaid Duncan Campbell and Malcolm Maccoll, were travelling together, and met Allan on the road: that Allan gave Duncan the common salutation: and said, that the last time he had been in Duncan's house, he was bad company, though it was not he that was so much the bad company, as the drink. *Causa scientie patet.* And this is the truth as he shall answer to God.

(Signed)

P. GRANT.

ANGUS MACDONALD.

Duncan Campbell, change-keeper† at Annat, aged thirty-five years, married, witness cited, sworn, purged and examined *ut supra*, depones, That, in the month of April last, the deponent met with Allan Breck Stewart, with whom he was not before acquainted, and John Stewart in Auchnacragan, at the house of the walk-miller of Auchnacragan, and went on with them to the house: that Allan Breck Stewart said, that he hated all the name of Campbell; and the deponent said, he had no reason for doing so; but Allan said, he had very good

* I do not find in Jamieson this word or 'walker' (fuller) with which professor Leslie suggests that it is synonymous, (*quasi* fulling-miller).

† Public-house-keeper. Qu. it's etymology; I find it not in Jamieson.

season for it: that thereafter they left that house; and, after drinking a dram at another house, came to the deponent's house, where they went in, and drank some drams, and Allan Breck renewed the former conversation; and the deponent making the same answer, Allan said, that, if the deponent had any respect for his friends, he would tell them, that if they offered to turn out the possessors of Ardsheal's estate, he would make black cocks of them before they entered into possession; by which the deponent understood shooting them, it being a common phrase in the country: that John Stewart said, he did not blame Glenure so much as Ballievolan for taking these possessions, whereas Glenure was doing the king service; and Allan Breck replied, That besides that, he had another ground of quarrel against Glenure, for his writing to colonel Crawford, that he, Allan, was come home from France; but that he was too cunning for him; for that, when at Edinburgh, he had made up his peace with general Churchill, and had got his pass, which he had in his pocket-book: that the deponent asked a sight of it: that he searched his pocket-book, but could not find it; upon which he tore a leaf out of the book, and said, there it was. And depones, That he said twenty times over he would be fit-sides with Glenure, wherever he met him; and wanted nothing more than to meet him at a convenient place. Depones, that, at this time, Allan Breck was not drunk, for he could walk and talk as well as any man; but it could easily be observed, he had been drinking. *Causa scientie patet.* And this is the truth, as he shall answer to God.

(Signed)

P. GRANT.

DUNCAN CAMPBELL.

Anne Muclaren, servitrix to Duncan Campbell, change-keeper at Annat, unmarried, aged twenty-one, witness cited, sworn, purged and examined by the sworn interpreter above-named, depones, That, some time after the 17th day of March last, before the first of May, she saw Allan Breck Stewart in company with John Breck Stewart in Auchnacoon, and Robert Stewart, in the mill of Duror, in her master's house; and that she heard Allan Breck then say, that he would not shun Glenure wherever he met him; by which she understood that he was to do hurt or harm to Glenure wherever he saw him. *Causa scientie patet.* And this is the truth, as she shall answer to God; and declares she cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

Robert Stewart, son to Robert Stewart, miller in Cuil, aged about twenty, unmarried, witness cited, sworn, purged and examined, *ut supra*, by the sworn interpreter, depones, That, some time in April last, the deponent was in company with Allan Breck Stewart, John Stewart in Auchnacoon, Duncan Campbell, change-keeper in Annat, in the said Duncan Campbell's house: that Allan Breck complained of Colin Roy, meaning Glenure, and

Mr. Campbell of Ballievolan; and said particularly of Glenure, that he had sent notice to Fort-William, that he was in the country, that he might be apprehended: but said, he was not in his reverence, as he had the king of France's commission in his pocket; and said, he would be even with him; and that he would take his opportunity to dispatch or murder either Glenure or Ballievolan, before he left the country. Depones, that Allan Breck was much in drink at the time of uttering the above expressions; and was then dressed in his long blue coat. *Causa scientie patet.* And this is the truth, as he shall answer to God; and declares he cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

Malcolm Bane Maccoll, change-keeper at Portnacrosb, aged fifty years, married, witness cited, sworn, purged and examined by the interpreter *ut supra*, depones, That, some time in April last, Allan Breck Stewart and John Stewart in Auchnacoon came to the deponent's house after nightfall, and sat up all night drinking: that, next morning, John Maccoll, then servant to the deponent, now in Shuna, came into the company, in a shabby condition: that Allan Breck asked who he was? That the said John Stewart answered, That he was an honest poor man, with a numerous family of small children; and that it would be great charity in any body to assist him: upon which Allan Breck desired the said John Stewart to give the said John Maccoll a stone of meal, and he would pay for it; which the said John Stewart promised to do: that the said Allan then gave the said John Maccoll a dram, and told him, if he would fetch him the red fox's skin, he would give him what was much better; to which the said John Maccoll answered, that he was no sportsman; and that he was much better skilled in ploughing or delving. Depones, that the deponent gave no great notice to these expressions at the time; but, after he heard of Glenure's murder, believed he meant Glenure, as he was commonly called Colin Roy, which means Red Colin, in the country. *Causa scientie patet.* And this is the truth, as he shall answer to God; and declares he cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

Anne Maccoll, spouse to Malcolm Bane Maccoll, the preceding witness, aged about forty, witness cited, sworn, purged and examined *ut supra*, by the interpreter, depones, conform to the said Malcolm Bane Maccoll, the preceding witness, *in omnibus*, except that the said Allan Breck and John Stewart in Auchnacoon went to bed for a short time; but, whether they slept, or not, the deponent knows not. *Causa scientie patet.* And this is the truth, as she shall answer to God; and declares she cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

John Stewart elder of Farnacloich, aged sixty-five years, married, sworn, purged and

examined *ut supra*, depones, That, upon the Monday before the murder of Glenure was committed, Allan Breck Stewart was then at the deponent's house, having been three nights there, accompanied by Charles Stewart, son to the pannel: that he told Allan Breck, that Glenure was come from Edinburgh with a warrant to remove the tenants; to which Allan Breck said, that, if there was a warrant, there was no more to be said; but that, if he had no warrant, he would not be allowed to remove them: that the deponent told Allan Breck, that a plea with Glenure, concerning the removing of these tenants, would be costly for James Stewart in Aucharn to support: that the reason he named James Stewart, was, that he was the person who acted in behalf of the tenants: that the distance between the deponent's house and the late Glenure's is about a mile: that he heard, on Sunday the 10th of May, that Glenure was going to Fort-William; and Allan Breck left his house about nine o'clock Monday morning. *Causa scientie patet.* And this is truth, as he shall answer to God.

ARGYLL. (Signed) JO. STEWART.

James Stewart younger of Fasnacloich, aged 29 years, unmarried, sworn, purged and examined *ut supra*, depones, That Allan Breck Stewart came to Fasnacloich about the 8th of May, and stayed three days: that he went away on Monday the 11th, about nine in the morning: that he was going to leave the country soon, but would see them again at Fasnacloich before he went away: that he was then dressed in a long blue coat, red waistcoat, black breeches, and a feathered hat: that he saw Allan Breck the next day, being Tuesday the 12th, at Ballachelish: that he was then dressed in a black short coat with round white buttons, and a dark great coat over it, with trowsers on, and a blue bonnet: that the deponent took notice to Allan Breck that he had changed his dress; who answered, that he did it because the day was warm: that the deponent was informed at Ballachelish, in company with Allan Breck, that Glenure was gone to Fort-William: that when he parted with Allan Breck at Glenco's house, Allan Breck told the deponent that he was going to Callart, and would return the next day, and did not see him since: that on Sunday the 10th of May, he heard, being in company with Allan Breck, that Glenure had got an order from Edinburgh to remove the tenants, and was gone to Fort-William; and that this was at Fasnacloich. *Causa scientie patet.* And this is the truth, as he shall answer to God.

(Signed) JAMES STEWART.

John Stewart younger of Ballachelish, aged 26 years, unmarried, sworn, purged and examined *ut supra*, depones, That, upon Tuesday the 12th of May last, he saw Allan Breck Stewart at his father's house of Ballachelish, and heard him ask questions about Glenure's travelling to Lochaber: that, on Thursday the 14th, late at night, Donald Macintyre, a ser-

vant of the pannel's, told the deponent of the murder; and that he was going with a message to Appin from James Stewart his master, to give him an account of the murder: that he arrived at Appin's house before the said servant came there: that he returned to Appin's house, instead of going to the pannel's house, where he had intended to be: that he told Appin of the murder, at which he expressed great surprise and concern. Depones, that, in the time of the spring circuit in this place in May last, he was summoned to be of the jury; but, at the earnest request of the pannel, that he, the deponent, should be present with a notary at the removing of the tenants from the estate of Ardshiel, he was a-going on that errand to the pannel's house; but returned to Appin, upon hearing of the murder committed that day. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)

ARGYLL. JOHN STEWART.

Katharine Maccoll, servant to the pannel, aged 16 years and upwards, who being solemnly sworn, by the forenamed sworn interpreter, purged of malice and partial counsel, and examined and interrogate, depones, That she saw Allan Breck Stewart at the pannel's house, upon Monday the 11th day of May last, in the afternoon, dressed in a blue side coat, red waistcoat, and black breeches; and does not remember to have seen him in any other dress that day. Depones, that the pannel went, in the afternoon of that day, to Keels, to meet Mr. Campbell of Airds, and that it was late at night before he came home; but that the family had not supped when the pannel came home; and that the pannel supped in company with Allan Breck Stewart, Fasnacloich's daughter, and Archibald Cameron, nephew to Fasnacloich, and the pannel's family. Depones, that she saw the said Allan Breck Stewart, on the morning of Tuesday the 12th of May last, dressed in a dunish-coloured great coat, in the pannel's house; and that she saw him go out at the door dressed in the said dunish-coloured great coat. Depones, that, upon the evening of Friday the 15th of May last, as the deponent came in at the door, Margaret Stewart, spouse to the pannel, being then in the cellar, called upon the deponent, who then saw the said Margaret Stewart put a-side blue coat, a red waistcoat, with something else that the deponent did not observe, into a sack, and delivered them to the deponent, desiring her to hide them some way without. Depones, that the said Margaret Stewart did not tell the deponent to whom the clothes belonged; but that the deponent thought the said coat and waistcoat were Allan Breck's. Depones, that she went away with the said sack, containing the said clothes; and, as she was going up the brae, in order to hide them, was overtaken by Dugald and John Beg Maccolls, servants to the pannel, who had some guns and swords; and the said

Dugald Maccoll asked the deponent, what she had got in the sack? The deponent answered, it was Allan Breck's clothes; and that she was going to hide them; and that accordingly the said sack, containing the above clothes, was hid in the moor above the pannel's house, by the said Dugald Maccoll, in presence of the deponent. Depones, that upon Saturday the 16th of May last, in the evening, the said Mrs. Stewart, spouse to the pannel, desired the deponent to carry back what she had hid, and leave it at the back of the brewhouse; which the deponent accordingly did; and has not seen them since. Depones, that Alexander Bane Stewart was seen by the deponent about the house that evening. Depones, that some time in summer last, after the above period, Solomon Bane Maccoll, servant to the pannel, told the deponent, that the said Mrs. Stewart, spouse to the pannel, desired her to conceal what she knew about the above clothes, in case she should be asked or examined about them. And, being interrogate for the pannel, depones, that Allan Breck Stewart did not lie in the pannel's house upon Monday night, the 11th day of May last, but lay in the barn,* as the deponent thinks. *Causa scientie patet.* And this is the truth, as she shall answer to God; and depones she cannot write.

(Signed)

ARCH. CAMPBELL. JA. FERGUSON.

Archibald Cameron, son to Allan Dow Cameron, some time change-keeper in Maryburgh, aged 22 years, unmarried, sworn, purged and examined *ut supra*, by Mr. Archibald Campbell, sheriff-substitute of Argyll-shire, depones, being interrogate for the pannel, That, upon Monday the 11th day of May last, the deponent came from Fasnacloich's house to the pannel's house after mid-day: that, some little time after he came there, he saw Allan Breck Stewart there: that the pannel was not at home when the deponent came first there, but came home before night-fall: that the deponent, pannel, Allan Breck, and the family, sat in one room, and supped together: that he did not observe Allan Breck and the pannel speak in private that night: that the deponent and Allan Stewart, the pannel's son, lay in one bed, Allan Breck and Charles Stewart, son to the pannel, in another bed, in the same barn: that, to the best of his remembrance, they all went to bed much about one time, and got up together next morning: that the deponent did not observe the pannel about the house next morning when

* "This was nothing uncommon among the yeomanry in the Highlands of Scotland. In that hospitable country, such troops of visitors are entertained as would derange the oeconomy of a more polished people. When they go to rest, they are never incommoded for want of lodging; as sheets and blankets spread on heath, in a barn, form supplementary beds for such of the guests as the house cannot contain." Arnot.

he got up. *Causa scientie patet.* And this is truth as he shall answer to God.

ARCH. CAMPBELL.

(Signed)

ARGYLL.

ARCHIBALD CAMERON.

John Breck Maccombich, change-keeper at Kintalline, aged about 40, married, witness cited, sworn and purged by the forenamed sworn interpreter, *ut supra*, depones, That, in the beginning of summer last, before Whitsunday, Duncan Campbell, sheriff-substitute of Killin, told the deponent, that if he could, with truth and honesty, make any discovery, tending to discover the murderers of Glenure, it was probable he would not be turned out of his possession. Depones, that, upon the 14th day of May last, John Beg Maccoll, servant to the pannel, came to the deponent's house about seven o'clock in the morning, and told, that the pannel had desired the deponent and John More Maccoll, another servant of the pannel's, to ferry the said John Beg Maccoll from his house to Lochaber, that being the shortest road from Aucharn to Fort-William: that the deponent at the first declined it; but upon John Beg's telling, that it was the pannel's desire that he should be ferried there, they carried him over accordingly. Depones, that, in the afternoon of the same day, before sun set, the said John Beg Maccoll came back to the deponent's house, and called for half a mutchkin* of aquavite, but did not sit down: that during the drinking of the dram, the deponent asked the said John Beg Maccoll if he had been at Fort-William? and if he had got Charles Stewart, notary? (which he told in the morning was his errand to Fort-William) John Beg Maccoll answered, that he had been at Maryburgh, but Charles Stewart was not at home. Depones, that, upon Tuesday the 12th of May last, Glenure sent notice to the deponent, that he and some other company was to be at his house upon Thursday then next, and desired that he might be prepared for entertaining them; and that he accordingly made provision for them. Depones, that he told that Glenure was to be at his house that night; and that the whole neighbourhood knew of it; and, upon the pannel's interrogatory, depones, that Glenure frequently went to Lochaber by Mamuckie, being a shorter road to the ferry of Ballachelish than the strath of Appin; and he once coming from Lochaber, landed at Kintalline; and that a person passing from Glenerearan to the ferry of Ballachelish by Mamuckie, does not go through the wood of Lettermore, nor by Kintalline. Depones, that he was warned to remove from his possession, being a part of Ardshiel estate, at Whitsunday last, and employed no person to keep him in possession. Depones, that, some time after he had got his citation of warning, the pannel passed by his house on horseback, and asked if he had his copy of citation in the removing? The deponent answered

* "A measure equal to an English pint." Jamieson.

he had; the pannel called for a sight of it; and, upon the deponent's producing it, the pannel said he would keep it. And being interrogate if the pannel informed him that he was going to Edinburgh, and was to produce his copy of citation there? depones, Not; but only that he was going southward. *Causa scientie patet.* And this is the truth, as he shall answer to God; and declares he cannot write.

(Signed)

P. GRANT.

ARCHIBALD CAMPBELL.

Alexander Stewart of Ballachelish elder, aged 68 years, widower, sworn, purged and examined *ut supra*, depones, That Allan Breck Stewart called at the deponent's house upon the 18th of May last, and that James Stewart younger of Fasnacloich was then at the deponent's house: that upon the 18th, about seven or eight in the afternoon, he came again to the deponent's house, and lodged with him all night, stayed the next day, being Thursday the 14th, till eleven or twelve, when he went out with a fishing rod in his hand, and was fishing in the burn near the deponent's house, but he did not see him take any: that he did not take leave of the deponent; and did not return; and he knows nothing of him since: that the said Allan Breck Stewart was dressed in a great coat, and under it a short black coat with white buttons: that, when the said Allan Breck Stewart was fishing, he saw a great coat lying upon the bank, which he took to be Allan Breck Stewart's: that, that evening on the 14th, he was in company with Glenure, and left him very near the wood of Lettermore: that the morning after the murder was committed, the deponent really thought, that Allan Breck Stewart might be the actor in this murder, because he did not return to this deponent again.† *Causa scientie patet.* And this is truth, as he shall answer to God.

ARGYLL.

(Signed)

ALEX. STEWART.

Donald Rankine, herd to Ballachelish, unmarried, aged about eighteen, witness cited, sworn, purged and examined *ut supra*, by the

† "This expression appears to me equivocal and suspicious. It must here be observed, that the common method of taking down written evidence in this country, is not to express the actual words of the witness, but for the judge, or commissioner, to clothe the witness's ideas in the most suitable language that occurs to him. Thus the witness's idea, when committed to paper by the judge, is sometimes very different from that which he delivered.—The judge who dictated to the clerk of court Mr. Stewart of Ballachelish's evidence was the duke of Argyll himself. I apprehend the deponent meant only, that he really thought Allan Breck might be guilty of this murder; yet his evidence is so worded as to imply, that the actual perpetrator was not without conspirators, who were joined with him in contriving this murder." Arnot.

said Archibald Campbell, sworn interpreter, depones, that on the 14th day of May last, he saw Allan Breck Stewart at the house of Ballachelish, his master: and that the said Allan Breck was dressed in a great dun coat, under which he had on a black short coat, with silver or white buttons on it: that before mid-day he went up with a fishing-rod to the water-side, where he saw him fishing up the water: that he has not seen him since. *Causa scientie patet.* And this is truth, as he shall answer to God; and declares he cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

Archibald Macinnes, ferryman at Ballachelish, witness cited, aged 65 years, married, sworn, purged and examined *ut supra*, depones, That he met Allan Breck Stewart near the ferry of Ballachelish, upon the evening of Wednesday the 13th of May last, as the said Allan returned from Glenco. Depones, that, after mid-day, upon Thursday the 14th day of May last, as the deponent was sitting near the ferry of Ballachelish, with the son of John Campbell in Stronmellachan in Glenorchie, Allan Breck came behind them, and hoasted* and, upon the deponent's looking about, desired him to come to him; which the deponent did; and the said Allan enquired of him, if Glenure had crossed the ferry from Lochaber to Appin? The deponent told him, he was sure he did not: that upon this, Allan Breck went away towards the high road; had on a dun-coloured big coat, and had no fishing-rod; and the deponent has not seen him since. Depones, that he is ferryer upon the Appin side, where this conversation happened. *Causa scientie patet.* And this is the truth, as he shall answer to God; and declares he cannot write. And further depones, that he heard nobody suspected for the murder of Glenure, but the said Allan Breck. Depones, that Glenure was expected back upon the Wednesday; and the deponent was sure he must be back the Thursday, as it was currently reported in the country, he was to have a meeting with some gentlemen at Kintalline, Thursday night. And this is also truth, as he shall answer to God.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

Donald Stewart in Ballachelish, aged about 30, married, solemnly sworn by Archibald Campbell, writer in Inverary, sworn interpreter, who, being purged of malice and partial counsel, examined and interrogate, depones, That upon the 15th day of May last, he met the pannel in Duror, upon the marches of Auchindarroch, opposite to the pannel's house. Upon the deponent's regretting that such an accident as Glenure's murder should happen in the country, the pannel joined with him, and said, that he was informed that one sergeant More, alias John Cameron, had been threatening

* 'Coughed,' see Jamieson's Dict. voc. To host, to hoist.

harm to Glenure in France, but did not inform the deponent who told him so. Depones, that, to his knowledge, serjeant More has not been in Appin these ten years past. Depones, that, upon the evening of Thursday the 14th of May last, about night-fall, Katharine Macinish then in Ballachelish, now in Larich, came to the deponent, and told him that one without wanted to speak with him: that this message came to him in Ballachelish's own house: that, when he went out, the said Katharine Macinish informed him, that it was Allan Breck that wanted him; and that he was a little above the house in the brae: that the deponent went up the brae, and met Allan Breck, who was then dressed in a great coat, and a dark short coat under it with white metal buttons; the deponent told him of the murder, and said it could not be but that he, Allan Breck, was about it; to which Allan Breck answered, that he heard of the murder, but had no hand in it; to which the deponent replied, he did not believe him. Depones, that the said Allan Breck Stewart told the deponent, he was going immediately to leave the kingdom, was very scarce of money, and was going then for Koalishnacoo; and desired the deponent to acquaint the pannel, that he was gone to Koalishnacoo; and desired him, if possible, to send him money there; and the deponent then promised to acquaint James Stewart of the above message. Depones, that the said Allan Breck said, he believed he would be suspected of the murder, and upon that account, and as he was a deserter formerly from the army, it was necessary for him to leave the kingdom. Depones, that, before he had the above conversation with Allan Breck he assisted in carrying the corpse of Glenure to the boat. Depones, that, after the conversation with the pannel about serjeant More, he delivered the above message from Allan Breck to the pannel; and that the pannel did not say whether he was to send the money or not: that this conversation happened about ten o'clock in the forenoon of Friday the 15th of May last; and that there was nobody present. Depones, that, upon Sunday the 17th of May last, he met Alexander Bane Stewart, packman in Appin, near the houses of Larich in Glenco, who told the deponent, that he had been at John Breck Maccoll, bouman to Appin in Koalishnacoo, with either three or five guineas, the deponent is not positive which, that he had got at Aucharn, to be left with the said John Breck for the said Allan Breck's use, if he called there; and told the deponent, that he left the money with the said John Breck Maccoll, but did not see the said Allan Breck. And, upon an interrogatory put for the pannel, depones, that, upon the deponent's delivering the above message from Allan Breck to the pannel, the pannel asked why Allan Breck himself did not come for money, if he wanted it? To which the deponent, to the best of his remembrance, replied, That Allan told him he would be suspected for the murder, and was a deserter; to which the pannel answered, that he hoped in

God Allan Breck was not guilty of the murder. Depones, that, during the above conversation with the pannel, Alexander Stewart, Duncan Maccombich, and several other possessors of Auchindarroch, were in the adjoining field delving, but at such a distance that the deponent cannot think they could hear the above conversation. And, being shewn the short black coat, with clear white buttons on the breast and pockets, and the blue striped trowsers, now lying in the clerk's hands, depones, that the said Allan Breck wore such a coat and trowsers upon Thursday the 14th of May last; and saw him in it the forenoon of that day at Ballachelish. And further depones, that he, the deponent, is married to a daughter of Stewart of Ballachelish, and stays in the house with him: that her mother was daughter to Stewart of Annat, in Perthshire. *Causa scientie patet.* And this is the truth, as he shall answer to God: and depones he cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

John Macdonald of Glenco, aged 26 years, unmarried, sworn, purged and examined *ut supra*, depones, That on the 12th of May last, Allan Breck Stewart came to Carnock, the house of the deponent: that he stayed there but a very little time, viz. not above a quarter of an hour: that the deponent had no conversation with him; and the said Allan Breck Stewart went away: That, on Friday the 15th of May last, the said Allan Breck Stewart came again to the said house at three or four o'clock in the morning, and knocked at the window of the said house when the family were all in bed; that the deponent went to the door of his house, and there saw Allan Breck Stewart, who gave him the first notice he had of Glenure's being murdered the evening before in the wood of Lettermore; and told him that he was to leave the country; and came to take leave of the deponent and his step-mother, who is a sister of Ardsheel's: that his clothes were then a dun or brown great jockey-coat: that the deponent did not ask Allan Breck Stewart any questions about the said murder: nor did he say any thing upon the subject to Allan Breck Stewart, as far as the deponent can remember: Allan Breck Stewart told him he was to go the moor-road leading to Rannoch: that, upon the Tuesday above-mentioned, James Stewart of Fasnacloich was along with the said Allan Breck Stewart; and that he was dressed in a black short coat with white buttons. *Causa scientie patet.* And this is truth, as he shall answer to God.

ARGYLL. (Signed) JOHN MACDONALD.

Isobel Stewart, relict of Alexander Macdonald of Glenco, aged 42 years, sworn, purged and examined *ut supra*, depones, that upon Tuesday the 12th day of May last, Allan Breck Stewart, described in the libel, came to her house at Carnock, in the afternoon, accompanied by young Fasnacloich, dressed in a black short coat with white clear buttons: that he

stayed about an hour: and then went away to the deponent's sister's house at Callart: that Allan Breck Stewart came again to the deponent's house on Wednesday the 13th of May last, in the afternoon, and stayed about a quarter of an hour; and then went to Ballachelish: that, on Friday the 15th of May, the said Allan Breck Stewart came again to the said house, at 4 o'clock in the morning, and knocked at the window of the house, and all the family was in bed; upon which the deponent went out with her step-son; and she asked him, what news up the country? To which he answered, A good deal of news, that Glenure was killed the evening before in the wood of Lettermore; that he was come to take farewell of the deponent; for he was to leave the country: that she asked him no more questions about the murder: that she asked him to come into the house; but he answered he would not stay: that to the best of her remembrance, Allan Breck Stewart told her, that Glenure was killed or shot: that, when he knocked at the window, one of the deponent's children told her, that he heard Allan Breck Stewart's voice. *Causa scientie patet.* And this is the truth, as she shall answer to God.

(Signed)

ARGYLL.

ISOBEL STEWART.

Mary Macdonald, spouse to Donald Macinnes in Leckintium, aged about 40, witness cited, solemnly sworn by Archibald Campbell of Knockbuy, sworn interpreter, purged of malice and partial counsel, examined and interrogate, depones, that a little before sun-setting, on Sunday the 17th of May last, she saw Allan Breck Stewart sitting in the wood of Koalisnacooan, less than a mile's distance from the houses: that, upon her approach, he started to his feet: that she gave and received the common salutation from him; and then she passed away on her own business: that he was dressed in a long dun jockey-coat and bonnet. And depones, she was alarmed at meeting a man in a place so remote. *Causa scientie patet.* And this is the truth, as she shall answer to God; and declares she cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

Duncan Stewart, travelling packman in Arlarich in Rannock, aged 32 years, married, sworn, purged and examined *ut supra*, depones, that he met with Allan Breck Stewart upon a Monday or Tuesday, about the 18th or 20th of May last, at a place in Rannock called Lockinstrensmeir; and, having asked Allan whence he had come, and whither he was going? he answered, he had come from Ballachelish or Callart, he does not remember which; and that he was going to a shealing, where his uncle Allan Cameron lived; and, as the deponent had at that time heard nothing of the murder of Glenure, he said nothing to him about it: that, two or three days thereafter, the deponent's sister told him, there were two gentlemen wanting him out-by: and after he had got his breakfast, he went out, and first saw

Allan Breck, and afterwards Allan Breck and Allan Cameron together at a know; and that, how soon the deponent went up to the two, Allan Cameron went back, and the deponent proceeded with Allan Breck down the country, about 6 miles, where he had occasion to be going about his own business; and parted with him at a place called Inching; and, after he parted with the said Allan Breck, he was apprehended by a gentleman called Alexander Campbell, who supposed the deponent to be Allan Breck Stewart; and, having asked the deponent, if he had seen Allan Breck? he then denied his having seen him. Depones, that Allan Breck was, at this time, dressed in a long blue coat, and blue bonnet. *Causa scientie patet.* And this is truth, as he shall answer to God; and depones he cannot write.

(Signed) JA. FERGUSON.

Allan Oig Cameron, in Arlarich in Rannock, aged 33, widower, sworn, purged and examined *ut supra*, depones, that on Monday, he thinks the 18th of May last, Allan Breck Stewart, the deponent's nephew, came to the deponent's house in Rannock, who having told the deponent, he had come from Appin or Glenoo, the deponent, who by that time had heard a rumour of Glenure's murder, said to the said Allan, that he doubted not he might be suspected of it, as he was a loose idle man in the country; to which the said Allan answered, that he made no doubt himself that he would be suspected of it: and the deponent having pressed him earnestly to make a clean breast, and tell him all he knew of the matter, he declared with an oath, he had never seen Glenure, dead or alive; and the said Allan having stayed with the deponent till the Wednesday thereafter, the deponent frequently repeated his instances, to tell him what he knew of the murder; at which Allan Breck became angry; and the deponent desisted further inquiry: that the said Allan Breck left the deponent's house upon the Wednesday, whom the deponent conveyed little more than two gun-shots from his own house; but Duncan Stewart, chapman, the preceding witness, who had come to the deponent's house that morning, went along with them; and he saw them take a little bye road through corn, which might have led them to the high road; but what road they afterwards took, he does not know: and depones, that at this time, Allan Breck Stewart was dressed in a big coat of a brownish colour, and had under it a long blue coat lined with red, red waistcoat, and a bonnet: that, upon the 24th of May, as the deponent thinks, having occasion to go to his master air Robert Menzies, when about 14 miles from his own house, and at the side of a wood, he heard a whistle from the wood, and looking about, saw it to be the said Allan Breck; and the conversation he then had with him, was to the following purpose: that Allan Breck having told him, his only fear was to be apprehended by the military, which might prove very fatal to him, as he had been a deserter; which led

the deponent to say, that he was very sure, the friends of the deceased would procure him his discharge, if he could discover the murderer; to which Breck answered, that they were at this time in such fury and rage, he was very sure, were he apprehended, he would be hanged. *Causa scientie patet.* And this is truth, as he shall answer to God. (Signed)

JA. FERGUSON.

ALLAN CAMERON.

James Man, change-keeper at Innerhadden, aged 32, married, sworn, purged and examined *at supra*, by the above Mr. Archibald Campbell of Stonefield, sworn interpreter, depones, That Allan Breck Stewart came to the door of the deponent's house at Innerhadden, the lower part of Rannoch, about twilight, towards the end of May last, and asked the deponent, who was then standing at his own door, if that was his house? which the deponent answered it was; and then Allan Breck told him, that he was directed by John Stewart in Bohallie to come there for some supply of provisions: that the deponent desired him to come into his house, and that he would give him part of such fare as he had; but that Allan Breck declined to come in, being in a hurry, and stood in need of some provision; whereupon the deponent brought him some bread and cheese, and after he gave him the same, conveyed him as far as his barn, where the said Allan Breck desired the deponent to return; and that he, the said Allan Breck, intended to go farther down the country that night: that the said Allan Breck was dressed in a great dun coat and bonnet; and short hose; what clothes he had under the great coat, he did not see; that he saw a holster under his left arm: that he asked him whence he had come; but he did not tell him. Depones, That before Allan Breck came, as aforesaid, it was reported in that country, that he was concerned in Glenure's murder; and that he himself suspected him at the time, as he came unseasonably, and was wanting provisions. *Causa scientie patet.* And this is truth, as he shall answer to God. And further depones, that he has been acquainted with Allan Breck these twelve years. And this is also truth, as he shall answer to God.

ARCH. CAMPBELL.

(Signed)

JA. FERGUSON.

JAMES MAN.

John Crawford, esq. lieutenant-colonel of general Pulteney's regiment of foot, aged thirty years, unmarried, sworn, purged and examined *at supra*, depones, That he knows the paper now put in his hands, being Number 11 of the inventory of writings in the clerk's hands: that it was sent open to him, before it was sent away. Being asked, whether the deponent had any preceding conversation with the pannel on the subject of this letter; he answers he does not remember he had any. And being asked, whether the deceased Colin Campbell of Glenure ever told the deponent, that Allan Breck Stewart was a deserter, and in this country? the deponent answers negative. *Causa*

VOL. XIX.

scientie patet. And this is truth, as he shall answer to God. (Signed)

ARGYLL.

JOHN CRAWFURD.

Alexander Stewart of Innernahyle, aged 44 years, married, sworn, purged and examined *at supra*, depones, That the pannel was a great many years ago tenant to his brother Ardsheel in the farm of Glenduror, and was removed also several years ago, the deponent does not remember how many, by his brother: that he again became tenant in the same lands in 1749, or perhaps 1748, and was again removed by the deceased Glenure, the factor, at Whitsunday 1751, and the lands set to Mr. Campbell of Ballieveolan. Depones, that, as the pannel is the deponent's near neighbour, the deponent had frequent opportunities of conversing with him touching his said removal: that the pannel did not expect to have been removed, and seemed dissatisfied that he was; and said, he believed Glenure would not have removed him, if Ballieveolan had not sought these lands from him. Depones, that the pannel further said, that the tenants generally allowed some gratuity to Ardsheel's children; and that these lands were the best farms on the estate, and most of the benefits accresced from them; and though he himself could be provided of a farm elsewhere, yet the children would be deprived of that benefit. Depones, that, about the end of April, or beginning of May last, the deponent thinks about the beginning of May, he casually met on the highway with Allan Breck Stewart, and quarrelled with him for not making him, the deponent, a visit; and Allan Breck Stewart promised to see the deponent before he left the country; but the deponent has never seen him since that time. Depones, that, upon the Saturday and Sunday after Glenure's murder, it was the general opinion of the people in the country, that he had been murdered by Allan Breck Stewart. Depones, that the place where Glenure was said to be murdered, and where the deponent observed marks and symptoms of the murder, is a very bad road through a wood, interspersed with rocks and stones upon a hanging brae, from which a person may descry the road on the north side of the ferry of Ballachelish, and where a person may easily conceal himself, so as not to be seen from the road. Depones, that the deponent is acquainted with the hand-writing of Allan Stewart, son to the pannel, and has frequently seen him write. And being shewn a letter signed Allan Stewart, and addressed to Duncan Stewart of Glenbuckie, dated at Aucharn the 1st of April 1751, being the writing Number 7, in the inventory of writings subjoined to the libel, depones, that it is like Allan Stewart's hand-writing, and the deponent would take it to be his, but cannot be positive that it is his. Depones, that after the attainder of Stewart of Ardsheel, the factor gave the pannel the opportunity of having the greatest influence with the tenants of Ardsheel more than any other person, by allowing the pannel to set the lands,

I

which he continued down to Whitsunday 1751, if not at that term also; but depones, that the pannel's connection with the family of Ardschiel gave him also a natural influence over the tenants, even before Glenure's factory. Depones, that, before that time, the tenants, the deponent believes, paid their rent to the lady of Ardschiel, and she again employed the pannel to deal with them. And being interrogate for the pannel whether he, the pannel, removed voluntarily from Glenduror without any warning? depones, that he did not hear of any warning, but that he removed voluntarily. Depones, that Allan Breck Stewart, as the deponent has been informed, was a soldier in the king's army, and was taken prisoner by the rebels at the battle of Preston; and that he was told so by a man who took him from among the prisoners. And depones, that he afterwards joined with the rebels, where the deponent saw him. Depones, that, after the battle of Culloden, he left this country, and, as he told the deponent, went over to France, and entered into the French king's service. Depones, that the deponent had no occasion of seeing Allan Breck Stewart last time he was in the country, but at the time before deponed upon, and one time before that; and both these times he was dressed in a blue long coat, a red vest, and a feathered hat, and black breeches. Depones, that he remembers that Allan Breck Stewart came over to this country a year or two ago, and stayed some weeks among his friends; but neither at that time, nor the last time, did he seem, so far as the deponent observed, to be in any apprehension of being taken; only, as he had been once in the army, he did not chuse to meet with any of the king's troops. Depones, that, at the time the pannel removed from Glenduror, he told the deponent, that he had had a meeting with Balliveolan; and that there was a compromise betwixt them, but does not remember the particulars. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)

P. GRANT.

ALEX. STEWART.

Donald Campbell of Airds, aged 47 years, married, sworn, purged and examined *ut supra*, depones, That the pannel was employed by the deceased Glenure for some time as his subfactor in levying the rents of Ardschiel, and setting the lands; and the pannel told the deponent, that whatever was made of these rents over what was paid into the exchequer, was accounted for to the children of Ardschiel: and when he removed from Glenduror, he told the deponent that he had reason to believe, that the said excrement of the rents of that farm would still be accounted for to them; and, in that case, he would be easy as to his own removal. And depones, that Ardschiel's children, at the time of the rebellion, were all young; his eldest son being now, as the deponent believes, about eighteen. Depones, that, in spring last, the deponent had a letter from

colonel Crawford, telling him that he heard Allan Breck Stewart was come to the country, and inlisting men for the French king's service, and desired the deponent to inquire if it was so: that the deponent did inquire, and wrote the colonel for answer, that he heard he had been in the country, but that he was then gone away: that this was in the month of April, to the best of the deponent's remembrance; and it seems about that time, Allan Breck Stewart had gone to Rannoch, which gave occasion to the deponent's being informed that he was gone away; and did not hear of his having returned to the country till after Glenure's murder; and thinks he wrote also to colonel Crawford, according to the information he had got, that Allan Breck Stewart was in use of coming every year to the country, since Ardschiel went to France. Depones, that, upon the afternoon of Monday the 11th of May last, the deponent sent to the pannel, desiring him to come to him to Keilla, a farm belonging to the deponent, at about a mile's distance from the pannel's house: that the pannel accordingly came there to him that afternoon, as soon as he expected him: that the deponent's business with him was for his assistance in setting that farm: that the farm was accordingly set; and the pannel himself took part of it, and conveyed the deponent a part of his way home; and then they parted: that, before parting, he desired the pannel to go next morning to Appin's house: that the pannel accordingly did so; and the deponent had a letter from him, from that place.* *Causa scientie patet.* And this is truth, as he shall answer to God. (Signed)

P. GRANT.

DONALD CAMPBELL.

* "It may be proper to acquaint the reader, that when Mr. Miller, one of the pannel's lawyers, desired that the deposing witness (Mr. Campbell of Airds) might be interrogated, as to the pannel's moral character in the country; and particularly, whether or not he was a God-fearing man, and generally employed in taking care of the affairs of widows and orphans? the lord justice-general was pleased to oppose the interrogatory, saying words to this purpose, Would you pretend, Sir, to prove the moral character of the pannel, after being guilty of rebellion; a crime that comprehends almost all other crimes? Here you will find treasons, murders, rapines, oppressions, perjuries, &c. To which the lawyer answered, That he abhorred rebellion as much as any person whatever; but, with great submission, he was intitled to plead for the pannel, that it was foreign to the present case, since the king had been pleased to grant an indemnity, in which the pannel was comprehended: and therefore could legally interrogate the witnesses, as to the pannel's moral character. This was never refused, added he. To give an instance.—The famous Collins was a rebel to his God and Saviour, as his writings testify: yet his most zealous enemies never refused his moral cha-

Charles Stewart, writer and notar at Bannavie, aged 38 years, married, sworn, purged and examined *ut supra*, depones, That James Stewart the pannel wrote a letter to the deponent, desiring him to go with the tenants of the lands of Ardschiel, to intimate to Glenure a sist on a bill of suspension: that accordingly the deponent went to Aucharn that night; and the next morning the tenants came there; and he then went along with the tenants to Glenure's house, and there intimated the sist; and a protest was also taken against the said Glenure: that this was on the 1st of May. Depones, that the pannel told the tenants at the pannel's house, that there was a sist come of the removing; that he did not desire them to go with the sist, unless they had a mind themselves; and they chose to go; but the pannel himself did not go along. Depones, that he received a second letter from the pannel of date the 14th of May, desiring him to attend next day at the ejection; but that he declined the same, because he did not care to disoblige Glenure. Depones, that he saw Allan Breck Stewart at Aucharn the 1st of May; and when the deponent left Aucharn next day, he left him there: that he heard Allan Breck say, that he thought it hard that Glenure should remove the tenants upon the estate of Ardschiel; when he did not remove those of Mamore. Depones, that, in the beginning of April having met Allan Breck Stewart, he told the deponent, that he heard that colonel Crawford was endeavouring to take him up as a deserter; but that he, Allan Breck, had surrendered himself in 1746 to sir Robert Menzies, as a justice of peace. De-

ponent to be extremely good.—The clerk however was forbid to mark any thing said by the witnesses, relating to the goodness of the pannel's moral character.—The doctrine which his grace's words import, springs from the source of party violence; which regards a man of different principles as a monster in every respect. But, thank God! the experience of late years has banished it from life: nor will the world learn, without a mixture of pity and indignation, that it has once more dared to raise its head in so solemn a place, and on so important an occasion. Surely his grace could have recollected instances, perhaps in the circle of his own acquaintances, if not among his creatures, where political principles, of a different turn formerly, are no bar to trust and favour now: in the distribution of which, it will not, I hope, be said, that moral character is totally disregarded.—Remarkable was the reflection of the poor pannel himself on this strange occasion; who said to his agent, —‘It is all over now: my lawyers need give themselves no further trouble about me: my doom is as certain as if it were pronounced. I always dreaded this place, and the influence that prevails in it: but this outdoes all. God forgive him.’” Supplement, &c.

See a Note in p. 33, of this Volume.

pones, that in the beginning of April, the deponent saw Allan Breck Stewart at Callart: that he did not appear to be skulking: that when he saw him first, he was dressed in a French habit: that on the 1st day of May, when he saw him at Aucharn, he was in a short black highland coat with white buttons and trowsers, and said he had come from Rannoch. *Causa scientie patet*. And this is truth as he shall answer to God.

(Signed)

ARGYLL.

CHARLES STEWART.

Duncan Maccoll in Ardschiel, aged 30 years and upwards, married, being sworn, purged and examined *ut supra*, by Mr. Alexander Campbell, minister at Inverary, sworn interpreter, depones, That on his and others being warned to remove from the lands of Ardschiel, as at Whitsunday last, he, for his part, had no intention other than to submit to the warning, till a paper was procured from Edinburgh, which he heard read by Charles Stewart, notar at Aucharn, as on a day he was there, being along with his neighbours advertised to meet there: that, when the notice was given for this meeting, he was not at his own house; but, on his return, his wife told him such a message was sent, and that advice was come from Edinburgh to direct those who were warned to remove, to continue in their possession: that on his coming to Aucharn, he does not remember whether the paper was read in his presence, but is positive he and his neighbours were told by Charles Stewart, notar, and the pannel, that the paper contained advice, as above, on which they should go to ask the lands from Glenure; and to be cautious in their conduct, as they were to swear about their being faithful and peaceable tenants. Depones, that he gave no allowance or mandate to the pannel to make any application at Edinburgh against the removing: that, before he heard any thing of this paper from Edinburgh, he had engaged to serve as bouman* to the

* “A bouman is a kind of tenant or servant (not a herd) in the Highlands of Scotland, that is placed upon a grass room or farm, with a stocking of cattle, &c. from the master; and is accountable to him for the value of the first stocking, and the produce of it, at the yearly rate of such a number of calves, kids, lambs, stones of cheese, butter, &c. He is always a man of substance, and able to maintain his family well, that is thus employed.” Supplement to the Trial of James Stewart.

The kindness of Mr. Walter Scott has furnished me with the following more full and exact account of the bouman or bowman:

“The poverty of the yeomanry and peasants of Scotland introduced a mode of cultivating the land, now fortunately only known in our law books; when the landlord furnished the tenant with the implements of husbandry, the cattle for labour, the seed corn, and other stock

tenants Glenure was to introduce; but that, on hearing of the paper from Edinburgh, he preferred keeping by his neighbours, as he considered the being continued in possession, did the law support him in it, more beneficial to him. Depones, that the procuring the paper at Edinburgh cost him no money. *Causa scientie patet.* And this is truth, as he shall answer to God. And, being interrogate for the pannel, depones, that it was in company with the rest of his neighbours, he went to Aucharn, and went along with them likewise in company from Aucharn to Glenure, along with the notary; and that he remembers, before they left Aucharn, the pannel, in general,

necessary to carry on the farm, the tenant only contributing his labour; the produce or return being divided between them. This species of location was called by the name of *steel-bow*, for which various etymologies have been assigned. Something of this kind subsisted to a late date in the Highlands, where a cottager unable to purchase a cow or horse to stock his croft, was furnished with one by the landlord on condition of sharing in profit. These were called by the old word *bowmen*; and such a person seems to have been the bowman of Killinacran in the trial of James Stewart." [See the deposition of Alexander Stewart the packman, *infra*.]

With Mr. Scott agrees Dr. Adam Smith, who, speaking of the metayers of France, describes them as Mr. Scott describes the bowmen, and says, "that at the time in which he wrote, a like sort of tenants still subsisted in some districts of Scotland, where they were called steel-bow tenants." See *Wealth of Nations*, vol. 2, book 2, c. 3, pp. 90, et seq.

In Jamieson I find not either of the words bouman, bowman, or steel-bow, but he inserts *steelbow goods*, which he defines thus: "Those goods on a farm which may not be carried off by a removing tenant as being the property of the landlord."

And the first authority which he cites is the following: "Till towards the beginning of this century, landlords, the better to enable their tenants to cultivate and sow their farms, frequently delivered to them at their entry corns, straw, cattle, or instruments of tillage, which got the name of steelbow goods, under condition that the like in quantity and quality should be redelivered by the tenants at the expiration of the lease." *Erskine's Instit.* book 2, t. 6, § 12.

But Mr. Walter Scott farther informs me, that in the Highlands a common herd, who takes care for numerous owners of their beasts feeding on extensive unenclosed pastures, is denominated the bouman; and qu. if that be not in this place the meaning of the word. See the phrase 'serve as bouman to the tenants,' repeated in the following deposition of Maccombich,

told them, they might follow the advice given them, or not, as they should see cause; and that, upon their arrival at Glenure, all that he remembers was, that they took protests with money in the notary's hands, against Glenure. And this is also truth, as he shall answer to God.

(Signed)

JA. FERGUSON.

ALEX. CAMPBELL.

John Maccombich in Ardshiel, aged 45 years, married, sworn, purged and examined *ut supra*, by the above Mr. Alexander Campbell, sworn interpreter, depones, That he was warned with the rest of the tenants to remove, as at last Whitsunday, and meant to submit to it, and therefore agreed with the tenants to be introduced to serve them as bouman; but on his being called to Aucharn, by a message in Charles Stewart the notary's name, and bearing the advice from Edinburgh explained there, and that there were some hopes the government would allow them to sit still, if they continued peaceable, he chused to keep by this chance with his neighbours; upon which he went along with them to Glenure, and asked to be continued; and got for answer, that the application was too late, the lands being set to others; upon which he joined with his neighbours in taking a protest in the hands of the notary. Depones, that, as to the agreement betwixt him and the incoming tenants, when he undertook to be their bouman, he heard both Glenure and these tenants say, that it was by Glenure's advice that this was done. Depones, that, as Duncan Maccoll and he agreed at the same time to be bouman to the incoming tenants, so he heard Glenure say, that it was his advice to the person who was to employ Duncan Maccoll, to take him as his bouman. Depones, that, on his being warned, he advised with the pannel how to behave: that he did not pretend to direct: that an advice in law should be asked: that he hoped the king, and those employed by him, would continue the former possessors, they behaving dutifully; and that, on his being advised by the pannel to have patience, he resolved to wait the issue: that likewise the pannel advised him, if better could not be made of it, to endeavour to get a sub-set from the incoming tenant; and that the pannel advised him, and others concerned, to qualify to the government. Depones, that he told the pannel, that if the law countenanced the continuing them in their possession, he would rather chuse it. Depones, that, on the day he and his neighbours went to Glenure, the pannel left them to the freedom of their own choice, whether to follow the purpose of the advice from Edinburgh, or not; only it was his opinion, that they had a chance of being continued in their possessions, they behaving themselves in all respects dutifully, and go and ask the lands of Glenure. Depones, that he does not remember that the advice from Edinburgh cost him any money, or that any was asked of him; but that some accounts were at that time betwixt him and the pannel.

Depones, that he continued with the rest of the tenants about the pannel, till they were desired by him to leave him, as he could take care of himself, and was to go home; and that he does not remember to have heard Glenure's name mentioned all the while; and that this happened on occasion of Glenure and the pannel's meeting at Kintalline: that he is not positive as to the time, but thinks it was the last night of the old year. Depones, that he heard Glenure went next day to the pannel's house, and dined there. *Causa scientie patet.* And this is truth as he shall answer to God. (Signed)

P. GRANT.

ALEX. CAMPBELL.

John Maccorquodale, late in Lettermore, now in Ballachelish, aged 20 and upwards, married, sworn, purged and examined *ut supra*, by the said Mr. Alexander Campbell, sworn interpreter, depones, That the last night of December last, he was present at Kintalline, as Glenure and the pannel, with some other company, met; when, after drinking a while, from loud words it was apprehended a quarrel would ensue; to prevent which, the deponent with some others, carried out the pannel, who seemed unwilling to part with Glenure, as he expected Glenure would go that night to his house: that the deponent heard that Glenure, though he declined to go with the pannel that night, yet he proposed to breakfast with him next morning: that the deponent was in company with the pannel, and followed him at some distance from the house of Kintalline; and that all the while he was in the pannel's company, he heard nothing of Glenure; only the pannel was disoblged at being separated from him, and said, that if they about him had kept off, Glenure and he would be good friends before they would part. Depones, that, when he was warned, and consequently like to want lands, he was talking of his situation to the pannel, being poor, and, in his own apprehension, unable to bear the expence of a law suit, did not propose to follow the matter in that way: that being asked a sight of the warning, he gave it to the pannel, but did not desire any advice in law should be asked about it, having some dependence on his innocence, and not being concerned in any of the troubles in that country. And being interrogate for the pannel, whether the pannel had advised him, the deponent, to engage as bouman in Lettermore, if better could not be provided for him, depones negative. *Causa scientie patet.* And this is truth as he shall answer to God.

(Signed)

P. GRANT.

ALEX. CAMPBELL.

Ewan Macintyre in Duchelly, late herd in Glenduror, aged 20 years and upwards, unmarried, sworn, purged and examined *ut supra*, by Mr. Archibald Campbell of Stonefield, sworn interpreter, depones, That he engaged to be herd to Mr. Campbell of Ballieveolan, in the farm of Glenduror, for the year 1751; and that the day after he entered into his service

there, the pannel challenged him for accepting thereof, and told him, that he would be fit-sides* with him, sooner or later, for doing it; and that if he did not meet with resentment himself in his life-time, others, such as his friends, might meet with it after his death. Depones, he never was in the pannel's service. *Causa scientie patet.* And this is truth, as he shall answer to God; and depones he cannot write. (Signed)

ARGYLL.

ARCH. CAMPBELL.

Alexander Campbell in Tynalub, aged fifty years, married, sworn, purged and examined *ut supra*, depones, That, in the end of April last, the pannel called at the deponent's house in the morning, to have his horse corned; and having called for, and got a dram, which was afterwards set down upon the table, one Mac-laren, a merchant in Stirling, who had lodged with the deponent the night before, being present, asked the pannel, if he would not help the deponent to a dram? And the pannel answered, he did not know any thing that he would help the deponent or any of his name to, if it was not to the gibbet. The deponent answered, that that was not a comfortable expression to him, that it seems if any of them were at the gibbet, the pannel would draw down their feet; and the pannel replied, that of some of them he would, and some of them he would not: that then the deponent said, that Glenure, as he supposed, was the man of the name with whom the pannel had the greatest quarrel, and the deponent did not know any good cause the pannel had for it: upon which the pannel answered, That if Glenure had used the deponent as ill as he had used him, the pannel, by turning him out of his possession, he would have no less quarrel with him than he had: and the deponent replied, That that was no just cause of quarrel; for that if the pannel had a tack of his farm, Glenure could not turn him out; and the deponent's wife was also present at this conversation. And being interrogate for the pannel, whether the deponent then thought him serious, and in earnest, or that it was only a joke? depones, that, at that time, he thought it proceeded from malice. And being further interrogate for the pannel, depones, he was at that time perfectly sober. Depones, that all they drank was a gill of aquavite, of which the deponent got a part. *Causa scientie patet.* And this is truth, as he shall answer to God. (Signed)

P. GRANT.

ALEX. CAMPBELL.

Ewan Murray, vintner, at west end of Lochearn, aged thirty-four years, married, sworn, purged and examined *ut supra*, depones, That, in April last, the pannel and Colin Mac-laren, merchant in Stirling, came to the deponent's house, and the pannel told the deponent, that Glenure had warned away several families in

* I believe the ordinary expression is to be *upsides with*. Both seem to correspond with the English vulgar phrase of *bring eyes with*.

Ardshiel's estate to remove; and that he was informed, that none of the factors on the forfeited estates had power to remove the tenants; and that he was going to Edinburgh to take advice of lawyers about it; and, if he had not that power, that the pannel would apply for suspension in his own name, and in name of the rest of the tenants; and, the conversation turning upon an officer of the army, that was branded with cowardice, and had been broke on that account, the pannel said, that he had reason to say that Glenure was as great a coward as that officer; for that he, the pannel, had challenged him to fight him, which Glenure declined; and desired the deponent to tell Glenure, that he had told him so; but the deponent answered, That he would not carry any such message from one gentleman to another; and, from the conversation, the deponent understood, that the arms with which the pannel had challenged Glenure to fight, was with pistols. And being interrogate for the pannel, depones, that he thought the pannel was a little concerned with drink. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)
P. GRANT.

EWAN MURRAY.

Colin Maclaren, merchant in Stirling, aged twenty-two years, unmarried, sworn, purged and examined *ut supra*, depones, That, in the month of April last, the deponent happened to lodge in the house of Alexander Campbell in Tynaluib a night, and in the morning about nine o'clock the pannel alighted there; and having breakfasted and got a dram, the deponent understanding that the pannel was going the same road with him towards Stirling, desired the pannel to give the landlord a dram, that they might go on their journey; that the pannel answered, That he did not think he should help the landlord, or any of his name, to a dram, or any thing else, if it was not to the gibbet: that he had mentioned to the landlord, that Glenure had warned him to remove from his possession in Ardshiel; therefore the landlord answered, that it seemed, if they were on the gibbet, the pannel would draw down their feet; and he supposed it was on Glenure's account; to which the pannel answered, he could not say but it was; upon which the pannel and landlord entered into an altercation together touching the justice of that removing; and, as the deponent had no concern in the matter, he took little notice to what passed. Depones, that, upon the landlord's using the above expression, that, if they were on the gibbet, the pannel would draw down their feet, the pannel's answer was in these words, That he did not chuse to be an executioner, but he could draw down some of them. Depones, that from Tynaluib the pannel and deponent proceeded on their journey, and about eleven o'clock, or mid-day, came to the house of Ewan Murray, the preceding witness: that there the pannel again complained of Glenure's removing him; told him, it was one Camp-

bell that was to succeed in his room: that he did not know any reason for Glenure's using him so, for that they were cousins: and, upon the deponent's saying, that possibly it was none of Glenure's fault, and that he could not help it, the pannel said, he did not know any business that either the exchequer or the factors had to turn out tenants, while they paid their rent; and said, that he was going to Edinburgh to get a suspension of the decret of removing. Depones, that, having left Ewan Murray's house together, and the said Ewan in company with them, the conversation turned upon an officer in the army, who had been broke for cowardice; and the deponent said, he was surprised with it; for that that officer, as the deponent heard, had not declined to accept of a challenge to fight from Glenure; that thereupon the pannel said, that he esteemed that officer a better man than Glenure: and Ewan Murray having contradicted his being so good a man as Glenure, the pannel said, that he knew the contrary; for that he himself had given Glenure a challenge to fight him, which Glenure declined; and desired Ewan Murray to tell Glenure, that he would fight him when he would; but Ewan Murray declined to carry such a message. Depones, that, after parting with Ewan Murray, in the course of their journey the deponent found that the removing was much at the pannel's heart; and the deponent endeavoured all he could to divert the conversation to another subject: that the pannel told him, that, if he failed in his suspension at Edinburgh, he would carry it to the British parliament; and, if he failed there, told him, after a little pause, and with an emphasis, that he behoved to take the only other remedy that remained. And being interrogate for the pannel, depones, that, during the conversation in Campbell's house, above deposed upon, the deponent at first thought that the pannel had been in joke; but afterwards it was like to become very serious; for the landlord and he came to pretty high words together: and being further interrogate for the pannel, depones, that he did not think the pannel drunk, either in Campbell's house, or in Ewan Murray's house; but, after leaving Murray's house, they drank two or three drams at a dram-house; and after that the deponent thought him much concerned with liquor; and it was after taking these drams that the conversation between Murray and the pannel, with respect to challenging Glenure, happened. And depones, that they had rode several miles together, before the conversation about the British parliament; and the deponent thought him even then still concerned with drink. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)

P. GRANT.

COLIN MACLAREN.

John More Maccoll, late servant to the pannel, aged thirty-seven, married, witness cited, solemnly sworn, purged and examined by the sworn interpreter above-named, depones, That

he was present at a conversation that happened betwixt the pannel, John Beg and Dugald Maccolle, both servants to the pannel, in the pannel's brew-house at Aucharn, before day-light upon a morning, about Yule last, as the deponent best remembers: that the deponent was then employed in distilling the second draught of a brewing of aquavite; and the pannel ordered the deponent to give him and the people present a dram, which the deponent did: that the pannel said, Glenure would not take the rent from the tenants of Aucharn, part of the Ardshiel estate, because they had given the pannel some bear, which Glenure alledged they ought to have paid him: that the pannel complained it was hard to refuse the rent in money from the tenants in a scarce year; and observed, that it would be of no great consequence to him, the pannel, though he should pay back the bear, in comparison to what it would be to the tenants for subsequent years, in case they were obliged to pay their farm bear and meal; and said, the tenants or commoners were likely to be very ill off; for if Glenure went on in the way he then did, it was likely he would be laird of Appin in a very short time; and that he knew once a set of commoners in Appin, who would not allow Glenure to go on at such a rate: to which the deponent and the rest answered, that they knew no commoners in the country that could strive or contend with Glenure in that manner. Depones, that he had no conversation with the said John or Dugald Maccolle that day, nor any time thereafter, about the import of the above communing. Depones, that in seed-time last, when they were harrowing the tath-field in Aucharn, being the very day that James Stewart went for Edinburgh, Allan Breck Stewart came to the deponent, and the said Dugald Maccoll, as they were yoking the horses; and the deponent, having asked him some questions about France, said, he did not see any of the people that went over there, come back in so good a way as they went over: to which Allan Breck replied, that they came back better than they went; and that they, meaning the people of Appin, might be much better, if they were worth themselves: upon the deponent's answering, that he did not see how that could happen, Allan Breck answered, if they, the commoners, were worth themselves, they could keep out Glenure, and hinder him from oppressing them; in which case, they would not be banished from their natural possessions; and, upon the deponent's answering, he did not see how any body could pretend to strive or struggle with Glenure in that way, as he had the laws of the king and country for him, and nobody to support or take them by the hand, after their so doing; Allan said, he had it in his power to save or protect any body that would put Glenure from trampling upon the country in the manner he then did. And, being interrogate for the pannel, what dress the said Allan Breck used to wear, when he saw him at Aucharn? depones, that he always saw him wear a blue side coat, red

waistcoat, and black breeches, with a hat and feather, except twice that he saw him in a black short coat, with white metal buttons. The first time he saw him with the said short coat, was, when the pannel was at Edinburgh; and the said Allan Breck told, he was going to Rannoch, and actually went away, and stayed several days; and the other was upon Monday the 11th day of May last, when he saw the said Allan Breck come to Aucharn dressed in his long clothes, and came directly where the pannel, Allan his son, John Beg Maccoll, and the deponent, were covering potatoes: that, when Allan came up, they were resting themselves, and sitting by one another: that Allan Breck sat with them; and all the conversation that the deponent noticed was, some questions about the welfare of the people of Glencrearan: and that he did not observe the pannel have any private conversation with the said Allan Breck; for that, a very little time after Allan Breck's arrival, the pannel had a message to meet Mr. Campbell of Airds at Keel; and that this happened after mid-day: that the pannel immediately, upon receiving the above message, went away in order to meet Airds: and that nobody went along with the pannel, Allan Breck having stayed with them: that a little thereafter, the deponent, Allan Stewart the pannel's son, and John Beg Maccoll, went to cover potatoes at a greater distance from the pannel's house; that Allan Breck stayed behind; and, some time thereafter, Allan Breck came where they were working, dressed in a black short coat with white metal buttons and black breeches, and wrought with them in covering potatoes. Depones, that the deponent came very early upon Tuesday morning to the pannel's son, and found the servants getting up: that the deponent went to Aucharn, at about a quarter of a mile's distance, for a slaughter-spade; and, as he was returning from thence, he met the pannel going for Appin's house; and when he came to the pannel's house, he saw Allan Breck sitting in a room, dressed in the black short coat, combing his hair. Depones, he never saw the said Allan Breck at work any of the times he saw him at Aucharn, except covering the potatoes upon the Monday evening as aforesaid. *Causa scientie patet.* And this is the truth, as he shall answer to God.

(Signed)

JA. FERGUSON.

ARCH. CAMPBELL.

Dugald Maccoll, servant to the pannel, unmarried, aged 24 years, witness cited, sworn, purged and examined ut supra, by the fore-named sworn interpreter, depones, That in the latter end of winter last, about day-break, the deponent was amongst with the pannel, in his brew-house at Aucharn, in company with John More Maccoll, and John Beg Maccoll, both servants to the pannel: that, after taking a dram of whisky, the conversation fell upon the tenants of Aucharn, a part of the forfeited estate of Ardshiel; and that it was then mentioned, that they were in use to pay some bear

and meal as part of their rent : that the tenants of the said town of Aucharn had paid the bear to the pannel they were in use to pay, and made offer of money for that and the rest of the rent to Glenure, the factor ; and that Glenure refused to take the money, insisting to have the victual paid in kind as formerly : upon which the pannel said, that Glenure was like to hurt him, the said James Stewart, as much as was in his power ; for, as the tenants had paid him the bear in use to be paid out of that farm, and turned it to his own use, he would be obliged to answer to Glenure for that article of the rent ; but added, that that was not the worst of it, and that, if he, Glenure, went on in the same way, it was likely he would in five years be laird of Appin ; and, upon the deponent and the said John More and John Beg Maccoll's saying, that that was likely to happen, the said James Stewart, the pannel, answered, that that was the fault of the commoners or followers ; for however he, or people in circumstances like him, would shift for themselves, they, the commoners would be very badly off : and added, that he knew commoners once in Appin, who would not allow Glenure to go on at such a rate ; to which the deponent and the others present answered, that they believed that there might be commoners once in Appin who would do so. Depones, that he does not remember that he and John Beg Maccoll had, at any time that day, or thereafter, any communing about the sense or meaning of this conversation that happened in the brew-house. Depones, That, upon the last night of December last, Glenure and John Campbell of Ballievolan were in company with the pannel, John Stewart younger of Ballachelish, and James Stewart in Ardnamurchan, uncle to the pannel, in the house of John Breck Maccombie, change-keeper at Kintalline ; and, after night-fall, by the desire of his mistress, the deponent went there to attend his master home : that, after he came there, Glenure, the pannel, and his company, drank till it was late at night, and the deponent heard them speaking together ; but as it was in English, he did not understand what they said : that at last they began to speak very loud, and got up upon their feet : that the deponent, and several other commoners, who happened to be at the house at the time, apprehending they were going to quarrel, went into the room in order to prevent it : that they still spoke loud, and in English ; and the deponent, with the assistance of John Maccombie, alias John the son of Duncan and grandson of Malcolm, and another John Maccombie, alias the son of Duncan and grandson of Duncan, both then tenants in Ardsheil, and John Roy Maccorquodale, then in Lettermore, now in Ballachelish, carried the pannel, and the said James Stewart his uncle, out of the room : that they insisted for being back to the company ; but that young Ballachelish came to them, and told them that they must not go back, and that they ought to be good friends : upon which the pannel said, he would not stir

from the place, till he was told by Glenure if he would go to his house next day ; that Ballachelish said he would go and get notice, and accordingly went into the room, and returned back in a little time, and told the pannel that Glenure promised to see him at his house next day : that the pannel asked if Glenure had promised so upon his honour ; and upon Ballachelish answering he did, the deponent and the said John Roy Maccorquodale carried the pannel over a burn adjoining to the said house of Kintalline in the road to Aucharn ; upon which the pannel told them, they were better at that than in doing what they ought to do, and that it was to side with Glenure, not with him, that they were there ; and asked the tenants then present, what kept them there so late, and why they did not go home in proper time of night ? And, they answering that they were there waiting upon him, the pannel replied, that it was not waiting upon him they were, but upon Glenure, to see what they could get by him : that he continued at such conversation as this, till they came to the fields of Auchindarroch, hard by Aucharn, when the said John Maccombie, alias the son of Duncan Macilchallum, said, that he was told that Glenure had a drawn hanger in the room where they had been drinking, after the pannel and his uncle were carried out, declaring that he would not allow them to return to his company any more that night ; upon which the pannel asked them, why he did not tell him that before he came away from the house, that he might see if it was true, and what Glenure meant by it ? and insisted then on going back to know the truth of it ; but the deponent and the other tenants declaring they would not allow him to go back, he bid them go about their business and leave him, which they accordingly did ; and the pannel, and the said James Stewart his uncle, went to Aucharn, attended only, as he remembers, by the deponent and a boy-herd named Duncan Maccaunach : that, when this happened, the pannel James Stewart and his uncle were very drunk. Depones, that, some time in March last, when the deponent and John More Maccoll were harrowing the tath-field at Aucharn, being the same day, or the day after the pannel went for Edinburgh, Allan Breck Stewart walked for a good time about the field ; and as they were loosing their horses, the said Allan Breck and they entered into conversation about France, and people from this country there ; and John More Maccoll asked if there was any prospect of any of them's coming back ? Upon Allan Breck's answering he was afraid they would not, John More said, he wished that none had ever come from that country ; in which the said Allan joined him, saying, it had dispersed the friends he most regarded ; and that it was a particular misfortune that the management of any concerns they left behind them, fell into the hands of one that was about to shew them no manner of favour ; and declared that he meant Glenure ; and told that the commoners of Appin were

little worth, when they did not take him out of the way before now; and upon their saying nobody would run that risque, not knowing who would stand by them, Allan answered, that he knew a way to convey out of the way any person that would do so, in a way that he would never be caught; and also said, that they, and the tribe they were of, (meaning the Maccolls) were not like to be the least sufferers by Glenure's proceedings. Depones, that the first time he saw Allan Breck Stewart at Aucharn was about the beginning of the oat-sowing, which was pretty far advanced in the month of March: that he was then dressed in a side blue coat, red waistcoat, and black breeches, with a hat and feather: that, while he was in the country of Appin, he was for the most part at the pannel's house; but that he was absent once for a considerable time, when he said he was at Rannoch: that the deponent saw him when he said he was going to Rannoch: that he was then dressed in a black short coat with silver buttons belonging to the pannel, blue trowsers striped with white, and a dun great coat, which the deponent thinks belonged to Allan Stewart the pannel's son; and, being now shewn the two black short coats in the clerk's hands, depones, that the coat with the silver buttons on the pockets belonged to the pannel, and is the same the said Allan Breck had on when he said he was going to Rannoch as aforesaid; and the other coat, with no buttons upon the pocket, belonged to Allan Stewart, the pannel's son. Depones, that he saw him have on the same dress when he came back from Rannoch. Depones, that he does not mind to have seen the said Allan Breck wear the said short coat at any other time, except upon Monday and Tuesday the 11th and 12th of May last. Depones, that upon Monday the 11th day of May last, he went to the wood for fire-wood; and upon his coming home in the afternoon, he found the said Allan Breck dressed in the said black short coat, working at potatoes along with John Mure Maccoll, and John Beg Maccoll, two of the pannel's servants, having on his own black breeches. Depones, that he saw the said Allan Breck upon Tuesday morning, the 12th of May last, in the pannel's house, dressed in the said black coat belonging to the pannel, and blue trowsers striped with white such as now shewn to him in the clerk's hands, and a blue bonnet. Depones, that the deponent was told the said Allan Breck left Aucharn early upon the Tuesday, and the deponent has not seen him since. Depones, that upon Friday evening the 15th of May last, the deponent and John Beg Maccoll overtook Katharine Maccoll, servant to the pannel, in the brae above the house of Aucharn, with a pock or sack, and something in it, under her arm; the deponent asked her, what she had got in the sack? To which she answered, that it was Allan Breck's clothes, and that she was going to hide them; and the deponent and the said John Beg Maccoll saw her hide the sack in which the said clothes were; and that this

VOL. XIX.

happened about four o'clock in the said afternoon. Depones, that upon Thursday evening the 14th of May last, after notice of Glenure's murder came to Aucharn, Allan Stewart, son to the pannel, desired the deponent and John Beg Maccoll to hide a large Spanish gun that used to stand in the brew-house; and told them, that he himself had concealed a lesser gun that used to stand at the end of the girnel* in the barn, under the said girnel, where he thought it would be safe. Depones, that the deponent, and the said John Beg Maccoll on the said Thursday evening, hid the large or Spanish gun that used to stand in the brew-house, under the thatch of the sheep-house, and three swords they took out of the barn, and a fourth that was brought by John Beg Maccoll, the deponent does not know from whence, under the thatch of the back of the barn. Depones, that about four o'clock, Friday the 15th of May last, the pannel desired the deponent to carry the above arms from the houses, and hide them in the moor: that accordingly the deponent and John Beg Maccoll took the aforesaid large gun from the back of the sheep-house under the thatch, and the said four swords from under the thatch of the barn, and found the gun that used to stand in the barn under the girnel, where the said Allan Stewart, the pannel's son, said he hid it, and carried them to the moor, and hid them in the hole of a rock, above the peat-moss. and that it was told at Aucharn, that there were soldiers coming to the country, before these arms were hid in the hill, as above. Depones, that the said John Beg Maccoll, and the deponent, had the above arms, when they overtook Katharine Maccoll, as aforesaid, with the clothes. Depones, that the large or Spanish gun, that stood in the brew-house, was charged with powder and small drops; and that there was no shot in the small or lesser gun, that used to stand at the end of the girnel in the barn; but Allan Stewart, the pannel's son, carried out the said gun, two or three mornings in order to shoot black cocks in the latter end of March or beginning of April last. Depones, that Allan Breck Stewart was also in use to carry out the said large or Spanish gun two or three mornings, in order to shoot black cocks; and about that time saw him endeavour to help the lock of the said gun with a file. And being interrogate for the pannel, depones, that he, the deponent, has no skill about guns; but heard the said Allan Breck and Allan Stewart, the pannel's son, more than once complain, that the guns were in bad order. Depones, that when the deponent came home from the wood, upon Monday the 11th day of May last, the pannel was not at home; and the deponent was told he was gone to Keels to meet the laird of Airds: and that the deponent had gone to bed before the pannel came home that night: and that early upon Tuesday morning, when the deponent got up, he saw the pannel

* "A meal-ark or corn-chest." Arnot.

without, who told him that he was going to Appin's house: and that, to the deponent's knowledge, Allan Breck, or the pannel's sons, were not then up: that he saw the pannel go towards Lettershuna, where Appin lives. Depones, that Allan Breck Stewart left Aucharn before the pannel returned from Lettershuna: and upon an interrogatory put for the pannel, if the pannel had given the short black coat the deponent saw the said Allan Breck wear, and which he has deponed belonged to the pannel, was given by the pannel to the deponent, or any other of his servants, before the said 11th of May, depones, that the said black coat was not given to him, the deponent, nor to any other of the servants, to his knowledge. And, being interrogate for the pursuers, after shewing him the powder-born, now in the clerk's hands, and which had been formerly shewn him when he was examined upon the precognition, whether he had ever seen it before the time of taking the said precognition? depones, he never did. And being interrogate for the pannel, depones, that Glenure and Ballievolan dined at the pannel's house, in company with the pannel, the day after they were like to have quarrelled at Kintalline as aforesaid. Depones, that it was ordinary for the pannel to give a dram to his servants every time he distilled a double draught of whisky. Depones, that the double draught was a distilling, when the deponent and the other servants got the dram mentioned in the first part of this deposition. *Causa scientie patet.* And this is the truth, as he shall answer to God. And declares he cannot write.

J. FERGUSON.

(Signed)

ARCH. CAMPBELL.

*John Beg Maccoll** servant to James Stewart pannel, aged 27 years, unmarried, sworn, purged and examined at *supra*, by the sworn interpreter, depones, that the latter end of winter, or beginning of spring last, early in a morning, the pannel gave a dram to the deponent, Dougal Maccoll, and John More Maccoll, both servants to the pannel, in the pannel's brew-house: that the conversation falling upon Glenure, the pannel complained that Glenure was no friend of his: but that that was not the worst of it; but that if he was to go on as he did, it was likely in five years he would be laird of Appin; and the deponent and the other two Maccolls answering, that that was likely to happen, the pannel replied, that he knew once a sett of commoners in Appin, who would not allow Glenure to carry matters with such a high hand; and to which the deponent and the other two Maccolls answered, That they did not believe there was any commoner in Appin, that durst contend or strive with Glenure in such a way: that, immediately thereafter, the deponent and Dougal Maccoll went out of the brew-house, leaving the pannel and John More Maccoll there. Depones, that,

after they went out of the brew-house, either that day, or some time thereafter, the deponent and Dougal Maccoll talked together, what the import of this conversation might be; and that the deponent was at a loss whether to consider it as an encouragement to destroy Glenure, or as a complaint against the commoners of Appin, as not being so faithful to the pannel as he expected them to be. Depones, that, in March last, Allan Breck Stewart came to the pannel's house, late in the evening, dressed in a blue side coat, red waistcoat, and black shag breeches, and a feathered hat: that he looked into the kitchen, and went immediately to the room where the pannel and his family were: that afterwards he used to go to the country to different places, and come frequently back to the pannel's house: that once he remained there a week, which is the longest time he stayed there at one time. Depones, that the said Allan Breck Stewart came to the pannel's house from Fasnacloich upon Monday the 11th of May last, about mid-day, dressed as above: that, upon the evening of the said day, the deponent saw the said Allan Breck dressed in a black short coat with silver buttons. Depones, that there was two short black coats with silver buttons in the pannel's house; the one belonging to the pannel, and the other to Allan Stewart, his son; the deponent does not know which of them the said Allan Breck had on. And depones, that the coats were so like, that he could not distinguish the one from the other. And depones, that it was one of these black coats he had on, the deponent having seen him, the said Allan Breck, near the houses, in his side clothes; and some time thereafter, coming from the house, dressed in the said short coat, in the evening of the said Monday the 11th of May, and came where the deponent and John More Maccoll were covering potatoes, and wrought with them for some time. Depones, that, some time thereafter, a young lad, brother to Glenure, by name Donald, as the deponent thinks, came to them, and told that Glenure was come home from Edinburgh, and was to go to Lochaber; upon which, some conversation happening about removing the tenants, Allan Breck said, Devil a bit of the new tenants would get possession, unless they had a warrant to shew, or come in by force. Depones, that, when the said Allan Breck came, upon the 11th of May last, to Aucharn, the pannel was seeing the deponent, John More Maccoll, and Dougal Maccoll, working at potatoes; and that Allan Stewart, the pannel's son, was likewise there: that, when Allan Breck came, they were sitting all together; and that he seated himself by the pannel and had some conversation in English, which the deponent does not understand. Depones, that Charles Stewart, son to the pannel, and — Stewart, daughter to Fasnacloich, came to Aucharn from Fasnacloich, a little after the said Allan Breck. Depones, that upon Thursday the 14th of May last, the pannel gave a letter to the deponent,

* See the Pannel's Dying Speech at the end of the Case.

to be delivered to Charles Stewart, notary public at Maryburgh; and told the deponent, that the letter was to make or cause the said Charles Stewart come to the country of Appin to protest against Glenure, in case he had not a sufficient warrant to remove the tenants of Ardsiel. Depones, that the pannel desired the deponent to make all possible dispatch, and desire John Breck Maccombie at Kintalline, and the said John More Maccoll, servant to the pannel, who was then at Kintalline, to ferry the deponent from Kintalline to Onich, being much shorter than the ferry of Ballachelish. Depones, that the pannel also told him, that he was to get some money from William Stewart, merchant at Maryburgh, to pay for milk-cows that were bought for him in the country; and that, if the money was not sent, he would not get the cows. Depones, that he was ferried from Kintalline to Onich, and went on to Fort William, and met Glenure at the three-mile water, who asked the deponent from whence he came? To which the deponent answered, That he had come over Keilis. Depones, that, being acquainted with Glenure's servant, he had some conversation with him, and told him he was going to Fort William. Depones, that he set out from Aucharn about 7 or 8 o'clock in the morning, and made all the dispatch he could to Fort William, where he arrived about 12 o'clock. Depones, that when he came to Fort William, he delivered the letter he got from the pannel to William Stewart, merchant in Maryburgh, who told him, that Charles Stewart the notary was not at home, he having gone to the braes of Lochaber in the morning; and told the deponent, that he, the said William, had wrote to the pannel in the morning; and that there was a notary along with Glenure, who would serve the pannel as well as Glenure. Depones, that he does not remember that he asked for any money from William Stewart, nor did he give him any, but said, he would send servants for the cattle. Depones, that he stayed a very short time at Fort William: that the said William Stewart asked him, if he wanted victuals? Upon the deponent's answering he did not, the said William brought him into his house, and gave him a dram; and the deponent immediately returned back by the short road to the ferry of Ballachelish, and found Glenure at the ferry before him: that the deponent required of the ferry-man to ferry him immediately, and the ferry-man desired him to stay till he would be ferried with Glenure's horses; but the deponent observed to him that the stream was rapid, and might draw some time before they would ferry the horses, he ought to ferry him immediately, which he accordingly did; and that this might be about 4 o'clock: that upon his crossing the ferry, he met Archibald Macinish, ferryman upon the Appin side, to whom he told where he had been, and his errand; and that the said ferryman told the deponent, that he was informed by a man, that he was going to meet Glenure: that the new tenants, that were to

come to Ardsiel, had come to Glenduror with their cattle; and were to take possession next day; and the deponent told him, that he did not believe they would get possession till their warrants were seen. Depones, that, a little thereafter, he met Alexander Stewart elder of Ballachelish, to whom he told where he had been, and his errand, and the conversation he had with the ferry-man; and Ballachelish desired him to tell his master, if he would send for him, he would go along with him to see Glenure's warrant. Depones, that he passed through the wood of Lettermore, and met or saw nobody there: that he went then home, and gave the pannel an account of his errand. That he was hardly an hour there, when John Mackenzie, Glenure's servant, came to the door calling for the pannel: that the pannel went immediately to the door, and asked the servant, what was the matter, and what news he had? To which the servant replied, The worst I ever had; my master is murdered in the wood of Lettermore: upon which James Stewart said, Lord bless me! was he shot? To which the servant answered, that he was shot, and said the pannel ought to go and take care of his corpse: that the servant immediately went off, but neither the pannel nor any of his family went near the corpse; and the pannel said, that, as he and Glenure were not in good terms, and some of the people that were to meet Glenure had arms, he did not care to go near them, not knowing what might happen. Depones, that his master said, that it was a dreadful accident, and was afraid would bring trouble on the country; and appeared to be sorry for what had happened. Depones, that, upon the evening of Friday the 15th of May last, the deponent and the said Dougal Maccoll overtook Katharine Maccoll, servant to the pannel, going up the brae above the house with a sack, and something in it, under her arm; and the said Dougal Maccoll asked her, what she had got there? To which she answered, That it was Allan Breck's clothes, which she was going to hide; and she hid them accordingly in the deponent's presence. Depones, that, when the said Allan Breck came first to Aucharn, he used to lie in a room in the lower end of the house; but afterwards he, and the pannel's sons, and any young people that came about the house, when the season was more advanced, used to lie in the barn. Depones, that, upon the said Friday evening the 15th of May last, Margaret Stewart, the pannel's wife, desired the deponent and the said Dougal Maccoll to hide all the arms that were about the house, as there was a party of soldiers coming to the country: that accordingly they took two guns and three swords, and a fourth sword was delivered to the deponent by Allan Stewart, son to the pannel; which two guns and four swords the deponent and the said Dougal Maccoll hid in the brae a good way above the pannel's house; and the two guns in the clerk's hands being shewn to the deponent, depones, that these were the

same two guns that were hid as above. Depones, that the largest of the guns, now shewn the deponent, was loaded, and lay in the brew-house; and the deponent believes, that either Allan Stewart, the pannel's son, or Allan Breck Stewart, charged the said gun; for the deponent saw Allan Breck Stewart have the said gun some time before, and go with it in order to shoot black cocks: that late on Thursday evening the 14th of May last, after notice came of Glenure's murder, the said Dougal Maccoll told the deponent, that the pannel's wife had desired to hide all the arms about the house, not knowing but that some soldiers might come to the country; upon which the deponent and the said Dougal carried the said loaded gun from the brew-house, and hid it under the thatch upon the outside of the sheep-house, and carried three swords out of the barn, and hid them under the thatch upon the outside of the said barn, being that barn where the pannel's children and Allan Breck used to lie: that, upon their being desired by the said Margaret Stewart next day to hide the arms better, they took the foresaid loaded gun and three swords out of the places where they had hid them; and upon their inquiring for the other gun that used to lie in the said barn, Allan Stewart, the pannel's son, told them, he had hid it under the large girdel in the barn, and told them they need not stir it, as it was safe enough there; but they answered, as they were hiding the rest, they would hide that likewise; and accordingly the deponent went and took the said gun from the girdel, where the said Allan told him he had hid it, and concealed them all together as above: upon recollection depones, that it was upon the Thursday evening the deponent and the said Dougal Maccoll inquired about the little gun which lay at the end of the girdel in the barn, and that the said Allan Stewart, son to the pannel, told them he had hid it, as above, under the girdel. Depones, so far as he can remember, he did not see the said little gun upon Thursday, but saw it stand as above, either upon Tuesday or Wednesday preceding, and used for some time preceding to see it stand in the same place. Depones, that it was upon Friday evening the deponent took the said gun from under the girdel, where the said Allan had hid it; and adds, that the reason he did not see it on the Thursday was, that he was from home almost that day. Depones, that he did not see the said little gun loaded, since March last, when the black cocks were crouding; that then there was a shot of drops in it, and the said Allan Breck carried it out one morning, and told that it mis-gave with him thrice at a black cock, and shot with it the fourth time without killing the black cock. Depones, that the brew-house, where the said large gun used to lie, was always locked, but when people were in it: that the barn, where the said little gun stood, had a lock and key, but was not in use to be locked since the crop was removed out of it, which was at the time they were done with

their oat-seed, which was some time before May-day. And, being interrogate for the pannel, depones, that neither of the guns were in good order: that the large or loaded gun was in use, when going to be snapped, to stand at half-cock, and the little gun was in use to snap or misfire. Depones, that the little gun had an old wore flint in it; and that he observed this flint in the said gun, when he was in use to see it stand at the end of the girdel as above; but did not observe whether it had a flint or no, when he took it from under the girdel as above. Depones, that he knows no fault the lock of the little gun had, but its being in use to misfire; and that the lock was on the said gun when he hid it the Friday evening as above. Depones, that when Allan Breck came, upon Monday the 11th of May last, to the place where the pannel, deponent, and others, were covering potatoes as above, they had sit together but for about a quarter of an hour; the deponent went to work at potatoes at a greater distance, and, before he went away, heard a message had come for his master, to meet Airds at Keil, and heard his master speak of going there; but when he went, or who went along with him, the deponent does not know: that the deponent continued working at the potatoes till the evening, and the pannel was not come home when he came from his work: that the pannel came home at bed-time, accompanied with John More Macilichattan, who lay with the deponent that night. Depones, that it was a while after (the deponent cannot say how long) the pannel parted from the deponent, and the other people that wrought at the potatoe-ground, that Allan Breck came dressed in the black short coat as above, and wrought with them at the potatoes. Depones, that they all got up together, after the said Allan Breck came to them, and sat with them as above; and he thinks the pannel went then towards the house. Depones, that Allan Breck and the pannel were in use to converse together, sometimes in English, and sometimes in the Irish language. Depones, that, when he went to Fort-William, with the above letter, to Charles Stewart, the notary, he had no orders from his master to inquire after the motions of Glenure, or to acquaint any body thereof. Depones, that he never saw the said Allan Breck Stewart change his clothes, and put on short clothes, at any time, at the said James Stewart's house, before the said 11th of May; but that, as the deponent best remembers, at the time the said James Stewart was at Edinburgh, he saw the said Allan Breck dressed in a black short coat, a dun big coat which the deponent thinks belonged to Allan Stewart, the pannel's son; and he heard the said Allan Breck, or others about the house say, that he was then going to Rannoch. *Causa scientis patet.* And this is truth, as he shall answer to God; and depones he cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

Captain David Chapeau, in general Pulteney's regiment of foot, married, aged 52, witness cited, sworn, purged and examined *ut supra*, depones, that, upon the 23d of May last, he was informed by Mr. Campbell of Barcaldine, that there were some arms hid among the rocks near the pannel's house; and was, at the same time, shewn the paragraph of a letter from colonel Crawford, who commands the regiment to which the deponent belongs, addressed to Barcaldine, wherein the colonel desired the deponent to go in search of such arms. Accordingly the deponent went that day with a party, and took along with him Mr. Patrick Campbell of Auchinsicallan, to direct him the road; and, when they came to a hill above the pannel's house, Mr. Campbell found concealed in a hill above the pannel's house two muskets and four broad-swords, whereof having informed the deponent, the deponent went and saw them taken out. And the muskets or fuzees, now in the clerk's hands, being shewn to the deponent, depones, that they are the very same fuzees he saw taken out as aforesaid: and depones, that the largest of the two fuzees was loaded, and the other not; and that, having drawn the shot of the loaded piece, he found it to be loaded with small-shot, by which he means drops and small slug mixed together; and it appeared to the deponent, that the said unloaded piece had been lately fired, having put his finger in the muzzle, which he brought out black. And, being interrogate for the pannel, whether a piece which is laid by foul, will not, after a month's time, file one's finger, when put in the muzzle of it, as well as when it has been lately fired? depones, he cannot tell, not being accustomed to see arms used so. And depones, that the said unloaded piece had a lock upon it at the time; but which had only one screw-nail in it. But depones, that a gun, having a lock with one screw-nail, may be fit enough to be fired with; and adds, that that end of the lock wanting the nail, was tied to the stock by a string. Depones, that the pieces, or fuzees, were carried along to Fort-William, where the deponent delivered them over to the adjutant at Fort-William; and does not know by what means the said lock upon the small piece, now amissing, was lost; but believes it to have been by accident. *Causa scientie patet.* And this is truth, as he shall answer to God.

JA. FERGUSON.

(Signed)

D. CHAPEAU.

Patrick Campbell in Auchinsicallan, married, aged 33 years, witness cited, sworn, purged and examined *ut supra*, depones, That some time in May last, he thinks on the 23d, he was called by captain Chapeau to go along with him to Aucharn in search of arms; and, having come to a moss, above the pannel's house of Aucharn, the deponent discovered two guns in a cove; whereupon he immediately called to the captain, who was with him, when they were taken out of the cove; as also, there

was also there three or four broad-swords. Depones, that one of the guns was heavier than the other; and the lightest gun had a stick laid along the lock tied by a string about the stock: but, whether the said lock had any screw-nail, or not, he does not remember; and that these arms were carried away by captain Chapeau. Depones, that the lightest of the said two guns was unloaded, and the heaviest loaded: that he saw the shot of the loaded gun drawn, which consisted of drops, with some small slug among them. Depones, that, in order to know whether the unloaded piece had been lately fired, several put their finger in the muzzle of it; and particularly the deponent; and the finger coming out black, he, and the rest with him, from thence concluded, that it had been lately fired. And, being interrogate for the pannel, whether a musket that has been laid by foul, after firing, will not, in like manner, file a man's finger put in the muzzle of it, after it has been fired a month or longer before? depones, that he never made that trial upon a gun that he knew to have been so long before fired. *Causa scientie patet.* And this is the truth as he shall answer to God.

(Signed)

JA. FERGUSON.

PAT. CAMPBELL.

William Stewart merchant in Maryburgh, aged thirty-six years, married, sworn, purged and examined *ut supra*; and, being shewn a letter, dated at Maryburgh the 14th of May last, signed William Stewart, and addressed on the back to the pannel, being the writing number 10, in the inventory subjoined to the libel; depones, That the letter is of his hand-writing, and was subscribed by him, and sent to the pannel, of the date it bears, by Ewan Mackenzie, a common carrier in Maryburgh. And, being also shewn a letter dated at Aucharn the 14th of May last, eight o'clock in the morning, signed James Stewart, and addressed on the back to Mr. Charles Stewart, writer at Auchintour, depones, that the said letter was wrote by the pannel, and sent, of the date it bears, by John Beg Maccoll, and in absence of the said Charles Stewart, who was not then at Maryburgh, was delivered by the said Maccoll to the deponent, who broke it open, and told Maccoll, that Charles Stewart was not then in Maryburgh, but that he expected him that night, but thought that he could not go along with Maccoll: that Maccoll asked the deponent, if he should wait for him, or go after him? The deponent answered, it was needless; for, if Charles Stewart could go, he would take a boat. And, being interrogate whether he wrote any answer by John Maccoll, or if he gave him any verbal answer to the postscript, wherein the pannel wrote to Charles Stewart, to tell the deponent to send him eight pounds sterling? depones, he gave no answer in writing; and thinks he did not give any verbal answer, if it was not, that he bid him tell his master he was not in cash, which was the case. And depones, that the deponent was himself

intended by the William in the postscript. Depones, that Maccoll did not stay three minutes with the deponent, when he went away. Depones, that the next day, being Friday, or the day thereafter, the deponent had a message from the pannel about ten o'clock forenoon, or betwixt ten and twelve, by Alexander Stewart, packman, who told the deponent, that he was sent by the pannel to Glenevis, and was ordered in his way to call at the deponent to send the pannel five pounds sterling; and that his errand to Glenevis was, to desire him to send for a horse that he had bought from the pannel: that the deponent told the packman, that he was not in cash, and could not send the five pounds; upon which the packman said, that the five pounds was to relieve some cows that the pannel had bought for the deponent at Ardsbiel; and, if the deponent did not send the money, he could not get the cows: that the deponent said, he was indifferent, but had not the money to send; upon which the deponent's wife desired the packman to go forward to Glenevis, and to call there in his return, and he would get the money, because they could not conveniently want the cows: that the packman accordingly went away; and the deponent's wife, as she afterwards told him, for he was not present, gave him three guineas: that the deponent is sure the money was not given on a Sunday, and thinks it was on a Saturday; and therefore believes it was upon Friday the 15th that the packman first called, the deponent being certain that a night intervened betwixt his calling and getting the money. Depones, that he had no conversation with the packman touching Allan Breck Stewart, whose name was not mentioned by either of them; but the deponent asked him, if he had come by the road where that unlucky murder of Glenure had happened? And the packman told him, he did; but the deponent did not ask him who was suspected for it; nor had any other conversation on that subject, there being a great many people present in the shop at the time. Depones, that the deponent received two of the cows about eight or ten days after, and other two he did not get at all. And being interrogate for the pannel, depones, that, upon Allan Breck Stewart's first coming to this country, which was in the month of February or March last, the deponent saw him at Edinburgh: that thereafter, upon the 1st of May last, the deponent happening to be at the pannel's house, Allan Breck Stewart came there from Rannoch, and was dressed in a short black coat with clear buttons, such as these now lying in the court. Depones, that when the deponent saw Allan Breck Stewart at Edinburgh, which, he thinks, was in February, he told the deponent, that it was then but three or four days since he arrived from France. Depones, that, at that time, Allan Breck Stewart was dressed in long clothes, a blue coat, and, as the deponent thinks, a red vest, a hat feathered in the inside. Depones, that, when the deponent was at the

pannel's, the 1st of May, Charles Stewart was there also, in order to go to Glenure, and intimate a sist that had been obtained in name of the tenants of Ardsbiel, upon a bill of suspension of a removing against them. Depones, that Allan Breck Stewart told the deponent, that he had been a soldier in the king's troops at the battle of Preston; and he thinks, he said, it was in Lascelles' regiment, but is not positive, whether it was Lascelles' or Murray's. And depones, that thereafter he was in the rebellion. Depones, that, when he was at the pannel's house, the 1st of May, as aforesaid, he did not sleep within the pannel's house, and seemed to be on the watch, lest he should be searched for. And, being interrogate, whether Allan Breck Stewart did not then lie in the barn, and some of the pannel's children with him? he says, it is very probable he might; but the deponent knows nothing of it; for the deponent saw him next morning, and, he thinks, breakfasted with him at the pannel's house. Depones, that the deponent is first-cousin to the pannel, and also his brother-in-law. Depones, that, before Charles Stewart went with the tenants to Glenure's house, upon the 1st of May, the deponent heard the pannel say to the tenants, that they might go, or not, as they thought proper; but he would be far from advising them. *Causa scientia patet.* And this is truth, as he shall answer to God.

(Signed)

P. GRANT.

WILLIAM STEWART.

Barbara Watt, spouse to William Stewart, merchant in Maryburgh, aged twenty-eight years, sworn, purged and examined *ut supra*, depones, That the day immediately after the murder of Glenure, about mid-day, Alexander Stewart, packman, brought the deponent's husband, the preceding witness, a message from the pannel, to send him five pounds sterling, to pay for some cows that the pannel had bought for him: that the deponent's husband was angry at the message, and said, that he had not then the money to give, having given away some money that morning; but that though he had it, he would not send it; and the packman answered, that he was a sufficient *but* himself for all the sum, though the pannel had not sent for it: that the packman told at the same time, that he was going to Glenevis on some message from the pannel touching a horse; therefore the deponent interposed, and desired the packman to call there in his return from Glenevis, and he would get the money; for that they behoved to have the cows to stock a farm they had: that this conversation happened in the deponent's shop, where several other persons were present. Depones, that, next day in the afternoon, the deponent's husband not being then at home, the deponent met the packman in the street of Maryburgh, and happening to have three guineas then in her purse, she gave them to him there in the street, and called her servant-maid to be witness, because there was no letter from the pan-

nel, nor receipt to be given by the packman. *Causa scientie patet.* And this is truth, as she shall answer to God. (Signed)
P. GRANT. BARBARA WATT.

Alexander Stewart, travelling packman in Appin, aged thirty, unmarried, witness cited, sworn, purged and examined *ut supra*, by Archibald Campbell, writer in Inverary, sworn interpreter foresaid, depones, That, upon Friday the 15th day of May last, about twelve o'clock, the pannel desired the deponent to go to Fort-William, to William Stewart, merchant there, and get from him five pounds, or five guineas; and told the deponent, that his friend Allan Breck was about to leave the country, as there were troops coming into it, and that he might be suspected of Glenure's murder; and that it was incumbent upon him, the pannel, to supply the said Allan Breck in money; and the pannel desired the deponent to tell the said William Stewart, that he must send him money, though he should borrow it from twenty purses; and desired him also to tell the said William to give credit in five pounds sterling to John Breck Maccoll, bouman* to Appin at Koalisnacoon, in case he came to demand such a sum; and the pannel desired the deponent to demand four pounds sterling more from the said William, as the price of a couple of milk-cows bought for him. Depones, that, in consequence of the above message, he went to Fort-William, where he arrived early in the evening: that he met the said William Stewart, and demanded from him, for the use of the pannel, the two sums above-mentioned: that the said William told him he had not money, but desired the deponent to go to Glenevis, and that he, the said William, had business to Glenevis, would meet the deponent there in the morning, and give him his errand. Depones, that the pannel desired the deponent to tell the said William Stewart to send notice to Glenevis, that he should send for a stoned horse Glenevis had bought from the pannel. Depones, that he went to Glenevis, where he arrived about sunset, and stayed there the said Friday's night: that, as the said William did not come there Saturday morning, the 16th day of May last, the deponent went back to Fort-William, and met the said William Stewart upon the street, and asked him if his answer was ready? that the said William said, that he would let him go immediately, and went into his own house, and immediately thereafter Mrs. Stewart, spouse to the said William, came to the door, and gave the deponent three guineas, with which the deponent went back immediately to Aucharn, and arrived there in the evening of the said Saturday the 16th of May: that when he came to Aucharn, the pannel was not at home; but soon after the deponent's arrival, notice came, that the pannel, and Allan Stewart his son, were made prisoners at Inshaig, a place of about a quarter of a mile from Aucharn: that,

immediately upon this notice, Mrs. Stewart, the pannel's wife, and the deponent went to Inshaig, and by the way the deponent saw the three guineas he had brought from Fort-William to Mrs. Stewart, but she desired him to keep them: that, upon their arrival at Inshaig, they found the pannel a prisoner; but Mrs. Stewart and the deponent having had access to converse with the pannel apart, the pannel asked the deponent, what money he brought from Fort-William? and upon the deponent's telling him, that he brought three guineas, the pannel pulled a green purse out of his pocket, out of which he took two guineas, and gave them to Mrs. Stewart, and Mrs. Stewart delivered the two guineas immediately to the deponent; and the pannel desired, that the five guineas should be sent to that unhappy man, meaning Allan Breck, to see if he could make his escape; and pitched upon the deponent as a person that should go with the money; and does not remember positively, that the pannel spoke about Allan Breck's clothes: that soon thereafter the pannel was carried off by a party to Fort-William, and the deponent returned to Aucharn with the pannel's wife: that the party and pannel called at Aucharn, and took a dram; and upon their going off, Mrs. Stewart, the pannel's wife, told the deponent, that he must go to Allan Breck with the five guineas and his clothes; and upon the deponent's inquiring where he would find him? Mrs. Stewart told him, that he would cast up in Koalisnacoon. Depones, that, some time after night-fall, the deponent got his supper at Aucharn, and how soon he was done eating, Mrs. Stewart, the pannel's wife, carried the deponent to the back of the brewhouse, where there lay a sack, out of which the said Mrs. Stewart took a blue side coat, red waistcoat, black breeches, a hat, and some shirts, all which she delivered to the deponent, ordering him to go with the clothes and money to Koalisnacoon immediately, and deliver them to John Breck Maccoll, bouman to Appin, if he did not meet Allan Breck himself. Depones, that the said Mrs. Stewart directed the deponent not to carry the clothes to John Breck Maccoll's house, lest any body might see them. Depones, that he declined going, and told Mrs. Stewart that she might send some other person, and that, at any rate, he did not chuse to go alone in the night-time; but that Mrs. Stewart insisted upon his going, telling there was no other body she could send, as both her servants were gone to Fort-William, and desired the deponent to carry his sister, Margaret Stewart, a part of the way with him: that accordingly the said Margaret his sister went along with the deponent as far as Larich in Glenco, where she parted with him about day-light Sunday-morning: that thereafter the deponent travelled alone to Koalisnacoon, and left the clothes, as directed, at the root of a fir-tree, at some distance from the houses; and as the deponent was going to the house, he met said John Breck Maccoll, and asked him if Allan Breck was there? And upon his deny-

* See a note to p. 118, of this volume.

ing that he was there, the deponent expressed some surprise, and that he was ~~sent~~ with ~~money~~ ^{the clothes} to him; told from whence he came, and how he got the money and clothes above-mentioned; upon which the said John Breck Maccoll told the deponent, that Allan Breck was in the heugh of Corrynakeigh, above the house of Koalishacoan; and if the deponent inclined to see, the said John Breck Maccoll directed him to go to a hill above the houses and whistle, and that the said Allan Breck would come to him: that the deponent answered, he had gone far enough after the said Allan Breck already, pointed out to John Breck where he had left the clothes, and gave him the five guineas to be given Allan Breck. Depones, that he went to the said John Breck's house, where he slept for some time, and thereafter dined with the said John Breck at his house. Depones, that the said John Breck Maccoll told the deponent, he did not know how the said Allan Breck could leave the country, as he had no victuals, and he, the said John, had none to give him, and desired the deponent to go to Mrs. Macdonald of Glenco's house at Inver, and get a peck of meal for Allan Breck's use, which the deponent refused. Depones, that the said John Breck Maccoll told the deponent, that, unless he had come with the money and clothes, he, the said John Breck, would have been obliged to go to Fort William for money to the said Allan Breck. Depones, that he, the deponent, came back to Aucharn upon the evening of the Sunday the 17th day of May last, and the pannel's wife asked him if he had seen Allan Breck? And upon his answering he had not, and telling that Allan Breck was at Koalishacoan, though he had not seen him, and that he had given the clothes and money to John Breck, she appeared satisfied. Depones, that the said John Breck Maccoll desired the deponent to conceal his carrying the clothes and money to Koalishacoan, as above; told him that he could not prove it against him, and that he could safely depon he did not deliver the clothes to him, since he only pointed out where they were. *Causa scientie patet.* And this is the truth, as he shall answer to God. And declares he cannot write. And further depones, that he is a distant relation of the pannel's, though he cannot tell the degree: that his father lives at a quarter of a mile's distance from Aucharn; and that he, the deponent, used to be often in the pannel's house. And this is also truth, as he shall answer to God.

(Signed)

P. GRANT.

ARCHIBALD CAMPBELL.

John Breck Maccoll, bowman to Appin in Koalishacoan, aged forty years, married, sworn, purged and examined *ut supra*, by the above Mr. Archibald Campbell, sworn interpreter, depones, That, upon the afternoon of Saturday the 16th day of May last, as the deponent was in a fir-bush near Aldavoim, at the foot of the heugh of Corrynakeigh in Koalis-

nacoan, he heard a whistle; and upon looking up, saw Allan Breck Stewart, at a little distance, beckoning to the deponent to come towards him; which he did: that after salutations, the deponent told him, he was afraid it was no good action that occasioned his being in such a remote place, and at such a distance from any common road: that Allan Breck answered the place was not very far from a common road: that the deponent, having heard the day before of Glenure's murder, charged Allan Breck with being guilty of it: that Allan Breck asked the deponent, what he had heard about the murder? That deponent answered, that he had seen no person from the strath of Appin; but that two poor women, that had come up Glenco, were telling that Glenure was murdered Thursday evening in the wood of Lettermore, and that two people were seen going from the place where he was murdered; and that he, Allan Breck, was said to be one of them: that Allan Breck answered, he had no concern in it; and that, if his information was right, there was but one person about the murder; and that, as he was idle in the country, he was sure he would be suspected of it; but that that would give him little concern, if he had not been a deserter, which would bear harder upon him, in case he was apprehended, than any thing could be proved against him about the murder: that the deponent did not believe him, when he said he had no hand in the murder of Glenure; and not caring to press it much upon him, told him, that, as he was already suspected, it was dangerous to have any intercourse with him, and pressed him to leave the place, lest he should bring the deponent and his family to trouble: that Allan Breck said, he did not doubt but the family of Ardabiel would be suspected of the murder, and it was probable the pannel, and Allan Stewart his son, might be taken into custody about it; and that he, Allan Breck, was afraid Allan Stewart the pannel's son's tongue was not so good as his father's; by which words the deponent understood, that Allan was easier entrapped than the pannel; and the deponent still insisting upon Allan Breck's leaving that neighbourhood, the said Allan Breck told him, he would not leave the town for eight days, unless some necessities he expected came to him; and told the deponent, unless some money came for him before next morning, he, the deponent, must go to Fort-William with a letter: that though the deponent refused to go, Allan Breck looked about among the trees, and finding a wood-pigeon's quill, made a pen of it, and having made ink of some powder he took out of a powder-horn that was in his pocket, he wrote a letter, which he told the deponent he must deliver to William Stewart, merchant at Maryburgh; and, upon the deponent's telling him that he would by no means undertake that, as he was informed that every body that went to Fort-William was searched, Allan Breck said it was an easy matter to hide a letter; the deponent answered, If he was caught

upon the streets, what would he do with it? Allan Breck told him that the letter must not be found upon him by any means, and, if he was caught with the letter, he must eat it before it was found: that the deponent then told the said Allan Breck, that he did not know but he would be obliged to go for some beer next day to Fort William, in which case he might possibly carry the letter; but at the same time told the said Allan Breck, if he was caught with the letter, he would tell all he knew about him: that the said Allan Breck desired the deponent to go to Callart or Glenco's house for a peck of meal to him, which the deponent refused; and at parting, the said Allan Breck told the deponent, he would see him next day. Depones, that, at the time of the above conversation, the said Allan Breck Stewart was dressed in a dun-coloured great coat, black short coat, and blue trowsers striped with white. And the deponent having seen in court the black short coat with the buttons on the pockets, and the trowsers, depones, that they are the short coat and trowsers he saw the said Allan Breck wear, or exactly like them. Depones, that early upon Sunday morning the 17th day of May last, as the deponent got up to look about his corns, he saw a man, which he at first imagined to be the said Allan Breck Stewart, travelling towards him up the glen; but, upon his coming near, the deponent knew him to be Alexander Stewart, travelling pack-man in Appin (the immediate preceding witness), who is cousin-german by the father's side to Allan Breck; and after salutation, and the deponent's expressing his surprize at seeing him so early, the said Alexander Stewart asked the deponent, if he had seen Allan Breck? And the deponent refusing his having seen him, Alexander Stewart seemed surprized, and told that he was informed he would meet Allan Breck there: and that he had brought some necessaries for him: and the deponent inquiring what he had brought, the said Alexander Stewart informed him, that he had brought five guineas and some clothes; and told that he had a great deal of trouble in getting the money: that he had been sent by the pannel to William Stewart, merchant, at Fort William, from whose wife he got three guineas; and that the pannel, or his wife, gave him the other two guineas; and that the pannel's wife gave him the clothes, and informed him that Allan Breck was to meet him at Koalisnacoon; but that now he would leave the money and clothes with the deponent: upon this the deponent told the said Alexander Stewart, that he had seen Allan Breck the day before, and that he expected these things; and told him, that he believed Allan Breck was then in the bough of Corrynakeigh, and, if he would go to a hill that the deponent pointed out to him, and whistle once or twice, he believed Allan Breck would come to him: the said Alexander Stewart declined going, alleging he was very much fatigued: that the deponent told the said Alexander Stewart, that he wondered he would not

VOL. XIX.

go that length to see his uncle's son; the said Alexander Stewart answered, that he had slept none for two nights, and was very much fatigued; and upon this he delivered to the deponent the five guineas, and told he had left the clothes at some distance, and would shew them to the deponent when he was going away: that the deponent told the said Alexander Stewart, that Allan Breck wanted a peck of meal from Glenco or Callart's house; and that he, the said Alexander Stewart, ought to get it for him; but the said Alexander Stewart refused to go for it: that, afterwards, the said Alexander Stewart slept in the deponent's house. Depones, that the said Alexander Stewart told him, that the pannel, and Allan his son, were made prisoners the evening before, and sent to Fort William; and, upon the deponent's inquiring who was suspected of Glenure's murder? the said Alexander answered, that it was Allan Breck, and that it was likely that the pannel, and Allan his son, would stand the first trial for it. Depones, that the said Alexander Stewart and the deponent dined together; and as the said Alexander Stewart was going away, about 12 o'clock, he pointed out a fir-tree, at the root of which he said he had hid Allan Breck's clothes. Depones, that, after the deponent had gone to bed, upon the said Sunday evening, he heard one knocking at the window, and imagined it might be Allan Breck; the deponent got up, and went out in his shirt, and saw the said Allan Breck at a little distance from the house; and, upon the deponent's coming up to him, the said Allan Breck asked him if any message had come for him? The deponent told him, that his uncle's son had come with five guineas and some clothes: that Allan Breck complained there was but little money, but hoped it would do his business: that the deponent told the said Allan Breck, he was afraid he would starve among the heather; and that he was not able to help him: that Allan Breck answered, he had no occasion for victuals, but wanted a drink very much: upon which the deponent went back to his house, and carried out some whey, or some milk and water, in a noggin, and the five guineas, and gave both to Allan Breck: that the deponent then went for the clothes, which he also gave the said Allan Breck, which consisted of a blue long coat, red waistcoat, black breeches, a hat, some stockings and shirts: that the deponent told the said Allan Breck, that the pannel, and his son Allan, were apprehended upon account of Glenure's murder; to which Allan Breck answered, that that was no more than he expected; but it would not signify much, as there could be no proof against them: but expressed some apprehension, lest Allan Stewart, son to the pannel, might be betrayed by his own tongue: that the deponent desired the said Allan, now that he had got all the necessaries he expected, to go about his business; and the said Allan Breck promised to do so; but told the deponent, that he must meet him, the said Allan Breck, next morning; that he must deliver the

L

deponent the clothes he, the said Allan Breck, had then on, to wit, the black short coat and trousers shewn to the deponent in the clerk's hands, in order to be kept by the deponent till he delivered them to the pannel's wife: that the deponent promised to meet the said Allan Breck next morning, but did not see him; and when the deponent went out next morning, he found the said short black coat, trousers, and the noggin in which the deponent carried the drink to the said Allan Breck, lying together in the place where the deponent parted with the said Allan Breck the night before; and found in one of the pockets of the said short coat the powder-horn now shewn him in the clerk's hands; and depones, that he has not seen the said Allan Breck since. Depones, that, in a conversation the deponent had with the pannel, as the deponent best remembers, about two years ago, mention being made of Glenure's being about to take the management of the estate of Ardsbiel from the said pannel, and thereby disabling the pannel from being of any service to Ardsbiel's children, he heard the pannel say, he would be willing to spend a shot upon Glenure, though he went upon his knees to his window to fire it. Depones, that he heard a waif report in the country, that Ardsbiel (attainted) had sent home a message, that he believed all his friends were dead, when Glenure was allowed to go on at the rate he did. Depones, that, upon the evening of the said Saturday the 16th day of May last, Katharine Maccoll, spouse to Hugh Maccoll, in Kaelismacoan, told the deponent, that she had seen a man in the heugh of Corrynakeigh that day at some distance, and was greatly frightened: that the deponent told her, there used to be bogles seen in that place, but she must take no notice of what she had seen, for fear of frightening the women of the town, and prevent them from attending their cattle in that part; and that the reason of telling her so, was for fear it would be known it was Allan Breck she saw. Depones, that, when he found the black short coat and trousers he saw Allan Breck wear, upon Monday morning the 18th of May last, he hid them; and that, after he, the deponent, had been some time prisoner at Fort William, became along with a party of soldiers, to whom he shewed the place he hid the said clothes; and the said party took the said clothes out of the place he had hid them in, in the deponent's presence, and carried them to Fort William. *Causa scientie patet.* And this is truth, as he shall answer to God; and depones he cannot write.

ARCH. CAMPBELL.

(Signed) J. A. FERGUSON.

Hugh Macclean, barber in Maryburgh, aged 27 years, married, sworn, purged and examined *at supra*, depones, That being a barber to his trade, and one day being called by the pannel to the prison to shave him, which he thinks was upon a Saturday, the pannel asked him, what news he heard in the town? To which the deponent answered, that he heard

that he, the pannel, was to be carried to Edinburgh on the Monday following: whereupon the pannel said, That that was a matter gave him no concern, and wished it had happened sooner, and was afraid of nothing but that his servants might be enticed to take money, and turn against him; and desired the deponent, as from him, to tell his servants to say nothing but truth, to keep their minds to themselves, and he would take care of them; and accordingly the deponent delivered the pannel's message, in his own words, to two of his servants, who were then in separate custody in the same prison; and that they were both of the name of Maccoll. Depones, that at this time the pannel gave the deponent a shilling, and said, when he came again to shave him, he would give him more; but that he never got more from him than the said shilling. Depones, that from the pannel he went to his son Allan also to shave him, to whom he told the commission his father had given to be delivered to the servants; and the said Allan gave him half-a-crown.* *Causa scientie patet.* And this is the truth, as he shall answer to God; and depones he cannot write.

(Signed) J. A. FERGUSON.

* "With respect to this deposition, it is to be noted, that, after it was finished, the pannel directed the following question to be put to the witness by the Lord Examiner, viz. How long he had shaved the pannel and his son, before he received the above named shilling and half-crown? and if he had formerly received any payment from them? In answer to which Macclean deposed, That he had shaved them both for five or six weeks before, and never received any money but the said shilling and half-crown. The Lord Examiner said, he did not think it was necessary to make this addition to the deposition; but would cause it to be done, in case the pannel's lawyers insisted to have it done. To which one of the pannel's lawyers answered, That, seeing the jury had heard the answer of the witness (still upon oath) to the interrogatory put for the pannel, and that the judge did not think it necessary to be added, he did not insist for it. Now, in the first place, As to the giving of this shilling and half-crown to the barber, was there not good reason for it; as they were then resting the barber for several weeks shaving; and that he depones he had told them on the Saturday, they were to be transported from Fort-William to Edinburgh on the Monday following? In the next place, As to the commission given to the barber, (which, by the by, is the only one; so no reason for saying, as Mr. Erskine does, repeated commissions); it consists of three particulars. For the first, To tell his servants to say nothing but the truth. Sure no good man can find fault with this. For the second, To keep their minds to themselves. This is agreeable to the declaration of the estates of the kingdom of Scotland, comprehending the Claim of Right, &c. and the grievances repre-

Thomas Baird, serjeant in general Pulteney's regiment of foot, aged 32 years, married, witness cited, solemnly sworn, purged of malice and partial counsel; and having been called into court, before closing of a former deposition, in order to open a bundle containing two short coats and a pair of trowsers, to be shewn to a preceding witness during his examination; and, after opening the said bundle, was removed, and called in again; and being solemnly sworn and interrogate, depones, That, about the beginning of July last, to the best of the deponent's remembrance, he was sent with a party of soldiers, and a guide along with him, whose name, he thinks, was John Breck Maccoll, to a place computed of above ten miles distance from Fort-William over Lochleven; but after passing the loch, their guide carried them two miles down the side of the loch, and up to the top of a rock, and out of a clift in the rock, the guide took a short black coat with silver buttons, and a powder-horn in the pocket, and a pair of trowsers, and gave them to the deponent; and the deponent carried them to Fort-William, and delivered them to colonel

sent by the estates, &c.; in which the doctrine of one article is, That persons ought not to be obliged to discover what are their private thoughts and judgments, in relation to other men's actions. And for the third, And he would take care of them.—It is very certain, that they then had great need of some person to take care of them, and hearten them; when, contrary to law, they as witnesses had been for several weeks, and still were closely confined in a fort, with iron shackles or hand-cuffs upon them; which cruel and arbitrary maltreatment of witnesses can have no foundation or warrant in the before recited act of the 21st of king George 2d; by which, forts 'are declared to 'be lawful prisons for the commitment and 'safe custody of offenders;' but not one word of the commitment and safe custody of witnesses. And what does a good law avail to the subject, unless it be observed, and the offender punished? Provoking then must it be to see abuses of this nature slurred, nay flourished over, as in the trial. But this expression ('and 'he would take care of them') is accounted for most rationally thus: They were his servants; and, though taken from their actual service, were maintained in prison at the pannel's expence. So that it was very proper now, when it was reported that the pannel was to be transported from thence to Edinburgh, to let them know, that he would order still to take care of their maintenance. After all, if any thing faulty really appeared in the commission said to be given to the barber, as there does not, it is to be observed, that he is a single witness. And if what he has deposed be true, the prosecutors had an opportunity of having it confirmed by the depositions of the servants themselves, the two Maccolls. But, for reasons best known to themselves, they did not attempt it." Supplement, &c.

Crawfurd. Depones, that one of the black coats, with the powder-horn and trowsers, that the deponent took out of the pocket as above-mentioned, are the same that his guide delivered to him, and which he delivered to colonel Crawfurd, as above deponed. *Causa scientia patet.* And this is the truth, as he shall answer to God. (Signed)

P. GRANT.

THOMAS BAIRD.

The Prosecutors Proof being concluded, the Pannel, for his exculpation, adduced the following Witnesses:

Hugh Stewart, residenter in Edinburgh, aged 30 and upwards, married, being sworn, purged and examined *ut supra*, depones, That he knows Allan Breck Stewart to have several times gone to France, and returned again to this country; particularly that he went to France in 1747, and returned to Scotland in December 1749; returned to France in May 1751, and came back in February 1752; and when in this country, he was in use to lodge at the deponent's house in Edinburgh: that he observed him to be afraid to be seen abroad, and kept at home in the day-time, and went abroad under the cloud of night; for which he gave this reason to the deponent, that he had been a soldier in colonel Lee's regiment, from which he had deserted, and was afraid to be discovered. And being interrogate, depones, that, when Allan Breck went abroad, as has been said, in May 1751, he owed the deponent a guinea, and, being run short of money, he drew a bill on the pannel for that sum, whereof he acquainted the pannel some time he thinks in July; and some time in August he received the money by Maccoll, the Appin carrier; and by the same carrier sent the pannel the bill upon him. *Causa scientia patet.* And this is truth, as he shall answer to God. (Signed)

J. A. FERGUSON.

HUGH STEWART.

Duncan Stewart of Glenbuckie, aged 37 years, unmarried, sworn, purged and examined *ut supra*, depones, That he was acquainted with Allan Breck Stewart; and that, at any time, when he came from France to this country, he had no fixed residence to the deponent known, but went about among his friends and acquaintances: that when he came last to Scotland, his dress was a long blue coat, a red waistcoat, black breeches, and a feathered hat: that, in March last, when he was at the deponent's house, he was in that dress; but, at other times, he has seen him in a different dress, particularly in April last at Glenenty, which was the last time he saw him, his dress was a black short coat, with clear buttons, a tartan waistcoat, trowsers, and a bonnet; and, above all, a dun-coloured great coat. Depones, that he remembers, that upon one occasion, while Allan Breck was at his house, being the first time he came, he for two days, to the deponent's certain knowledge, wore a short blue coat of the deponent's, which the deponent, at

his desire, lent him; and whether he wore it any more than two days, of the ten days he at that time stayed at the deponent's house, the deponent does not know, not having been at home all the time. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)

JA. FERGUSON.

DUN. STEWART.

Duncan Ferguson, servant to *Duncan Stewart* of *Glenbuckie*, aged 19, unmarried, sworn, purged and examined *ut supra*, depones, that, about the 20th of April last, he saw *Allan Breck Stewart* at the house of *Brasachile*, the house of the former witness; at which time he was dressed in a short black coat with clear white buttons, a tartan vest, trowsers, tartan hose, and bonnet. Depones, that he stayed there two nights, and went from thence, as the deponent was informed, to *Glenfinlas*, and stayed a night there. Depones, that the deponent also saw him at *Glenbuckie's* house in March last, at which time he was dressed in a blue coat, red vest, and feathered hat. *Causa scientie patet.* And this is truth, as he shall answer to God; and depones he cannot write.

(Signed)

P. GRANT.

Duncan Stewart in *Glenfinlas*, aged 39 years, married, sworn, purged and examined *ut supra*, depones, that one night, between the 20th and 23d of April, the deponent saw *Allan Breck Stewart* at *Glenfinlas*, and was dressed in a black short coat and white clear buttons, trowsers, and a bonnet, and had on a den big coat above the short coat. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)

P. GRANT.

DUNCAN STEWART.

Katharine Macinnes, late servant to *Alexander Stewart* of *Ballachelish*, aged 22 years, sworn, purged and examined *ut supra*, by *Mr. Archibald Campbell* of *Stonefield*, sworn interpreter, depones, that in the evening of the 14th of May last, the deponent saw *Allan Breck Stewart* at the goat-house in the moor of *Ballachelish* after *Glenure* was killed; and that *Allan Breck* then asked her, what was the occasion of the stir in the town? and that she told him, *Glenure* was murdered; and further asked her, who might have committed the murder? and that she told him she did not know; and that the said *Allan* further desired the deponent to tell *Donald Stewart* in *Ballachelish* to go to the pannel and desire him to send the said *Allan* money; and that she delivered this message to *Donald Stewart* that same night. Depones, that she told the said *Donald Stewart* where she saw *Allan Breck*; but that she did not tell him to go to the said *Allan*, nor did he desire her. *Causa scientie patet.* And, this is truth, as she shall answer to God; and depones she cannot write.

(Signed)

P. GRANT.

ARCH. CAMPBELL.

John Stewart younger of *Ballachelish*, aged

26, unmarried, sworn, purged and examined *ut supra*, depones, that, the day after the murder of *Glenure*, the deponent was at the pannel's house, who after 12 o'clock of the day, told the deponent, that he had had a message that morning from *Allan Breck* by *Donald Stewart*, to send him money; but does not remember, whether the pannel told him the place where he was directed to send it; and the pannel told the deponent, that he was resolved to send him money. Depones, that the last day of December last, the deponent was in company with the deceased *Glenure*, an uncle of *Ardshiel's*, and the pannel, and *Mr. Campbell* of *Ballievolan*, when, after the company had drunk very hard, and were all drunk, some high words arose between *Glenure* and *Ardshiel's* uncle, and they were like to come to blows, which both of them attempted; but the deponent once and again separated them: that *Ardshiel's* uncle happened to go out of the house, as did also the pannel, and the deponent called to the people without not to let them in again, because they were drunk: that the pannel had invited *Glenure* next day to his house, which *Glenure* had accepted of, and therefore the pannel pressed to come in again to the house to renew the invitation, and take his leave of *Glenure*; but the deponent would not allow him to come in, and undertook to make his excuse to *Glenure*: that the deponent, coming into the house, found *Glenure* standing with a drawn hanger in his hand; and the deponent asked what he meant by that? and *Glenure* answered, That he should not allow him to be mobbed there; upon which the deponent assured him he should not be mobbed there; and then *Glenure* threw the hanger upon the bed: that the deponent went home with the pannel, and next day *Glenure* came there before dinner, and dined, and made apologies mutually for what passed the night before; and that *Mr. Campbell* of *Ballievolan* dined there also. And being interrogate for the pursuers, depones, that the deponent was in *Edinburgh* in August last, and was present at consultations of the pannel, his lawyers and agents touching his defence. *Causa scientie patet.* And this is truth as he shall answer to God.

(Signed)

P. GRANT.

JOHN STEWART.

Alexander Stewart in *Auchindarroch*, aged about 18, unmarried, witness cited, sworn, purged and examined *ut supra*, by *Mr. Archibald Campbell* of *Stonefield*, sworn interpreter, depones, that, to the best of his knowledge, he saw *Donald Stewart* in *Ballachelish* and the pannel together, upon the marches between *Aucharn* and *Auchindarroch*, in the morning of the 15th of May; and that he himself was at the time digging ground, with the other tenants of the town. *Causa scientie patet.* And this is the truth as he shall answer to God.

(Signed)

ARCH. CAMPBELL.

ALEX. STEWART.

P. GRANT.

Alexander Stewart of Ballachelish elder, witness cited, sworn, purged and examined *ut supra*, depones, that the deponent was with Allan Breck Stewart's father a considerable time before his death; but, after he had contracted the indisposition whereof he died, he told the deponent, that he intended to leave the care of his children, and of his affairs, to Ardsziel and the pannel: that the deponent knows they accordingly took upon them the management, though he believes the nomination was only verbal, and not in writing. *Causa scientie patet.* And this is the truth, as he shall answer to God. (Signed)

P. GRANT.

ALEX. STEWART.

John Stewart, tenant in Auchnacoon, aged 52 years, married, witness cited, sworn, purged and examined *ut supra*, depones, that Allan Breck's father, as he believes, named the pannel to be tutor to his children, and no other tutor; and the cause of the deponent's belief is, because he saw the pannel take the management of their affairs upon him. *Causa scientie patet.* And this is the truth as he shall answer to God. (Signed)

P. GRANT.

JOHN STEWART.

John Flockhart, writer in Edinburgh, aged 30 and upwards, married, witness cited, sworn, purged and examined *ut supra*, depones, that being shown a letter by the pannel to Mr. John Macfarlane, writer to the signet, dated the 19th of May last, depones, that that letter came to the deponent's hands at Edinburgh by course of post the 24th of May last, and the deponent being to go for Perth next day, he gave the letter to Alexander Hart, clerk to Mr. Macfarlane, to be delivered to his master; and knows not whether any thing was done by Mr. Macfarlane, pursuant to that letter. *Causa scientie patet.* And this is the truth, as he shall answer to God. (Signed)

JO. FLOCKHART.

And after closing the oath, being further interrogate for the pannel, depones, That there was no other letter accompanying the one before-mentioned. And this is also truth, as he shall answer to God. (Signed)

P. GRANT.

JO. FLOCKHART.

John Cameron of Strone, aged 25, married, witness cited, and sworn *ut supra*, depones, That, about a year ago, being in company with some of the tenants of Rannoch, in a house in Rannoch, a man came unto them, whom they called serjeant More Cameron, whom the deponent never saw before, nor since: that the tenants were complaining of Glenure for his hard usage of the tenants of Ardsziel; and the said serjeant More said, that if he met him in the highway, he would shoot him. *Causa scientie patet.* And this is the truth, as he shall answer to God. (Signed)

P. GRANT.

JOHN CAMERON.

Ewan Cameron, servant to John Cameron of Strone, aged 30 years, unmarried, witness cited, sworn, purged and examined *ut supra*,

by Archibald Campbell, writer in Inverary, sworn interpreter foresaid, depones, that he had occasion to be in Rannoch harvest last: that he saw there a man that was called serjeant More Cameron, whom he never saw before, or since. Depones, that he saw the man called serjeant More in a house; but does not know the name of the town, or the name of the man to whom the house belonged, the deponent having never been in Rannoch but that one time. Depones, that he heard the said serjeant More say, that, if he, the said serjeant More, met with Glenure, he did not care though he should be up-sides with him; but had no reason for saying so, he having heard no more of his discourse. Depones, that the deponent was then servant to the former witness, and was then in Rannoch attending him. *Causa scientie patet.* And this is the truth, as he shall answer to God; and declares he cannot write. (Signed)

P. GRANT.

ARCH. CAMPBELL.

Then the Procurators for the Pannel declared their Probation to be concluded.

FOLLOWS THE WRITINGS PRODUCED IN EVIDENCE FOR THE PROSECUTORS.

The Judicial Declarations of the Pannel, his Wife, and Children.

At Fort-William, the 2d day of June 1752 years, in presence of George Douglas, sheriff-substitute of the sheriffdom of Inverness, sitting in judgment, compeared James Stewart in Aucharn, now prisoner at this place; who being judicially examined anent the matter underwritten, declares judicially, That Allan Breck Stewart came to his house in the latter end of March, upon his coming from France; that he stayed two nights there, when the declarant went to Edinburgh, leaving the said Allan at his house: that the said Allan came to the declarant's house in the month of April, after being at Glenbuckie's and Rannoch; and that, upon Monday the 11th day of May last, the said Allan came to the declarant's house from Farnacloich; and the declarant being called upon by Mr. Campbell of Airds to go to Keil, had little conversation with the said Allan till his return, and no other after his return, than what was in the presence of the family; Nor does the declarant remember, whether he supped with the said Allan that night or not; but rather thinks he did; or whether the said Allan was dressed in a long blue coat and hat, or in a black short coat with silver buttons: That the declarant thought himself concerned in drink that night, having drunk at the miller of Keil's house with the old piper, the young piper, the said miller, and old Duncan Maccombich, and his son Archibald: the declarant went away to Appin's house early upon Tuesday the 12th day of May last, and did not see Allan that day or since: that when the declarant was at Edinburgh, the said Allan carried a short black coat with silver buttons, belonging to the declarant,

with him to Glenbuckie's and Rannoch, and wore it upon his return; when the declarant told the said Allan, that he wondered how his short coat fitted him, as Allan was a large man, and the declarant a little man; to which he answered, that it served him well enough: that, upon Monday night the 11th day of May last, the declarant's son Charles told him, he was to go to Glenco, Callart, and Fort-William; and that he did not see his said son from that night, till he saw him in this place, after that he, the declarant, was made prisoner; nor is the declarant sure if his said son went to Glenco or Callart till Wednesday the 13th day of May last. Declares also, that his son Allan was at home on Sunday's night the 10th of May last; but is not sure whether he was at home all that day or not. That there were no strangers at the declarant's house upon the said Sunday's night, or on the following Monday or Monday's night, nor yet on the Tuesday or Tuesday's night following, except the said Allan Breck and Fasnacloich's daughter upon the said Monday's night. Declares, that John Stewart younger of Ballachelish was at his house upon Wednesday's night, and is sure that Ewan Roy Maccoll, brother to Appin's bouman at Koalismacoan, supped at his, the declarant's house, either upon the Wednesday or Thursday's night the 13th or 14th days of May last; and that the said Ewan Roy Maccoll was also at the declarant's house upon Saturday thereafter, in the forenoon, along with his sister, spouse to Ewan Maccombich, padler in Cuil, and then paid the declarant 10*l.* Scots, except seven shillings and two-pence, for which the said Ewan Maccombich, padler, became debtor; which 10*l.* Scots was in payment of the grass-meal of cattle; and that the said Ewan Roy Maccoll did then give to the declarant a list of debts due to him in the country, whereof 30*l.* Scots was to be applied towards payment of a debt due by the said Ewan to his said sister, as the declarant had the management of her effects in the country of Appin; and which sister's name is Christian Maccoll, and was last winter servitrix to Mr. Stewart of Ballachallan: that the declarant delivered some cattle to Duncan Stewart, servitor to Glenbuckie, and Solomon Maccoll, servitor to the declarant's son Allan Stewart, and John Maccoll, now prisoner at Fort-William, at the marches betwixt Aucharn and Salachan; and that the said Ewan Roy Maccoll was to meet them at Glenduror with cattle of his own that were to be sent south along with the declarant's; and that the said John Maccoll parted with them at a shealing called the Immerin; and that the declarant did not see the said Ewan Roy Maccoll since. And being interrogate, if he had any arms in his house? declares, that when he was made prisoner, he had a small fowling-piece and a broad-sword, which broad sword was to be kept for the children of the deceased Allan Stewart of Cuil, till they were of age. Declares also, that the said Solomon Maccoll, formerly servant to Donald

Stewart at Tayharnan, came home to his service on the 15th or 16th days of May last; that John Stewart in Auchnacoon came to the declarant's house upon the evening of the 14th day of May last, and stayed there that night; and declares, that he did not send him any message, either that day or the preceding day, nor had he any business that the declarant knows of. Declares also, that the afternoon of Glenure's murder, several of the tenants in the neighbourhood, particularly the tenants of Auchindarroch, and Duncan Stewart at Inslraig, and Robert Stewart the miller, came to the declarant, to know what they should do, or whether they should go near the corpse; and that he advised them to go; but that neither he nor his son Allan went there, because he understood that Ballieveolan and his sons were to be there; and that there were some chagrine betwixt him and them, they having taken the declarant's possession the year before, wherein he had a stock of cattle, viz. Glenduror, a part of the estate of Ardsiel: that when young Ballachelish was over-night at the declarant's house as aforesaid, they had a conversation about the removal of the tenants from the estate of Ardsiel; the result of which was, that they should continue their possession, and take the hazard of the violent profits, unless they were forced out; and that he had conversations with old Ballachelish to the same purpose; and that he gave the same opinion to such of the said tenants as applied to him; but recommended to them to use no force in keeping their possessions; that the declarant had no written, but a verbal commission from the said tenants, to negotiate for them at law; nor did he receive any money from them; but that the tenants of Lettermore and Ardsiel and the miller promised to refund his expences for representing their case, particularly Dugald and John Maccombicks in Ardsiel. And being interrogate, if he had any conversation with the said Allan Breck concerning Glenure? the said Allan asked the declarant, if he heard that serjeant More was come from France, or if he was in the country of Appin? To which the declarant answered, that he did not hear he was in Appin, but heard he was in Glenlive last year; whereupon the said Allan told the declarant, that serjeant More swore he would kill Glenure, because of the treatment he gave the tenants on the estate of Mamore, part of Lochiel estate. Declares also, That the said Allan Breck threatened, that he would challenge Ballieveolan and his sons to fight, whenever he met them, because of his removing the declarant last year from Glenduror, and being about to remove the other tenants this year from some other parts of the estate of Ardsiel; and that the declarant told him then, they would not fight him, as they would not consider him as their equal; and if he had come to the country to fight, he had better stayed in France. And being interrogate, if he had any conversation with William Stewart, merchant in Maryburgh? de-

clares he had, about the expediency of the said tenants their keeping their possessions; and that it was the said William's opinion, that they should keep their possessions; and that their case should be represented to the barons of exchequer; and that it was hard they should be turned out, until their case was stated. And being asked, if he had any conversation with Callart anent the removings? declares, he does not remember; but that commonly every body he saw asked him, what should become of the tenants of the estate of Ardschiel? To which he answered, he did not know till the term-day. This declaration is emitted before the said sheriff-substitute, place and date fore-said, before these witnesses, colonel Howard, colonel Crawford, Donald Campbell of Airds, and Colin Campbell of Carquhin, esqrs.

Witnesses, (Signed)
G. HOWARD. JAMES STEWART.
DONALD CAMPBELL. GEORGE DOUGLAS, S. S.
CO. CAMPBELL.

Eodem die, The said James Stewart, being re-examined, judicially declares, upon recollection, That it was upon Thursday the 14th day of May last, that his said son Charles went to Glenco, and not on Wednesday, as before-mentioned; and that Callart was at the declarant's house upon Sunday's night the 10th day of May last. Declares, that, before Glenure served the warnings against the tenants of the estate of Ardschiel, the laird of Appin proposed to accommodate some of them in land: that how soon the declarant heard of Glenure's murder, it came in his mind, that serjeant More had done it, because Allan Breck told him, that the said serjeant swore bloody revenge against Glenure before the serjeant came from France, upon account of Glenure's treatment of Lochiel's tenants, and his differing with John Cameron of Fassafarn, brother to Lochiel: that the declarant's reason for suspecting Allan Breck afterwards, was, because he left the country abruptly, without taking leave of him, as he expected; and if the said Allan was guilty of the said murder, he believes it behoved to be on account of the disturbance given to the tenants of the estate of Ardschiel, and knows no other. Declares, that he did set out for Edinburgh on Friday the 3d day of April last, was at Glenco that night, the 4th at Innerkenvie, the 5th at Lanerick, the 6th at Annat, and called next day at Newton, and was that night at Mr. Wordie of Cambusbaron's house at St. Ninian's, called at Touch on the 8th, and got a letter from Mr. Seaton to Mr. David Moncrief, secretary to the barons of exchequer; called at Mr. Wilson's house of Murray's-hall, and was that night at Mr. Foster of Dunivan's house, and got a letter from him to Mr. Patrick Haldane, the solicitor; but did not deliver it, or the other letter, as he was told they would be of no consequence; and went to Edinburgh upon Thursday the 9th day of April last, where he continued for eleven days: that he left Edinburgh upon Sunday the 19th, was that night

at Dunivan, called at Mr. Wilson's and Mr. Wordie's and was at Stirling at night; which place he left on the 21st; called at Mr. Dundas of Manner's house, Dunblain and Newton, and was at Annat's at night; upon the 23d came to Ballachallan's, and stayed there that night; came to Glenbuckie's the 23d, and stayed there two nights; on the 25th came to Tayindrom; on the 26th came to Duncan Stewart's house in Glenco; and upon the 27th came home: that, upon the 25th, he called at Mr. Murray of Glenkernock: That, soon after the declarant came home, he gave notice to the tenants of Ardschiel, that he had procured a sist for them against the decreet of removing; and that, if they had a mind to continue their possessions, they were advised to go to Glenure and seek their possessions, and if did not grant their desire, they should send for a notary, and go with him to protest against Glenure; and if they pleased he would send for a notary; to which they agreed: that accordingly the declarant sent for Charles Stewart, notary, and writ him a letter, signifying they had obtained a sist for the tenants of the estate of Ardschiel, and desired him to come to intimate the same to Glenure, to the purpose above-mentioned; and that the said Charles did accordingly come to the declarant's house at night, and the tenants came also next morning; and that the declarant told them, in presence of the said Charles, that, if it was not their mind to proceed in that method, he would not desire them to do it, because he could not assure them of success; and that now they had the advice as it was given to him: and particularly remembers, that three of the tenants of Ardschiel met the notary at the declarant's house, but is not sure if old John Colquhoun, the fourth tenant in Ardschiel, was there, but rather believes he was: that he was informed on Monday the 11th day of May last, by his son Charles, Allan Breck, and Fasnacloch's daughter, that they heard Glenure was to go to Lochaber that day. Declares, also, that he saw James Stewart, younger of Fasnacloch, at Glenco's house, upon the 5th day of May last, who asking him what he had done at Edinburgh? the declarant told him, he had procured a sist for the tenants of Ardschiel's estate; and that he did not know what service it might be of, but that some people thought they might sit, and take the hazard of the violent profits, till they had an opportunity of laying their case before the barons of exchequer: that at this time the declarant told the said James Stewart, that he wished some persons of understanding were present on the term-day, to see if there was law for ejecting them; and asked the said James, if he was to be in Duror about that time? who said, he did not know: that when the said John Stewart of Ballachellish was at the declarant's house, he asked him, if he would be present with the tenants, to see if there was law for turning them out? who said he would, if he did not go to Inverary. Declares also, that in general,

he recommended to every body not to make any disturbance, and particularly recommended to his own servants not to be present, not knowing what might happen if a mob of people gathered; nor did he intend to be present himself. This declaration is emitted judicially, place and date foresaid, before these witnesses, colonel Howard, Donald Campbell of Airds, and Colin Campbell of Carwhin, esqrs.

Witnesses, (Signed)
G. HOWARD. JAMES STEWART.
DONALD CAMPBELL. GEORGE DOUGLAS, S. S.
CO. CAMPBELL.

At Maryburgh, the 3d day of June 1752 years, in presence of the said sheriff-substitute, appeared the said James Stewart, who, after having his former declarations fully read, recollects, that he was not a night at Annet, but called there on his way to Edinburgh, and so was a day sooner there than what's mentioned in his former declaration. And being interrogate, if Allan Breck, the declarant's son Charles, or Fasnacloich's daughter told him, when she came to his house upon Monday the 11th day of May last, that Glenure had got the said sist removed? Declares, they did not; but that one of them told him, he heard Glenure was to remove the tenants of Ardsbiel, but which of them said so, he does not remember. This declaration emitted, place and date foresaid, before the said Donald Campbell of Airds, and Colin Campbell of Carwhin, esqrs.

Witnesses, (Signed)
DONALD CAMPBELL. JAMES STEWART.
CO. CAMPBELL. GEORGE DOUGLAS, S. S.

At Maryburgh, the 3d day of June 1752 years, in presence of the said George Douglas, sheriff-substitute of the shire of Inverness, appeared Allan Stewart son to James Stewart in Aucharn; who, being examined judicially, declares, That; Allan Breck Stewart came to the declarant's father's house on Monday's afternoon, the 11th day of May last, dressed in a long blue coat, red waistcoat, black breeches, tartan-hose, and a hat; and after being some time there, did put off his blue coat and waistcoat, and put on a black short coat with silver buttons, belonging to the declarant's father; and went that afternoon to work with the declarant's father's servants in covering potatoes: that the said Allan Breck staid that night, and was dressed next morning in his blue coat and red waistcoat, as the day before: that the declarant did not see him go away from Aucharn upon the 12th, the declarant being in the fields from the time he rose in the morning till twelve of the clock that forenoon, sowing barley, except once that he made a start home for more bear. Declares, That upon the afternoon that the said Allan Breck came to Aucharn, as aforesaid, he told the declarant, that he heard in Glencrearan, that the tenants who had taken the lands of Ardsbiel were to be at Glenduror on Thursday's night, in order to enter to the possession on Friday the 15th day of May last; and told him likewise, that he heard Glenure

had come home, and had orders to remove the former possessors: that Archibald Cameron, cousin to Drummasailly, came along with Fasnacloich's daughter, and the declarant's brother Charles, to his father's house, upon the said 11th day of May last, and staid all night; the said Allan Breck having come by himself about two of the clock in the afternoon that day: that the declarant's father conversed with the said Allan Breck aside, upon his first arrival at Aucharn upon the said 11th day of May; but that the conversation did not last above five minutes, or thereabouts; nor did the declarant hear what passed: that the declarant's father did not appear to be the least in drink upon his coming home upon the evening the Monday aforesaid, but told that Mr. Campbell of Airds had given the declarant's father, and the tenants of Keil, three or four bottles of whisky; and that the declarant's father supped at home along with the said Allan Breck that night: that, upon Tuesday afternoon the 12th of May last, the declarant, and the said Archibald Cameron, and Donald Macdonald, brother to Glenco, went to the isle of Ballinagowan; and the declarant, and the said Donald Macdonald, returned in the evening to Aucharn; but the said Archibald Cameron went to his aunt's at Caill: that in the morning of the 13th of May last, the declarant went to Sallachan, where he saw John More Macilichatten, and delivered them a mare and a filly, and then returned home; and in the afternoon of that day went to Kintalline, in order to go to Tayphinst; but being informed by Donald Mackendrick, the old piper at Keil, whom he met there, that young Ballachelish was to be at Aucharn that night, the declarant returned with the said piper, and went along with him to the moss: that accordingly Ballachelish younger came to, and staid at the declarant's father's house that night, and went next day to Appin's house: that the said Ewan Roy Maccoll, brother to Appin's bouman at Koolisnacoean, wrought at the declarant's father's peat-moss upon the said 13th of May last, and supped at the declarant's father's house that night, and believes he took his hed with Duncan Maccoll, his uncle's son, at Auchindarroch that night: that, upon the 14th of May in the morning, the declarant went up to Freichie, and returned by the houses of Glenduror, where he saw two women, and spoke with one of them, to hinder the cattle to trespass on his father's grounds; and whilst the declarant was speaking to that woman, he saw a man passing at a little distance, who was enquiring for Glenure, as the said woman told the declarant; which man the declarant thereafter observed travelling on the road towards Auchindarroch: that the declarant came straight home from Glenduror, and continued at home till he went to Inshaig, along with his brother Charles and Fasnacloich's daughter, and continued there till the news of Glenure's murder reached his father's house, where he heard the first accounts of it, Glenure's servant being just gone,

as the declarant was informed: that the declarant was at home all day the 15th of said May; only that he made a start to Cuil, where he was in company with Duncan Stewart senior, and Duncan Stewart younger, his son, and Duncan Stewart at Inshaig. And being interrogate, what conversation passed betwixt him and his father, on his return home from Inshaig? his father told him, That Glenure's servant was there; and upon the declarant's father's asking his news, he told him the worst that ever he had; that his master was killed at Lettermore; and that his father asked, if it was by a shot; and that the servant answered, that it was; and that the said servant also desired his father to go and take care of the corpse; which he proposed to do, but that his wife would not let him; but that he sent for the tenants of Anochindarroch, and desired them to go to take care of the corpse; and that the reason that he, the declarant, did not go to take care of the corpse, was, because it did not at first occur to him; and that it was too late, and the rest of the people gone; yet it was clear day light, but thinks the sun was set; and that the declarant's mother also hindered his going, and assigned for a reason, that if the friends of the deceased were there, and had arms, they might, in their passion, do hurt to him and his father; and that he was but a little time at home after his return from Inshaig, when he saw Glenure's servant returning from Glenduror, and passing towards Kintalline: that the declarant thinks his brother Charles went in the afternoon of the 14th of May last with Fasnacloich's daughter, and the said Archibald Cameron, and the declarant's sister, to Lagnaha, where they dined in Alexander Stewart senior his house, and afterwards came back to Aucharn, and then went to Inshaig as aforesaid. Declares, that he heard the said Ewan Roy Maccoll say, upon the 13th, two several times, that it was hard in Glenure to turn out the honest tenants of the Ardsheel estate, as they paid their rents well, and offered an augmentation of rent, and were willing to give obedience to the government; and that one of the times was after breakfast, when the people were together, at the end of the declarant's father's house, going to the moss; but that his father was not present: that some of the tenants of the neighbourhood were there, as well as his father's servants; and that they generally talked in the same strain with the said Ewan Maccoll; and that the other time was after their returning from their work that evening at the declarant's father's house: that the declarant does not know what became of the said Ewan Roy Maccoll all Thursday said 14th of May last; but is positive that he came into the barn where the declarant was lying, that same night, about twelve of the clock, asking for a bed, which was refused him; but ordered to go and lie with the servants in another barn in Aucharn, meaning Dougal and John Maccolls, now prisoners at Fort William: that the declarant saw the said Ewan Roy Maccoll at Aucharn, upon

VOL. XIX.

the 15th of May in the morning, and saw him again at Cuil about twelve of the clock that day; and that they came together from thence to Aucharn, where they parted, and that the declarant does not remember if they had any conversation all that time about Glenure's murder. This emitted judicially, place and date foresaid, before these witnesses, Donald Campbell of Airds, and Colin Campbell of Carwhin.

Witnesses

(Signed)

DONALD CAMPBELL.
CO. CAMPBELL.ALLAN STEWART.
GEORGE DOUGLAS, S. S.

Eodem die, The said Allan Stewart being re-examined judicially, and being interrogate whom he suspected guilty of Glenure's murder? declares, That he thought, if Allan Breck did not soon cast up in the country, he was the most likely man to have done it: and further declares, That, in a conversation between him and his father, and others, they were of opinion, that the people of Ballachelish and Lettermore must have known who committed the murder at the time it happened: that, upon the Friday after the murder happened, he heard his father say, he did not doubt but he would be taken up upon suspicion of the said murder: that when the declarant's father was at Edinburgh, he expected a letter from him about what he was doing about the removings; which letter came to Aucharn in the declarant's absence, and was opened by James Stewart younger of Fasnacloich, and contained an account of what the declarant's father had done about the removings; and that he was about buying a bargain of meal. Declares also, That he heard his father express his desire to young Ballachelish to be present when the new tenants came to take possession of the estate of Ardsheel; and that Donald Mackintyre in Aucharn told him, that young Ballachelish had come back from Appin to Keil, in order to attend; but, upon hearing of Glenure's murder, returned to Appin: that the declarant's father told him he would not be present at the entering of the said new tenants; nor was the declarant resolved to be present himself; nor did his father desire him to go, or suspect him such a fool as to go: that he knows that the said Allan Breck Stewart lay with the declarant's brother Charles in a barn in Aucharn, upon Monday's night the 11th day of May last: that the declarant has a black short coat, with nine round silver buttons on the breast, two upon each haunch, whereof one is small, and it has no buttons on the sleeves or pockets; and that his father has also a black short coat, with silver buttons on the breast and pockets, and has none upon the haunches or sleeves, to the declarant's remembrance: that the said Allan Breck had no big coat on upon the 11th day of May last, when he came to Aucharn, nor had he any big coat of his own that the declarant knows of; for the said Allan borrowed the declarant's big coat, when he came to Rannoch:

that, in a conversation the declarant had with old Ballachelish on the Sunday before Glenure's murder, Ballachelish then told the declarant, that the man that had taken the ferry of north Ballachelish, came there with his boat, and was refused to enter to the possession by the tenants, who thought they had as good a right to the ferry as to the land: that thereupon the ferry-man drew his boat, and went to Glenure, the tenants being resolved to keep their possessions for the year; and that Ballachelish said, that the tenants of the Ardschiel estate had as good a title to sit, as the tenants of Ballachelish, if the suspension was not discussed; and that it was a cant word through the country, That the tenants might sit, since the worst of it would be paying the violent profits. Declares also, That he has a gun and broad-sword: that he left the gun in his father's brow-house, and the sword he gave to John Maccoll, his father's servant, that is prisoner at Fort-William: that John Roy Stewart, nephew to Fasnacloich, lay in the barn with the declarant upon Thursday's night the 14th day of May last; and that John Stewart in Auchnacoon lay in the same barn with the declarant's brother Charles, being the night that the said Ewan Roy Maccoll came to look for a bed there. This judicial declaration emitted in presence of the said sberiff-substitute, place and date foresaid, before these witnesses, the right honourable the lord Bury, colonels Howard and Crawford, Donald Campbell of Airds, and Colin Campbell of Carwhin.

Witnesses,

(Signed)

DONALD CAMPBELL.
CO. CAMPBELL.ALLAN STEWART.
GEORGE DOUGLAS, S. S.

At Maryburgh, the 4th day of June, 1752 years, in presence of the said George Douglas, sberiff-substitute aforesaid, appeared Charles Stewart, son to James Stewart in Aucharn; who being examined judicially, declares, That he was at home all day of the 14th day of May last, and that he dined with his father, mother, brother, sister, and Fasnacloich's daughter; and after dinner went to Auchindarroch, and there conversed with Duncan Maccombie, Duncan and John Maccolls, and others that were covering potatoes, and desired Solomon Maccoll to go with Fasnacloich's daughter to Ardnamurchan, but he would not go: that Fasnacloich's daughter and the declarant's sister went along with him to Auchindarroch, and returned before him to Aucharn, the declarant having staid a quarter of an hour after them, to persuade the said Solomon to go to Ardnamurchan, and then followed them directly to Aucharn; and did not go nearer Lettermore that day, than the place where the people of Auchindarroch were covering potatoes; and, in an hour thereafter, went with Fasnacloich's daughter, and the declarant's brother Allan, and sister, to Inshaig, where he received the news of Glenure's murder from John Maccoll, now prisoner at Fort-William; being sent there, by the declarant's father, to

desire him and his brother Allan to come home; but that his said brother was gone a little before the said John Maccoll came. Declares also, that he saw Ewan Roy Maccoll, brother to Appin's bouman at Koolisnacoon, at the declarant's father's house, upon the evening of the 14th day of May last before they lighted candles, and told he had come from Glenure that day; that he afterwards, that night, came into the barn where the declarant was lying with his uncle John Stewart, looking for a bed, and was directed to lie with the servants in the other barn in Aucharn. Declares, that upon his return from Inshaig with the said John Maccoll, prisoner, that the declarant asked him where Glenure was murdered, what way it was done, and if any person was seen by the place; and that the said John answered, That it was done in the wood of Lettermore; whether it was south or north of the houses, he could not tell; that it was by a shot, and that there was a man or two seen near the place; and this is all the declarant remembers of the conversation upon that head; and that upon his coming home, he heard his father desire the people of Auchindarroch to go and take care of the corpse; and that his father proposed to go himself, but that his wife would not let him; and, at the same time, heard his father say that he would be suspected of the murder, as he was taking so much part with the tenants against Glenure the factor: that he heard Ewan Roy Maccoll say, upon the 15th day of May last, that he wondered that Glenure was removing the tenants that paid their rent well, and were willing to qualify to the government: that he observed his father and the said Ewan Roy Maccoll have several conversations aside about that time. This declaration emitted judicially, place and date foresaid, before these witnesses, Donald Campbell of Airds, and Colin Campbell of Carwhin, esqrs.

Witnesses,

(Signed)

DONALD CAMPBELL.
CO. CAMPBELL.CHARLES STEWART.
GEORGE DOUGLAS, S. S.

Charles Stewart, son to the said James Stewart in Aucharn, being solemnly sworn and examined, depones, That, upon Tuesday the 5th day of May current, the deponent and the said Allan Breck Stewart went from the deponent's father's house, where the said Allan had been on and from the 1st current (except that he was Saturday's night at Cuil), and stayed at Appin's house on Tuesday's night, were Wednesday's night at Auchnacoon's, Thursday's night at Auchlaouran's, Friday, Saturday, and Sunday's night at Fasnacloich's, and came on Monday the 11th current to his father's house: that the dress the said Allan wore all this while, was a long-bodied blue coat, red waistcoat, black breeches, a hat with a black feather, and tartan hose, with a big coat dun-coloured; in which very dress, and with which big coat, he came along with the deponent to his father's house upon the 11th current, continued there that night, and the

deponent and he lay together: that he rose before the deponent on Tuesday the 19th current, but that the deponent was up before he left his father's; and that as he was going away, which was about 8 or 9 of the clock in the morning, was told by him he was going for Glenco: that then he had on the whole of the same dress as above described: that the deponent accompanied him to Kintalline, and did not part with him any where on the road: that they passed through Auchindarroch and Lagnaha, and spoke with some people as they went along, particularly Alexander Stewart in Lagnaha, and Alexander Stewart his son: that the blue coat Allan wore had yellow metal buttons: that the deponent and he parted at Kintalline, after the deponent asked John Breck Maccombie for ale there. And this is truth, as he shall answer to God.

(Signed)

ARCH. CAMPBELL, S. D. CHARLES STEWART.

Margaret Stewart, spouse to James Stewart in Aucharn, being solemnly sworn and examined, depones, That Allan Breck Stewart came to her house upon Monday immediately before Glenure's murder, dressed as mentioned in the last deposition, and with a big coat of the same colour; that he stayed all night, and went away next day about 8 or 9 of the clock in the forenoon, dressed in the same habit; and at his taking leave of the deponent, asked her, if she had any commands for Rannoch? That, to the best of her knowledge, he came by himself, and went away by himself. And this is the truth, as she shall answer to God; and declares she cannot write. (Signed)

ARCH. CAMPBELL, S. D.

Elisabeth Stewart, daughter of the said James Stewart in Aucharn, being solemnly sworn and examined, depones, conform to her mother's deposition in every thing, only that she is positive that Allan Breck Stewart came all alone to Aucharn, upon Monday immediately before Glenure's murder, she having seen him come there. And this is truth, as she shall answer to God; and declares she cannot write; and adds, that Solomon Maccoll, her father's servant, went off for the south country upon Saturday the 16th current.

(Signed) ARCH. CAMPBELL, S. D.

Charles Stewart, son of the said James Stewart in Aucharn, being re-examined, judicially acknowledges, That Dugald Maccoll, former declarant, told the said Charles Stewart, that there were arms in his father's house, which he had hid; and this judicial acknowledgment is signed this 23d day of May, 1752 years, before these witnesses, Donald Campbell of Airds, and James Campbell, writer in Inverary, writer hereof.

Witnesses

(Signed)

DONALD CAMPBELL. CHARLES STEWART.
JA. CAMPBELL.

Thereafter the said *Charles Stewart* judicially owns, That, upon the 12th day of

May current, the black short coat with silver buttons, then wore by Allan Breck Stewart, was given to him by the declarant's father; and that he had got the plaiden trowsers, then wore by him, from the declarant's father, or brother Allan; and this is also signed, place and date aforesaid.

Witnesses

(Signed)

DONALD CAMPBELL. CHARLES STEWART.
JA. CAMPBELL. ARCH. CAMPBELL, S. D.

The said *Margaret Stewart*, spouse to the said James Stewart in Aucharn, being re-examined, judicially declares, That her husband James Stewart was at home, and lay in the same bed with her, on Monday's night the 11th of May current. And this is also truth, as she shall answer to God; and declares she cannot write. (Signed)

ARCH. CAMPBELL, S. D.

The said *Elisabeth Stewart*, her daughter, re-examined, judicially owns, That her father was at home on Monday's night the 11th day of May current. And this is also truth, as she shall answer to God; and declares she cannot write. (Signed)

ARCH. CAMPBELL, S. D.

At Taynaheinsag, the 25th day of May, 1752 years, the said *Charles Stewart*, being re-examined by the said sheriff-depute, judicially declares, That the said Allan Breck Stewart had on a black short coat with round silver buttons, upon the 30th day of April last, when he came to the declarant's father's house in Aucharn from Rannoch: that the declarant left the said Allan Breck at his father's house, he himself having, upon the 1st day of May current, gone to Glenure along with the tenants of Ardsheel and Charles Stewart, notary, to be a witness to the intimation of the act they had obtained against the decreet of removing; and that upon his return that evening, he found the said Allan Breck at his father's, and was then dressed in a black short coat and round silver buttons; and then observed, that the said coat was lined with red in the breast and skirts; and that the said Allan told him, that he had got the said short coat from the declarant's father; but does not remember when it was he told him so. Declares also, that the said Allan Breck Stewart had on blue and white trowsers, when he came from Rannoch to his father's house, on the 30th day of April; and had them likewise on, on the 2d day of May current, when he went to Cuil in Appin; and that he wore the same dress upon the 3d and 4th days of May current: that the said Allan did put on his side blue coat on the 5th day of May current, when he went to Appin's house: and likewise declares, that he saw Allan Breck's blue coat, upon the 13th current, lying upon a trunk in the room upon the right hand of the entry of his father's house: that the said Allan had on the said black short coat, when at breakfast at the declarant's father's house, upon the 13th

day of May current, but had on no jockey-coat then. This declaration is judicially signed, place and date foresaid, before these witnesses, Donald Campbell of Airds, and Colin Campbell of Carwhin.

Witnesses (Signed)

DONALD CAMPBELL. CHARLES STEWART.
COLIN CAMPBELL. ARCH. CAMPBELL, S. D.

The said *Margaret Stewart*, spouse to the said James Stewart in Aucharn, being re-examined, declares, That the black short coat now shewn to her, is the same which was brought from her house upon Saturday's evening the 23d current, and belongs to Allan Stewart, her son: that her husband has had no black coat for three quarters of a year past; and that the last black short coat he had, was given by him to John More Maccoll; and that the round silver buttons, which are upon the coat now produced, were formerly upon the coat given to the said John More Maccoll. This judicial declaration is emitted this 25th day of May, 1752 years, before these witnesses, Colin Campbell of Carwhin, and Donald Campbell of Airds; and the declarant declares she cannot write.

Witnesses (Signed)

COLIN CAMPBELL. ARCH. CAMPBELL, S. D.
DONALD CAMPBELL.

The said *Margaret Stewart* also owns, That there was a gun in her husband's house this spring, which she saw her son Allan go out with once or twice to kill black cocks. This judicial declaration is also signed, place and date aforesaid, and before the witnesses above named and designed.

Witness (Signed)

DONALD CAMPBELL. ARCH. CAMPBELL, S. D.

Letter addressed to Duncan Stewart of Glenbuckie.

"Now I am sorry to acquaint you, affairs is going quite wrong upon this estate of your cousin's: Glenure wants Ardsheel and Lettermore in his own hands, and more rent for our tenement, and the carriages to himself. How far these things will take place, God knows! the man that makes the whole noise, is Ballievolan, upon account of our keeping John More; for he does not deny but what he offers more rents for Glenduror, and gives this as his reasons. However, it shall be a dear gien to them or they shall have it. All you heard about the country is true: I go, in a few days, to Kingailoch for the stallion, which stands us eight guineas; he wants to harrow him this spring, and to get him broke for the saddle again harvest. Fasnacloich has made the purchase for himself. You'll not neglect to send all the money you can in a very short time, as money never was scarcer in this country. Kingailoch has got money; so that we are sure of his cows. Malcolm Livingston has sent for more money; for he employed what he got. I shall refer the whole history of the country till I have the pleasure of seeing you.

I beg you'll not neglect sending a servant soon, with as much as possible; let nothing stop him. Neglect not about your brother. No more, but my compliments to Miss Jeany, Sandy, and little Donald, is all from, dear cousin, I am your affectionate cousin,

(Signed) "ALLAN STEWART."

"Dated Aucharn, April the 1st, 1751."

Maryburgh, 4th June, 1752 years. This letter was found among James Stewart in Aucharn's papers, and shewn this day to Allan Stewart his son, who refuses it to be his handwriting, in presence of Colin Campbell of Carwhin, and Donald Campbell of Airds, esqrs. two of his majesty's justices of peace for Argyllshire.

Witnesses (Signed)

DONALD CAMPBELL, ARCH. CAMPBELL, S. D.
CO. CAMPBELL.

The above letter was addressed on the back, "To Duncan Stewart of Glenbuckie, at Brenchyle."

James Stewart to Charles Stewart, Notary.

"Dear Charles; Not knowing of your return from Mudart, sent for your father Tuesday's afternoon; but the rascal I sent, went not by Glencrearan that night, by which he missed the old man, who went a-fishing, as you'll see by the inclosed, early that morning; which I reckon a very great misfortune. The next best I can think of is, that you be here without fail this night, if you should hire a horse, as every thing must go wrong without a person can act, and that I can trust. This is such a tie upon all the members of our family, that I'll press you no further, but do depend on seeing you once this night; and am your own, &c. dear cousin,—(Signed) JAMES STEWART."

"Aucharn, May 14th, eight o'clock morning, 1752."

"P. S. As I have not time to write to William, let him send down immediately 8l. sterling, to pay four milk cows I bought for his wife at Ardsheel."

Addressed on the back thus: "To Mr. Charles Stewart at Auchintour. Per express."

William Stewart to James Stewart.

"*Maryburgh*, May 14, 1752.

"Dear Sir; I send the bearer for the best mare, and my young beasts in Salachan; unless you keep by it (which I think you ought), and send some other body up with him, and let them carry the milk cows you bought for me. Let the filly be grazed thereabouts, waiting market.—I find Glenure has a mind to eject the tenants; but they ought to be deaf to it, and, at all risques, keep possession, as they are in good hands, as it must end in exchequer; so that I beg they keep possession; as there will be no troops, they ought to repel force by force, and take their hazard of the consequence; as it can be no more than violent profits, which is often modified in inferior courts, besides the

exchequer, who will insist for no such; their chief design being to have a sett of peaceable tenantry, and a well paid rent; so that the people ought to be assured they shall be supported as far as law will, which no doubt must determine in their favours; and am, dear Sir, your own, &c.—(Signed) WILLIAM STEWART."

Addressed on the back thus: "To Mr. James Stewart in Aucharn."

Wrote on the back thus:

"Maryburgh, the 5th day of June, 1752.—This is the Letter relative to the declaration emitted this day before me, by William Stewart, merchant in Maryburgh.

(Signed) "GEORGE DOUGLAS, S. S."

James Stewart to John Macfarlane.

"Sir; Just now had your favour, and am sorry these poor tenants should have made use of me for representing their grievance, as, in all appearance, it has brought a great deal of trouble upon me; being carried here, and my son upon Sunday last, suspected to be knowing to the barbarous murder of Glenure, who was shot dead upon Thursday the 14th current, in a wood within two miles of my house. It is not pretended that I or my son were actors in this horrid action, as we both can be well attested; but alleges, it was a premeditated thing, to which I must have been knowing: but so far otherwise, that no man (I thank God) abhors the fact more, and would, if at liberty, do all in my power to bring it to light. There is one Allan Stewart, a distant friend of the late Ardshiel's, who is in the French service, and came over in March last, as he said to some, in order to settle at home; to others, that he was to go soon back; and was, as I hear, the day the murder was committed, seen not far from the place where it happened, and is now not to be seen; by which it is believed he was the actor; he is a desperate foolish fellow; and, if he is guilty, came to the country for that very purpose. He is a tall pock-pitted lad, very black hair, and wore a blue coat and metal buttons, an old red vest, and breeches of the same colour. I would own myself under many obligations to any friend would discover him; am persuaded he is gone south, in order to embrace the first opportunity of going abroad. When at Edinburgh, he stayed in Mr. Hugh Stewart's at the back of the Fountain-well; so begs, as you have any regard for my interest, recommend all that wish the country well to be in search of him. What makes my confinement very uneasy to me is, that this is the time of the year that my business would require my presence most; having bought cattle (wherein I yearly deal) in different countries, and taken grassings south for the cattle, which I must pay, if I should never send a beast upon it; which I am afraid will be the case, if either my son or self be not admitted to bail, to put our affairs in order: so hopes you'll spare no pains in this, as Airds and Appin will bail me in any sum whatever.

"Your return I'll expect in course of post; and am, with compliments to your lady and self, dear Sir, your humble servant,

(Signed) "JAMES STEWART."

"Fort William, May 19, 1752."

Addressed thus: "To Mr. John Macfarlane, writer to the signet; in his absence, to Mr. John Flockhart, his principal clerk, at his house in the Mint, Edinburgh."

Inverary, September 22, 1752.—This is the Letter referred to in colonel Crawford's oath of this date.

FOLLOWS THE WRITINGS PRODUCED FOR THE PANNEL, BEING FIVE LETTERS WROTE TO HIM BY COLIN CAMPBELL, OF GLENURE.

"Glenure, November 8, 1748.

"Sir; I think I can now, with some certainty, tell you, that I am appointed factor over the lands you possess, and other lands that belonged to your brother Ardshiel; and as the term is now at hand, will beg the favour, you desire the tenants and possessors to be preparing the rents. I am, Sir, your most obedient humble servant.

(Signed)

"COLIN CAMPBELL."

Addressed thus: "To James Stewart in Auchindarroch, in Duror."

"Glenure, October 14, 1749.

"Sir; As I intend Monday next to be in Duror, to hold a baron-bailie-court on the estate of Ardshiel, and call for hygone rents, have sent you this, to beg the favour you would let the tenants know of it, that they may be prepared to make payments, and not be out of the way; and I shall be glad to have the pleasure of seeing you at Taynaheinsag Monday afternoon. I am, Sir, your most obedient humble servant,

(Signed)

"COLIN CAMPBELL."

Addressed on the back, "To Mr. James Stewart, brother to Ardshiel."

"Glenure, December 11, 1749.

"Sir; This moment I had yours by your servant, with the 20l. 18s. 5d. sterling, and the warrant I formerly gave you. Receive inclosed your note: your payments are very good, for which I am obliged to you. I intend, God will, to be at Edinburgh on, or a day or two before the 25th current; that is, I intend to set out from this place this day, or tomorrow eight days, and will go by Glasgow, and make no stop by the way. Remember lady Ardshiel's discharges, and all your other tackling. I heartily wish you a good journey.

(Signed) "COLIN CAMPBELL."

"My wife, who, I find, is your sincere well-wisher, returns you her hearty thanks, and is sorry you have had such bad weather to travel, when you are so weak."

Addressed on the back thus: "To James Stewart in Auchindarroch in Duror."

"Glenure, April 6, 1750.

"Sir; I have yours, and think it is quite right to have burliness: they are frequently very necessary, and can't well be wanted. You will therefore appoint two discreet honest men for that purpose of the tenants; and, to prevent any complaints or objections, be sure you swear them to fidelity in their office. My wife returns you her thanks for your good wishes. I am, Sir, your most obedient,

(Signed) "COLIN CAMPBELL."

Addressed on the back thus: "To Mr. James Stewart in Auchindarroch."

"Glenure, March 14, 1751.

"Sir; After you left this, something has occurred that makes it necessary that you do not set any part of Ardsiel, Auchindarroch, or Aucharn, till I see you after my return from Inverary; which is the reason I run you this express. I am, Sir, your affectionate humble servant,

(Signed)

"COLIN CAMPBELL."

Addressed thus: "To James Stewart of Aucharn, Duror."

Then, the Proof on both sides being concluded, the lord Elphinstone said to the Lord Advocate, that now was his time to proceed to give his Charge to the Jury; which his lordship did as follows.*

Lord Advocate:

Gentlemen of the Jury; It now becomes my duty, to be assisting to you in the discharge of yours, by stating to you this case, and summing up the evidence that hath been given in your presence; which I shall now proceed to do as well as I am able, after so long an attendance.

That attendance, I am sensible, must have been very heavy upon you, and hath been such, as the like hath not happened since the Circuit-Courts of Justiciary were brought to be held in this county: but I hope you will not repine at the great fatigue of this trial, in a case, whereof the importance is as unusual as the length of it; and in which your giving a just verdict will be highly for the service and credit of your country.

I need not resume to you, gentlemen, the libel or indictment, whereof I presume you have been furnished with printed copies before you came here; that, being thereby informed of the principal circumstances which have been discovered concerning the murder of Mr. Campbell of Glenure, you might have leisure to weigh the import of these, and be the better enabled to

attend to the evidence that should be brought before you; and, on the other hand, the pannel James Stewart, who is now standing his trial, was, by that libel, fairly informed of the principal facts and circumstances that were then discovered against him, so as he might have opportunity to account for these, and clear himself, if notwithstanding such strong appearances, he was truly innocent.

The crime itself, which gives occasion to this trial, was of its nature the most horrid and atrocious that can well be conceived. Wilful murder, at any rate, is a crime most heinous; and concerning the first murder, God Almighty himself said to Cain, "The voice of thy brother's blood crieth unto me from the ground." And the murder now in question, as to this pannel's accession to it, was one of the most causeless and unprovoked that ever happened. Poor Mr. Campbell of Glenure was cut off in the vigour of his life, in the very road of his duty in the king's service, and for no other cause or provocation than his doing that duty; and then was he basely assassinated by a ruffian, who lay in wait for him, and shot him from behind his back, so as he died upon the spot, leaving two infant children, and his widow pregnant. And to this horrid violation of the laws of God and of humanity, is to be added, in the present case, that the sole offence taken at Glenure was his acting in the quality of factor on the forfeited estate of Ardsiel, agreeably to his powers and instructions from the barons of Exchequer, as being administrators for the king, whose property that estate was; and it was resented as a capital injury, that the king's factor should venture to exercise his majesty's property as freely, as every subject may do his own.

And last of all, that this murder was committed on the 14th day of May last, just seven weeks after his majesty had given his royal assent, and passed into a law, the bill for annexing this and other forfeited estates to the crown unalienably, and for applying the rents and profits thereof for the better civilizing and improving the Highlands of Scotland.

The clemency of the king had been extended early after the last rebellion, by the act of grace of the 30th year of his reign, of which the pannel James Stewart, among many others, had the benefit; and other beneficial laws were then made, to secure and promote freedom, property, and good order in all parts of Scotland. And, to crown all, this last most beneficent act was made, for the more immediate benefit of the Highlands of Scotland, out of which three rebellions have been raised, since the accession of the royal family now happily reigning; an act of beneficence not to be paralleled in history, and calculated to render all the inhabitants of the Highlands good and useful subjects under this government, by making them feel their own interest in being such, and rendering the meanest of them, who will be honest and industrious, free and happy: and at such a juncture, the murder you are now in-

* N. B. By the 16th act Anno 1672, concerning the regulation of judicatories, article tenth, on the justiciary court, it is provided in these words: "That, in all criminal pursuits, the defender, or his advocate, be always the last speaker, except in cases of treason or rebellion against the king."

quiring into received no small aggravation, as it was flying in the face of the legislature itself, and endeavouring, as much as in these criminals lay, to defeat or discourage the prosecution of a measure of government, so highly gracious and beneficial to this country.

The truth is, gentlemen, that though, God be praised, the Highlands of Scotland are in this age less barbarous than they have been in former times; yet, in our own time, there have been such instances of remaining barbarism, as serve to prove but too strongly, that these countries stand yet in need of being better civilized. I think it was in the year 1794, that, for an offence of the same nature with what was here taken, an attempt to remove certain Macphersons living on the estate of the duke of Gordon in Badenoch, the late Gordon of Glenbucket, his factor or tacksman, was invaded, and received many wounds, given with intent to bereave him of his life, though he chanced to recover.

You must all remember, how basely captain Monro of Culcairn was assassinated, by lying in wait, when he was acting in his duty in the king's service, soon after the defeat of the late rebellion.

And you must have all heard of the late barbarous enterprise of Robert Macgregor and his accomplices, in carrying off from her own house, the unfortunate Jean Kay, a young widow and an heiress, in the depth of winter, and middle of the night, into remote parts of the Highlands, and causing her to be married to that Robert, a person of no fortune, and an outlaw for murder; for being a conductor in which attempt, James Drummond, alias Macgregor, a brother of Robert, has been lately convicted.

The excuse offered for James Macgregor, was the same mistaken principle that appears to have misled the unhappy prisoner at the bar. It was said that James Macgregor was actuated by one of the best affections; he was seeking no personal advantage to himself by that enterprise, but only to make the fortune of Robert his brother.

And the now pannel James Stewart conceived a mortal enmity against Mr. Campbell of Glenure, for disabling him to provide for the children of his brother, Charles Stewart late of Ardschiell, attainted, by contributions levied from the tenants on that estate, who had been under his influence.

But alas! what a delusion is it, from such principle to be led to commit or justify the most heinous and abominable crimes! the care of the interest of one's kindred is doubtless a laudable affection; and even when that good-will is extended to the remoter degrees, and enlarges the circle of benevolence, there is no harm in it; provided in both cases it be conducted with justice, and men exert themselves to serve their friends, without violating the rights of other individuals, or the laws of society and civil government; but he who robs or defrauds his neighbour, to provide for his own household, or

the immediate children of his own body, is not the less criminal in the sight of God and man, that he was moved by an affection, in itself natural and just, but which he pursued in a wicked manner.

And, in the present case of the murder of Glenure, there appears to have been no reasonable or probable scheme of advantage to the family of the late Ardschiell, or any body; but that it proceeded from mere wickedness, malice, and resentment, the most groundless that ever was. It affords a recent and shameful instance of that spirit of revenge, which was the characteristic of the barbarous Highlanders in former times; and a pity it is, gentlemen, and a reproach to the present age, that it should be yet capable of furnishing such an example.

I am far from meaning by this, that the crimes of a few wicked persons can justly bring a general imputation on the whole country where these were committed; we daily hear of most horrid and unnatural crimes perpetrated in the parts of the kingdom the most wealthy, populous, and civilized; but the part incumbent on the country where such things happen, is, to purify the land of the innocent blood with which it is polluted, by bringing the guilty to condign punishment; and this is what you are now employed in: and as you have attended to the evidence patiently, I desire nothing more, than, as an impartial and intelligent jury, you may consider it carefully, in order to discern the truth, and then to follow that resolutely according to the conviction of your own minds; which, if it lead you to believe the pannel guilty, you will do justice to your country by saying so; and if you are not convinced of his guilt, in God's name, let him be acquitted; for better that this murder, atrocious and scandalous as it is, should go altogether unpunished, than that one innocent man should suffer for it.

In order to lay before you distinctly the evidence that you have heard of this pannel's accession to the murder of Glenure, I shall first of all recite the state or situation in which the deceased and the pannel stood towards each other, previous to the murder, and also that of Allan Breck Stewart in respect of both the others. 2dly, I shall point out to you the evidence that Allan Breck was the actual murderer, which I admit to be a fact that was incumbent on us to prove, in order to convict this pannel of wilful accession to it: and, lastly, I shall sum up the evidence that has been brought of that accession, and examine the force of the defences or excuses which the pannel has endeavoured to prove.

As to the first of these, the situation of the pannel himself; that, gentlemen, you partly know, and have heard proved: he is a bastard brother of Charles Stewart late of Ardschiell, attainted, who, out of his own tenants, and those of Dougal Stewart of Appin, his chieftain, levied a regiment or battalion, at the head of which he went into the late rebellion, accom-

panied, among others, by this pannel, who had the benefit of his majesty's act of grace or indemnity; whereby he was left at liberty to remain with his family in the country, whilst Ardschiel himself, the attainted person, made his escape into foreign parts, leaving at home his wife and a family of children, who, as Mr. Campbell of Airds has deposed, were all young, his eldest son being now, as he thinks, about eighteen years of age, and consequently, at the breaking out of the late rebellion, must have been about eleven.

The late rebellion, as you all know, was finally suppressed by his royal highness the Duke, in the spring and summer 1746: in the year following, the act vesting the forfeited estates in the king was passed; and, in 1748, the lands of Ardschiel, among others, were surveyed by order of the barons of the exchequer; to the property whereof a claim was entered on behalf of Alexander the eldest son of Charles Stewart, the attainted person; which claim, upon answers made for the king, was dismissed by the court of session: and thus it happened, that there was no factor appointed by the barons on the estate of Ardschiel, until Colin Campbell of Glenure was made factor, by commission, bearing date the 23d February 1749, upon that estate, and also upon the neighbouring lands of Allan Cameron of Callart, attainted, and, adjoining to those, that part of the estate of Lochiel which lies in the shire of Inverness, to the southward of Fort-William, and betwixt that fort and the ferry of Ballachelish, of which you have heard so much, upon that loch or arm of the sea, which separates Lochaber in Inverness-shire, from the country or district of Appin in this shire.

Now, as this factory was granted full three years after the rebellion, it is to be observed how the estate of Ardschiel was possessed and managed in this interval; and this appears by the oath of Alexander Stewart of Innernahyle, who hath deposed, "That, before the factory, as he believes, the tenants paid their rents to the lady of Ardschiel, and that she again employed the pannel to deal with them."

It was during this period, that the pannel, as the same Alexander Stewart deposes, who had been a great many years ago tenant to his brother Ardschiel in the farm of Glenduror, and had been removed also several years ago by his brother, again took possession of the same farm; and that Ardschiel's lady and the pannel, jointly, introduced certain new tenants of their own choice, into different parcels of the land, which Ardschiel, the attainted person, had himself occupied before the rebellion.

Again, when Glenure had obtained this factory, after he had been for some time abroad with the regiment to which he belonged, in Flanders; and being now come home, was occupied with the treaty for his marriage with the young lady who is now his widow; he did, as Mr. Campbell of Airds hath deposed, for some time employ the now pannel, as his sub-factor, in levying the rents of Ardschiel, and

setting the lands; and, to the same purpose, the said Alexander Stewart deposes, "That the factor gave the pannel the opportunity of having the greatest influence with the tenants of Ardschiel, more than any other person, by allowing the pannel to set the lands, which he continued doing to Whitsunday 1751, if not at that time also: but adds, that the pannel's connexion with the family of Ardschiel, gave him also a natural influence over the tenants, even before Glenure's factory."

The use which the pannel made of this influence, natural or acquired, appears partly from the evidence of the same two gentlemen: for, upon this article, Mr. Campbell of Airds hath deposed, "That the pannel told him, that whatever was made of these rents, over what was paid into the exchequer, was accounted for to the children of Ardschiel; and, when he removed from Glenduror, he told the deponent, that he had reason to believe, that the said ex-crescence of the rents would still be accounted for to them; and, in that case, he would be easy as to his own removal."

And Mr. Stewart of Innernahyle deposes upon this article, "That the pannel was again removed by the deceased Glenure, the factor, from the farm of Glenduror at Whitsunday 1751, and the lands lett to Mr. Campbell of Ballievolan: that as the pannel is the deponent's near neighbour, the deponent had frequent opportunities of conversing with him touching his said removal: that the pannel did not expect to have been removed, and seemed dissatisfied that he was; and said, he believed, that Glenure would not have removed him, if (Mr. Campbell of) Ballievolan had not sought those lands from him: that the pannel further said, that the tenants generally allowed some gratuity to Ardschiel's children, and that these lands were the best farms on the estate, and most of the benefits accresced from them; and though he himself could be provided of a farm elsewhere, yet the children would be deprived of that benefit."

In what manner this removal of the pannel, from this beneficial farm of Glenduror, to which he had last entered since the rebellion, without any lawful title whatever, was brought about, appears from the instructions to Glenure from the barons of exchequer, produced and proved before you; the last of which is in these words: "You are, on no condition whatever, to lett a farm to any of the friends (i. e. the relations) of the forfeiting persons." And though it be true, that these instructions bear date the 25th July 1751, about two months after the actual removal of the pannel from Glenduror, these were nevertheless the true cause of that removal; for it was known or expected by the factor, that he would receive such instructions, there having been notice given to the lords commissioners of the treasury, of a considerable possession of the estate of Lochiel having been lett to, or for the use of one of the brothers of the attainted person; upon which their lordships had directed the barons of the

exchequer to provide against the like being done for the future, in order to avoid the occasions of continuing that leading or influence over the vulgar inhabiting those estates, that had produced so much disturbance and mischief to the public.

And thus it was through necessity, and in order to the faithful discharge of the duty of his office, that Mr. Campbell of Glenure, at Whitsunday, or in May 1751, removed the pannel from his possession of the farm of Glenduror, to the continuance whereof he had no legal title or claim whatsoever; and also resolved to employ the pannel no longer as his sub-factor or assistant, in managing the estate of Ardsheel.

It is not easy to conceive, that there was any reason or just cause given by this conduct of Glenure, for resentment or hatred from this pannel, even if it had been true, which the pannel expressed to Stewart of Invernahyle, that, as he believed, Glenure would not have removed himself, if Balliveolan had not sought or solicited this possession of Glenduror from him; and yet, that the pannel conceived and expressed, and prosecuted such disposition in the most outrageous manner, hath been now fully proved before you. But, before I mention the particular evidence of this, I must proceed to recite the fresh cause of difference betwixt these persons, and of animosity conceived by this pannel, from the after-proceedings of Glenure in the spring of this present year; when he having taken the resolution to remove a few of those tenants, who had been introduced to their possessions, as I have mentioned, by Ardsheel's lady and this pannel, in the interval betwixt the rebellion and the date of the factory, it appears, that the pannel being apprehensive, that this would lessen his interest and influence among the people, if he should not be able to protect those persons in the possessions, which he himself had bestowed or procured, took the resolution to oppose these removings; which he prosecuted, by representing and complaining of it in the country as a mighty act of oppression, because the king's factor thought fit to remove four or five tenants lately introduced upon this estate, who had neither standing leases nor old possessions, to intitle them in point of right, or in point of favour, to be continued: and this groundless opposition to those removings the pannel set about and conducted at his own expence, and gave himself great agitation and trouble in the prosecution of it, having gone to Edinburgh in April last, on purpose to present the bill of suspension of those removings, which you have heard, setting forth most frivolous grounds; and all this without the knowledge, application, or contribution for the expence by the tenants themselves, in whose names he took upon him to offer that bill of suspension, until he had obtained at Edinburgh an order upon the bill from the lord Dun ordinary, that answers should be put in to the same, and sitting or staying execution in the interim:

VOL. XIX.

with which sist, and certain advices he had received at Edinburgh, for making application for those tenants to the barons of Exchequer, when they should meet in the beginning of June, the pannel returned to his own house on the 27th April; and then sent for those tenants, and gave them notice of his proceedings at Edinburgh on their account; and that if they had a mind to continue their possessions, they were advised to go to Glenure, and seek their possessions (or demand such continuance); and if he did not grant their desire, they should send for a notary, and go with him to protest against Glenure; and if they pleased, he would send for a notary, to which they agreed: and accordingly the pannel sent for Charles Stewart, who hath been examined on this fact, and sent him along with the tenants to Glenure's house, where he intimated the sist, and took a protest against him on the 1st of May last.

It was upon receiving this notice of a suspension presented, and a sist granted, that Glenure repaired to Edinburgh, and put in his answer to the bill; upon consideration of which, the bill was refused or dismissed by the lord Haining ordinary; and then Glenure returned to his own house on Saturday the 9th May last, in order to take the necessary measures for executing the removings that had been thus opposed.

This part of the pannel's proceedings is proved by the oath of Charles Stewart his notary, by the pannel's own examinations, which you have heard read, and by Duncan Maccoll in Ardsheel, one of those tenants, who hath now deposed, "That, upon himself and others being warned to remove from the lands of Ardsheel, as at Whitsunday last, he for his part had no intention other than to submit to the warning, till a paper was procured from Edinburgh, which he heard read by Charles Stewart, notary at Aucharn, as on a day he was there, being along with his neighbours advertised to meet there, where he and his neighbours were told by the pannel and Charles Stewart, the notary, that the paper brought from Edinburgh, contained advice for those who had been warned to remove, to continue in their possessions; and that they should go to Glenure, and ask the same from him. And deposes, That he gave no allowance or mandate to the pannel to make any application at Edinburgh against the removing: that, before he heard any thing of this paper from Edinburgh, he had engaged to serve as bouman to the tenants Glenure was to introduce; but that, on hearing of this paper, he preferred keeping by his neighbours, as he considered the being continued in his possession, did the law support him in it, as more beneficial to him: and adds, That the procuring the paper at Edinburgh cost him no money."

To the same purpose, John Maccombich, another of those tenants in Ardsheel, hath deposed, and adds this further circumstance, "That as to his agreeing with the incoming

N

tenants to be their bouman, he heard both Glenure and these tenants say, that it was by Glenure's advice that this was done : " which is, by the way, an instance of the humanity, with which Glenure acted on this occasion, in being at pains to provide bread for these persons whom he did not think fit to continue as tenants on this estate of Ardsheel, where they had been so lately introduced by the pannel.

These then were all the causes of offence, that after the strictest enquiry, can be discovered to have been ever given by Glenure to this pannel; namely, that Glenure as factor upon this estate of Ardsheel, removed the pannel himself from the farm or possession of Glenduror at Whitsunday last year, and gave over employing or entrusting the pannel to act under him in the management of the lands of Ardsheel; and that he was taking measures for removing the few tenants lately introduced by the pannel, at Whitsunday this year; which measure he persisted in, the opposition that the pannel was pleased to make notwithstanding. Very strange causes, it must be confessed, for the pannel's conceiving a violent, and even a mortal enmity against Glenure! And yet nothing is more certain, than that violent offence may be taken, where no just, or even plausible cause for it hath been given: and, from the first murder recorded in sacred history, down to this now in question, often hath it happened, that wicked men have hated their brothers without a cause, that is, without a reason or just cause, though there was always an occasion, or a motive such as it was, for that hatred being conceived.

Again, it is to be considered, that occasions of offence operate differently, according to the education, temper, and character of the party who meets with them; and we have now heard from the evidence in this trial, what a wrong way of thinking this unfortunate pannel is possessed of, in holding it to be a cause of mortal enmity, that a man should be removed by another from his farm or possession which he hath no manner of title to hold or retain: which is a prejudice or delusion, that, in a lower degree prevails elsewhere, but seems to be in a particular manner prevalent in the Highlands, and was the cause of the attempt made by the Macphersons to assassinate Glenbucket some years ago, as well as the cause of the horrid murder into which you are now enquiring.

And, for one proof that this pannel is deeply poisoned with this most erroneous opinion, you heard, gentlemen, a little while ago, the objection that was by him made to Alexander Stewart senior in Lagnahaw, one of the witnesses in the list served upon him, and called up to give evidence against him, to whom the pannel objected, that this witness bore enmity against him, for that the witness was formerly in possession of the lands of Aucharn, which the pannel now holds under Mr. Campbell of Airds; and that the pannel had caused the witness to be removed from that possession,

and succeeded him in it: an objection in itself insufficient in point of law, which cannot suppose men to be so wicked as to entertain mortal enmity for such a cause; and therefore, as you heard, it was over-ruled by the court; notwithstanding which we freely passed from the witness, being satisfied that we had evidence enough besides, and unwilling to leave any room for the pannel to complain, or for you, gentlemen of the jury, to apprehend that any one witness was used against him, of whose credibility there could be the smallest suspicion; but the very moving of such objection on the part of the pannel, affords one proof of his own sense of the nature and degree of such offence.

Another signal proof of this appears from the oath of Ewan Macintyre, late herd in Glenduror, who hath deposed, " That he engaged to be herd to Mr. Campbell of Ballievochan in the farm of Glenduror, for the year 1751; and that, the day after he entered into his service there, the pannel challenged him for accepting thereof, and told him, that he would be fit-sides with him sooner or later for doing it; and that, if he did not meet with resentment himself in his life-time, others, such as his friends, might meet with it after his death." And adds, " That he himself was never in the pannel's service." This was surely carrying this delusion to a most extravagant pitch, and such as, to any stranger to this odd way of thinking, must have appeared incredible, till he heard the proof of a fact, which demonstrates how deeply that opinion is rooted in the mind of this pannel.

And, accordingly, we have heard how that was farther displayed by his words and by his actions on other occasions, in respect of the deceased Glenure, for the causes of offence I have mentioned, by the evidence I shall now point out.

And first of all, John Breck Maccoll, the bouman to Appin (who though he lives in a desert, appeared to me to have given his evidence in a most natural ingenuous manner; and, by his own words and behaviour related in it, discovers a degree of sagacity which, in a person of his situation, surprized me; and) upon the article I am now speaking of, he deposes, " That in a conversation the deponent had with the pannel, as the deponent best remembers, about two years ago," (whether he was herein accurate in the chronology, is not essential to the question in issue) " mention being made of Glenure's being about to take on himself the management of the estate of Ardsheel from the said pannel, and thereby disable the pannel from being of any service to Ardsheel's children, he heard the pannel say, he would be willing to spend a shot upon Glenure, though he went upon his knees to his window to fire it: and farther deposes, that he heard a waif (that is a flying or uncertain rumour or) report in the country, that Ardsheel (the attainted person) had sent home a message, that he believed all his friends were

dead, when Glenure was allowed to go on at the rate he did."

Again, another remarkable conversation of the pannel's in the same spirit, but carried a good deal farther, is proved to have happened about Christmas last 1751, within the pannel's own brew-house at Aucharn, betwixt him and three of his own servants, who all concur in proving it, namely, John More Maccoll, Dougal Maccoll, and John Beg Maccoll; of whom the first hath deposed, "That he was present at a conversation that happened betwixt the pannel, John Beg and Dougal Maccolls, both servants to the pannel, in his brew-house at Aucharn, before day-light, upon a morning about Yule (or Christmas) last, as the deponent best remembers: that the deponent was then employed in distilling the second draught of a brewing of aquavite, and the pannel ordered the deponent to give him, and people present, a dram; which the deponent did: that the pannel said, Glenure would not take the rent from the tenants of Aucharn, part of the Ardsheil estate, because they had given the pannel some barley, which Glenure alledged they ought to have paid him: that the pannel complained, it was hard to refuse the rent in money from the tenants in a scarce year; and observed that it would be of no great consequence to him, the pannel, though he should pay back the barley, in comparison of what it would be to the tenants for subsequent years, in case they were obliged to pay their farm, bear and meal," (to-wit, in kind according to their leases) "and said the tenants or commoners were likely to be very ill off; for, if Glenure went on in the way he then did, it was likely he would be laird of Appin in a very short time; and that he knew once a sett of commoners in Appin who would not allow Glenure to go on at such a rate: To which the deponent and the rest answered, That they knew no commoners in the country who could strive or contend with Glenure in that manner."

This conversation in the brew-house is further proved or explained by the other two servants present: and John Beg Maccoll adds this circumstance, "That after he and Dugald Maccoll went out of the brew-house, either that day or some time thereafter, they talked together what the import of this conversation might be; and that the deponent was at a loss, whether to consider it as an encouragement to destroy Glenure, or as a complaint against the commoners of Appin, as not being so faithful to the pannel, as he expected them to be."

It must be left to your consideration, gentlemen, whether this John Beg Maccoll was not in the right in his conjecture; and that this conversation can receive no other construction, than that the pannel took that occasion to instigate these servants of his own, who were all of one tribe, to resent against Glenure the supposed injuries to the common people of that country, which the pannel had thus represented and exaggerated to them; or at

least to feel their pulses, and try how they would relish such a proposal or insinuation.

But farther still, the pannel continued to discover the rancour with which his own heart was filled against Glenure; the next instance of which that hath appeared upon the evidence, happened in April last, when he was on his road to Edinburgh, with intent to offer a bill of suspension of the removing of the tenants that hath been mentioned: and here three circumstances are proved by the testimonies of Alexander Campbell and Ewan Murray, two of his landlords or iankeepers by the way, and Colin Maclaren, merchant in Stirling, who fell into company with the pannel at both their houses, and travelled in the pannel's company some miles on the road towards Stirling.

Alexander Campbell in Teynaloib hath deposed, "That in April last the pannel called at the deponent's house in the morning to have his horse corned; and having called for, and got a dram, which was afterwards set down upon the table, one Maclaren, a merchant in Stirling, who had lodged with the deponent the night before, being present, asked the pannel, if he would not help the deponent to a dram? and the pannel answered, he did not know any thing that he would help the deponent or any of his name to, if it was not to the gibbet: and after some farther conversation, the deponent said, that Glenure, as he supposed, was the person of the (deponent's) name with whom the pannel had the greatest quarrel; and the deponent did not know any good cause the pannel had for it. To which the pannel answered, that if Glenure had used the deponent as ill as he had used him (the pannel,) by turning him out of his possession, he would have no less quarrel with him than he had. And, upon the pannel's interrogatories, the witness added, that at that time he thought what the pannel said proceeded from malice, and that the pannel was then perfectly sober."

This conversation was confirmed by Colin Maclaren, the merchant, who lodged in that house all night, who adds, "That the pannel then said (speaking of the Campbells) that he did not chuse to be an executioner, but he could draw down some of their feet;—and that at first, during this conversation in Campbell's house, he thought that the pannel had been in joke, but afterwards it was like to become very serious; for the landlord and he came to pretty high words together."

The next landlord, Ewan Murray, at the west end of Lochern, hath deposed, "That in April last, the pannel, and Colin Maclaren, merchant in Stirling, came to the deponent's house, and the pannel told the deponent, that Glenure had warned away several families in Ardsheil's estate to remove; and that he was informed, that none of the factors on the forfeited estates had power to remove the tenants; and that he was going to Edinburgh to take advice of lawyers about it; and if he had not that power, that the pannel would apply for

suspension in his own name, and in name of the rest of the tenants: and the conversation turning upon an officer in the army that was branded with cowardice, and had been broke on that account; the pannel said, that he had reason to say, that Glenure was as great a coward, as that officer; for that he, the pannel, had challenged him to fight him, which Glenure declined; and desired the deponent to tell Glenure, that he had told him so: but the deponent answered, that he would not carry any such message from one gentleman to another: and from the conversation, the deponent understood, that the arms with which the pannel had challenged Glenure to fight, was with pistols."

And it is true, gentlemen, that this witness adds, upon the pannel's interrogatory, "That he thought the pannel was a little concerned with drink;" but if it was so, *tum vere voces*.

This conversation is again confirmed by Mr. MacIaren, the pannel's fellow-traveller, in both the parts of it; who adds this circumstance, that the latter part of the conversation happened upon the road after they left that house, and Murray the landlord rode some part of the way along with them: and then Mr. MacIaren deposes to a third conversation betwixt himself and the pannel, in these words: "that, after parting with Ewan Murray, in the course of their journey, the deponent found, that the removing was much at the pannel's heart, and the deponent endeavoured all he could to divert the conversation to another subject: that the pannel told him, that if he failed in a suspension at Edinburgh, he would carry it to the British parliament; and if he failed there, told him, after a little pause, and with an emphasis, that he behaved to take the only other remedy that remained."

These last words, gentlemen, need no explanation; for surely, after the judgment of the British parliament, no other legal or lawful remedy could remain.

And, as to the condition of the pannel during these conversations, Mr. MacIaren farther deposes, "That he did not think the pannel drunk either in Campbell's house, or in Ewan Murray's house; but after leaving Murray's house, they drank two or three drams at a dram house, and after that the deponent thought him much concerned with liquor; and it was after taking these drams that the conversation between Murray and the pannel, with respect to challenging Glenure, happened; and that the deponent and the pannel had rode several miles together before the conversation about the British parliament; and the deponent thought him even then still concerned with drink:" and very likely it was this that threw the pannel so much off his guard as to speak out, to his landlord and his fellow-traveller, so much of what lay deeply at his own heart, and to tell upon himself this matter of fact about the challenge he had given Glenure to fight him with pistols.

Such appearing to have been the temper and

disposition of the pannel towards Glenure in the month of April last, and before that time; I shall next point out to you, gentlemen, the evidence concerning that of his friend Allan Breck, who himself does not appear ever to have had any acquaintance of, or intercourse with Glenure in his life, but, by the pannel's own showing, was his kinsman, and had been his ward or pupil; and, by Breck's character, and his then situation, as being engaged in foreign service, and not at liberty to live openly in this kingdom for any long time, though he went about among his highland friends without any scruple, he was a fitter instrument of the vengeance meditated against Glenure, than the Maccolles the pannel's own servants, or any of the common people of Appin, could be.

And, concerning this Allan Breck, John Beg Maccoll, one of the pannel's servants, hath deposed, "That, in March last, he came to the pannel's house, late in the evening, dressed in a blue coat, red waistcoat, black shag brochea, and a feathered hat," (that is in his French dress, which the witnesses call a side or long coat, in opposition to the black short coat with silver buttons belonging to the pannel, which he was afterwards seen in; and, upon this his first arrival, the witness proceeds to depose,) "That he looked into the kitchen, and went immediately to the room where the pannel and his family were; that afterwards he used to go through the country to different places, and came frequently back to the pannel's house: that once he remained there a week, which was the longest time that he stayed there at one time."

Here is then the intimacy still subsisting betwixt the pannel and Breck, that naturally arose from the acknowledged connection betwixt them; the pannel's house was his headquarters in the country of Appin, from whence he made his excursions to visit his other friends in those parts; and, during the pannel's absence on his journey to Edinburgh, Breck went over to see his relations in Rannoch. And it hath appeared upon the evidence, how thoroughly Mr. Breck espoused, and entered into the notions and sentiments of his old guardian and friend the now pannel, with respect to Glenure.

And on this head Duncan Campbell, change-keeper at Annat, deposes, "That, in the month of April last, the deponent met with Allan Breck Stewart, with whom he was not before acquainted, and John Stewart of Achnacoon, at the house of the walk-miller of Achnacoon, and went on with them to the house; that Allan Breck said that he hated all the name of Campbell; and the deponent said, he had no reason for doing so; but Allan said he had very good reason for it: that thereafter they left that house; and, after drinking a dram at another house, came to the deponent's house, where they went in, drank some drams, and Allan Breck renewed the former conversation; and the deponent making the same answer, Allan said, That if the deponent had any re-

spect for his friends, he would tell them, that if they offered to turn out the possessors of Ardsheil's estate, he would make black cocks of them before they entered into possession; by which the deponent understood shooting them, it being a common phrase in the country: that John Stewart said he did not blame Glenure so much as Ballievolan, for taking those possessions, whereas Glenure was doing the king's service: and Allan Breck replied, that besides that, he had another ground of quarrel against Glenure, for writing to colonel Crawford, that he, Allan, was come home from France; but that he was too cunning for him; for that, when at Edinburgh, he had made up his peace with general Churchill, and had got his pass, which he had in his pocket-book: that the deponent asked a sight of it; that he searched his pocket-book, but could not find it; upon which he tore a leaf out of the book, and said, there it was. And deposes, that he said twenty times over, he would be fit-sides with Glenure where-ever he met him, and wanted nothing more, than to meet him at a convenient place."

This conversation is confirmed by Anne MacLaren, servant to the said Duncan Campbell, who deposes, "That she heard Allan Breck then say, That he would not shun Glenure, where-ever he met him; by which she understood, that he was to do hurt or harm to Glenure, where-ever he saw him."

And it is further confirmed by Angus Macdonald, the walk-miller mentioned by Duncan Campbell, and by Robert Stewart, a fourth person present in the company, who adds indeed, that Allan Breck was much in drink at the time of uttering the above expressions; but they are not the less to be regarded in this trial, when the occasion of these threats, the repetition of them, and, last of all, the fatal execution hath been at the same time proved before you.

Another like conversation of Allan Breck's was proved to have happened at the house of Malcolm Maccoll, change-keeper at Portnacross, by the landlord, and by Anne his wife, who depose, "That, one morning in April last, Allan Breck being in his house with John Stewart, John Maccoll, then servant to the deponent, came into the company in a shabby condition; that Allan Breck asked who he was? that the said John Stewart answered, that he was an honest poor man, with a numerous family of small children, and that it would be great charity in any body to assist him; upon which Allan Breck desired the said John Stewart to give the said John Maccoll a stone of meal, and he would pay for it, which the said John Stewart promised to do: that the said Allan then gave the said John Maccoll a dram, and told him, if he would fetch him the red fox's skin, he would give him what was much better. And depose, that they gave no great notice to these expressions at the time; but, after they heard of Glenure's murder, believed he meant Glenure, as he was commonly called

Colin Roy, which means Red Colin, in the country."

A third and very remarkable instance of Allan Breck's conversations on this subject, was one which he held with two of the pannel's servants above-mentioned, Degald and John More Maccolls; whereof the former deposes, "That as he and John Maccoll were barrowing in a field belonging to the pannel at Aucharn, being the same day, or the day after the pannel went for Edinburgh, (that is, on the 3d or 4th of April) Allan Breck Stewart walked for a good time about the field; and as they were loosing their horses, the said Allan Breck and they entered into conversation about France, and people from this country there; and John More Maccoll asked, if there was any prospect of any of them coming back? Upon Allan Breck's answering, he was afraid they would not, John More said, he wished that none had ever come from that country; in which the said Allan joined him, saying, it had dispersed the friends he most regarded; and (then added) that it was a particular misfortune, that the management of any concerns they left behind them, fell into the hands of one that was about to shew them no manner of favour; and declared, that he meant Glenure; and told, that the commoners of Appin were little worth, when they did not take him out of the way before now; and upon their saying, nobody would run that risk, not knowing who would stand by them, Allan Breck answered, that he knew how to convey out of the way any person that would do so, that he would never be catched; and also said, that they, and the tribe they were of, (meaning the Maccolls) were not like to be the least sufferers by Glenure's proceedings."

John More Maccoll swears to the same conversation at the harrowing, and deposes, that Allan Breck then said, If they, the commoners of Appin, were worth themselves, they could keep out Glenure, and hinder him from oppressing them; in which case they would not be banished from their natural possessions; and, upon the deponent's answering, he did not see how any body could pretend to strive or struggle with Glenure in that way, as he had the laws of the king and country for him, and nobody to support or take them by the hand after their so doing, Allan said, he had it in his power to save or protect any body that would put Glenure from tramping upon the country in the manner he then did.

Here then was Allan Breck the popil, in spring last, a few weeks before the murder happened, speaking the very same language, and using the same arguments, with two of these Maccolls, the servants of the pannel, with which the pannel himself had been practising upon them in his own brew-house about Christmas last; and this conversation of Breck's was not like the former, after drinking drams in change-houses, but when he was sober and cool, walking in the fields about the pannel's house, which was in effect his home.

And, to the evidence on this article, may be

added, what the pannel himself hath declared at his first examination before the sheriff-substitute, which has been proved and read in your presence, when, being interrogated, "If he had any conversation with Allan Breck concerning Glenure?" he answered, That the said Allan asked the declarant, if he heard that serjeant More (Cameron) was come from France, or if he was in the country of Appin? To which the declarant answered, That he did not hear he was in Appin, but he heard he was in Glenetive last year; whereupon the said Allan told the declarant, that serjeant More swore he would kill Glenure, because of the treatment he gave the tenants on the estate of Mamore, part of Lochiel estate. Declared also, that the said Allan Breck threatened that he would challenge Ballievolan and his sons to fight, because of his removing the declarant last year from Glenduror, and being about to remove the other tenants this year from some other parts of the estate of Ardschiel."

Now, as to the mention here made by the pannel of serjeant More Cameron, I shall hereafter have occasion to take notice of the use the pannel made of it; but have here only to observe, that the causes of offence, for which the pannel says Breck threatened to fight Ballievolan, were the very same which the pannel himself, as well as Breck, resented so highly against Glenure, namely, the removing the pannel himself from Glenduror the last year, and being about to remove other tenants of Ardschiel this year: and though the pannel carefully avoids saying any thing of Breck's threatenings against Glenure, after he had been actually murdered, and had attempted to throw the suspicion of that upon serjeant More; yet here, by the pannel's own shewing, Breck had entered thoroughly into those quarrels of his for the actual removal of himself, and the intended removal of others, and threatened to challenge and fight Ballievolan upon that account.

And as to the other ground of quarrel against Glenure, which Allan Breck mentions in one of the above conversations, namely, for his supposed writing to colonel Crawford, that he, Allan, was come home from France, I shall not take upon me to explain, or to guess in what manner Allan Breck came to be possessed with such a conceit; because we have heard no evidence concerning the manner in which he received such piece of false information or intelligence; for that it was false hath been fully proved before you.

First of all, colonel Crawford himself "being asked whether the deceased Colin Campbell of Glenure ever told him, that Allan Breck Stewart was a deserter, and in this country, hath answered upon oath, in the negative."

And next, Mr. Campbell of Airds hath deposed, "That, in spring last, he had a letter from colonel Crawford, telling him, that he heard Allan Breck Stewart was come to the country, and inlisting men for the French king's service, and desired the deponent to enquire if

it was so: that the deponent did enquire, and wrote the colonel for answer, That he heard he had been in the country, but that he was then gone away: that this was in the month of April, to the best of the deponent's remembrance; and it seems about that time Allan Breck Stewart had gone to Rannoch, which gave occasion to the deponent's being informed that he was gone away, and did not hear of his having returned to the country till after Glenure's murder; and thinks he wrote also to colonel Crawford, according to the information he had got, that Allan Breck Stewart was in use of coming every year to the country since Ardschiel went to France."

And Alexander Stewart of Innernahyle deposes, "That he remembers that Allan Breck Stewart came over to this country a year or two ago, and stayed some weeks among his friends; but neither at that time, nor the last time, did he seem, so far as the deponent observed, to be in any apprehension of being taken; only, as he had been once in the army, he did not chuse to meet with any of the king's troops."

And besides all this, it hath appeared in the proof before you, that Breck Stewart remained in the country, as usual, a full month or more, after he had mentioned the supposed notice given concerning him by Glenure to colonel Crawford; and it hath not been proved, or even alleged, that in pursuance of that notice, whoever gave it, there was any search made for Breck, or the smallest disquiet given to him, or any alarm or precautions taken by him, till after the murder of Glenure. To say nothing therefore of the injustice of that cause of offence, had it been true, that Glenure, a good subject to his majesty, formerly a military, and still a civil officer in his service, had given notice to the commanding officer in a neighbouring garrison, of such a person as Breck Stewart, a late rebel, a deserter, or a French emissary possibly for raising recruits, being then lately come into that country; I have only to observe on this occasion, that in fact it is incredible, that Breck Stewart himself, upon a bare surmise, which was not true, that Glenure had given such notice to colonel Crawford, and upon which no molestation followed to himself, should have conceived or prosecuted a deadly hatred against Glenure; and therefore the true cause of that enmity must have been the other main quarrel or cause of offence, which was first taken up by the now pannel, and thereafter adopted and espoused by Breck in the manner that you have heard.

And for the truth of this observation, we have the authority of the pannel himself, who had the best opportunity to be thoroughly acquainted with Allan Breck's sentiments; for, in the pannel's examination that hath been read before you, he says, "That how soon the declarant heard of Glenure's murder, it came into his mind, that serjeant More had done it, because Allan Breck had told him, that the said serjeant swore bloody revenge against Glenure,

before the serjeant came from France, upon account of Glenure's treatment of Lochiel's tenants, and his differing with John Cameron of Fassaferr, brother to Lochiel. That the declarant's reason for suspecting Allan Breck afterwards was, because he left the country abruptly, without taking leave of him, as he expected; and, if the said Allan was guilty of the said murder, he believes it behoved to be on account of the disturbance given to the tenants of the estate of Ardschiel, and he knows no other."

Thus, gentlemen, stands the evidence you have heard of the causes of offence, such as they were, that were taken by the pannel and his friend Breck Stewart against the late Glenure, and of the manner in which their resentment against him had been expressed and displayed in and before the month of April last, when the pannel went to Edinburgh to obtain a suspension for staying the removings. And we must now proceed to examine the evidence of the sequel of these animosities and threatenings, and of the fatal execution thereof by the actual murder of Glenure, upon the very eve of Whitsunday, or the 15th of May, when he was to have proceeded to the removing of the tenants of Ardschiel, after he had, upon answers made, obtained the bill of suspension offered by the pannel to be refused or dismissed; whereby the pannel's last effort, to prevent those removings, and to preserve his own authority or influence with the tenants of Ardschiel, had been frustrated.

On the 27th April last, by the pannel's own account, he returned to his own house from Edinburgh, with the order he had obtained on his bill of suspension, that the same should be answered, and a sist or stay of proceeding in the interim; soon after which, he called the tenants, and gave them notice what he had been doing for them, and sent them with his notary to intimate the sist to Glenure; which was accordingly done on the 1st of May, as Charles Stewart the notary hath deposed.

On Saturday the 9th of May, Glenure returned to his own house from Edinburgh, whither he had gone to make an answer to that bill of suspension that had been intimated to him; and, upon that answer, had got the same refused or dismissed; and gave out, in his family, his resolution, after reposing himself that Sunday at home, to set out on Monday the 11th for Fort-William, in order to settle the affairs of his factory on the Lochiel estate, and to return to Appin or Ardschiel before the 15th.

At this time Allan Breck Stewart is proved to have been at the house of John Stewart of Fasnaloich, distant but one mile from Glenure's house, which, in that country, is near neighbourhood; and there accompanied by Charles, one of the pannel's sons, where Allan Breck had opportunity to get intelligence of the motions of Glenure; which accordingly he received from his landlord John Stewart the elder of Fasnaloich, who hath deposed, "That he told Allan Breck, that Glenure was come from

Edinburgh, with a warrant to remove the tenants; to which Allan Breck said, That if there was a warrant, there was no more to be said; but that if he had no warrant, he would not be allowed to remove them: and the witness adds, that he heard, on Sunday the 10th of May, that Glenure was going to Fort-William; and Allan Breck left his house about nine o'clock Monday morning."

This is confirmed by James Stewart the younger of Fasnaloich, who adds, "That Breck was then in his French dress, and that, when he went away on Monday the 11th, about nine in the morning, he told the family that he was going to leave the country soon, but would see them again at Fasnaloich before he went away: and further says, that, on Sunday the 10th, he heard, being in company with Allan Breck, that Glenure had got an order from Edinburgh to remove the tenants, and was gone to Fort-William."

From Fasnaloich, Allan Breck came directly the same day to the pannel's house at Aucharn, where, soon after, he put off his French clothes, and put on the black or dark-coloured short coat belonging to the pannel, with silver buttons, with a bonnet and trowsers, being, as several of the pannel's servants have deposed, the second time they ever saw him in that dress; the only former time having been, when Breck went in these clothes for some days to Rannoch in April preceding, whilst the pannel was at Edinburgh.

And now the pannel himself hath declared, "That he was informed on Monday the 11th of May, by his son Charles, Allan Breck, and Fasnaloich's daughter, that they heard Glenure was to go to Lochaber that day; and that one or other of them told him, that Glenure was to remove the tenants of Ardschiel."

By the communication of this intelligence, it appeared, that the matter in dispute was coming to a crisis: the laborious efforts made by the pannel, in going to Edinburgh, of his own accord, to get a stop put to the removing, he now saw were rendered ineffectual, by means of Glenure's having gone thither after him: and it is presumeable from the facts that preceded, and that followed this day, that this was the time when the pannel and Breck, at his own house, concerted, that Glenure should be cut off by the hands of Breck, upon his return from Fort-William into that country of Appin; and, as it appears from the evidence, that the pannel at this time was low in cash, the facts that have been proved serve to evince, or to render it further presumeable, that at this time it was concerted betwixt the pannel and Breck, that the latter, as soon as his work was done, should retire to the desert of Koalisnacuan, and there wait, till either the pannel sent him a supply of money to carry him off, or caused the money to be furnished by his friend and correspondent, William Stewart, merchant in Maryburgh.

It is true, that for some hours of this Monday the 11th, the pannel went from his own

house, upon a message from Mr. Campbell of Airds; but he returned home in the evening; and in the disposition that both he and Breck Stewart had long been in towards Glenure, which was now more inflamed by this fresh intelligence they had received, that Glenure had got the better of them at law, and was about to proceed in the removings, a very short consultation betwixt them might serve to make all this concert; the evidence of which arises from the ensuing facts, joined with those preceding this 11th of May.

For it hath been proved, that on the morning of Tuesday the 12th Allan Breck set out from the pannel's house, dressed in his short clothes, and went directly to the house belonging to Stewart of Ballachelish, adjoining to the ferry of that name, upon the road by which Glenure was to come from Fort William into Appin; and there Breck met his friend Stewart the younger of Fasnachloich, who hath deposed, "That he took notice to Allan Breck, that he had changed his dress; who answered, That he did it because the day was warm:" and adds, "That the deponent was informed at Ballachelish, in company with Allan Breck, that Glenure was gone to Fort William."

The same day Allan Breck went, accompanied by Fasnachloich the younger, to the house of Macdonald of Glenco, where his mother-in-law, the pannel, and Ardschiel's sister, also lived; and from thence, after staying about an hour, went a-cross the ferry to the house of Cameron of Callart, where another sister of the pannel and of Ardschiel lives, and where he lodged all that night; and next day, being Wednesday the 13th, came back, after calling again by the way at Glenco's house of Carnoch to Ballachelish, where he remained the night following.

And now, gentlemen, we are come to the fatal day, which was Thursday the 14th of May last, of which, and the days immediately following, the various events and incidents that have been proved before you, merit your particular attention, as I endeavour to put you in mind of them, as nearly as possible in their order.

On the morning of this Thursday the 14th, about 7 or 8, as John Beg Maccoll, the pannel's servant, hath deposed, "The pannel sent him off with a letter to Charles Stewart, notary public at Maryburgh, and told the deponent, that the letter was to make, or cause the said Charles Stewart come to the country of Appin, to protest against Glenure, in case he had not a sufficient warrant to remove the tenants of Ardschiel;—and also told the deponent, he was to get some money from William Stewart, merchant at Maryburgh, to pay four milk cows that were bought for him in the country; and that if the money was not sent, he would not get the cows; and that the pannel desired the deponent to make all possible dispatch:—that accordingly he made all the dispatch he could to Fort William, where he arrived about 12 o'clock, and delivered the pannel's letter to William Stewart, merchant; who told him, that Charles

Stewart, the notary, was not at home; but that there was a notary along with Glenure, who would serve the pannel as well as Glenure; and further told the deponent, that he, the said William, had wrote to the pannel in the morning; that the said William did not give him any money, but said, he would send servants for the cattle."

The reason why he got no money at this time, is explained by William Stewart himself, who deposes, "That he gave no answer in writing, and thinks he did not give any verbal answer, if it was not, that he bid him tell his master, that he was not in cash, which (he says) was the case."

The letter itself, sent from the pannel by this witness, hath been produced, and proved before you; and the postscript of it is in these words, which I will now repeat, though they are inserted in the libel: "As I have no time to write to William, let him send down immediately 8*l.* sterling, to pay four milk cows I bought for his use at Ardschiel."—The pannel must have had a very pressing use for money, when he was thus urging the payment of the price before the buyer received the cattle; and let it be observed, that this first express sent with this demand of money from William Stewart, was dispatched by the pannel on the morning of the day on which the murder happened in the evening.

Again, you are here to observe the connexion betwixt the pannel and this William Stewart at Maryburgh, who appears, by the letter which he mentioned to the messenger as having been sent by him that morning to the pannel, to have entered with great zeal into the pannel's scheme for opposing the removing of the tenants; for that letter also hath been proved before you, and contains these words: "I find Glenure has a mind to eject the tenants; but they ought to be deaf to it, and, at all risks, keep possession, as they are in good hands, and it must end in exchequer; so that I beg they keep possession: as there will be no troops, they ought to repel force by force, and take their hazard of the consequence, as it can be no more than violent profits."

About noon on this Thursday the 14th, as Ballachelish elder hath deposed, "His guest Allan Breck went out with a fishing-rod in his hand, and was fishing in a burn near the deponent's house; but he did not see him take any; that he did not take leave of the deponent, and did not return, and he knows nothing of him since."

Archibald Macinnish, the ferry-man at Ballachelish, deposes, "That, after mid-day upon Thursday the 14th of May last, as the deponent was sitting near the said ferry with another man, Allan Breck came behind him, and hoisted (or hemmed,) and, upon the deponent's looking about, desired him to come to him; which the deponent did, and the said Allan enquired of him, if Glenure had crossed the ferry from Lochaber to Appin? The deponent told him he was sure he had not: that upon this

Allan Breck went away towards the high-road, had on a dun-coloured big coat, and had no fishing-rod. And further deposes, that Glenure was expected back upon the Wednesday, and the deponent was sure he must be back the Thursday, as it was currently reported in the country, he was to have a meeting with some gentlemen at Kintalline (on the Ardsiel estate) Thursday night."

These ferry-men have opportunity to learn all the news in the country; and that his intelligence upon this last article was just concerning the motions of Glenure; and that the same were well known, is further proved by John Maccombich, change-keeper at Kintalline, who hath deposed, "That upon Tuesday the 12th of May, Glenure sent notice to the deponent, that he and some other company were to be at his house upon Thursday then next, and desired that he might be prepared for entertaining them: that he accordingly made provision for them; that he told that Glenure was to be at his house that night, and that the whole neighbourhood knew of it."

And accordingly it hath been proved by the persons who were in company with Glenure, Mungo Campbell, who attended him as a clerk or writer, John Mackenzie his servant, Donald Kennedy, one of the sheriff's officers, that Glenure and they crossed the ferry of Ballachelish betwixt four and five in the afternoon of this day; that, after crossing the ferry, Ballachelish elder walked along with Glenure about half a mile, till they came to the skirts of the wood of Lettermore, where Glenure, pursuing his journey through the wood, which stood on the ascent of the hill on his left hand, was suddenly shot through the body with two balls, that entered behind his back, and came out at his belly; of which wounds he died upon the spot about six o'clock that same evening.

It is unnecessary for me to repeat the several moving circumstances related by his attendants; but if this base and cruel murder was truly perpetrated by Allan Breck Stewart, who had expressed his wishes to meet Glenure at a convenient place, it must be confessed with regret, that he here met him, or rather, in a base and cowardly manner, lay in wait for him, at a place convenient indeed for that wicked purpose, for concealing himself whilst he went about it, and not far distant from a proper place of retreat, after it should be over, until he should be put in a condition to leave the country; for which a supply of money was necessary.

The news of the murder was quickly brought to the house of the pannel, by John Mackenzie, the servant of the deceased, who went there to get intelligence of Mr. Campbell of Ballievelan; "Where the pannel seeing him weeping, asked what the matter was? And the servant having told him his master was killed, the pannel wrung his hands, expressed great concern at what had happened, as what might bring innocent people to trouble, and prayed that might not happen."

VOL. XIX.

And John Beg Maccoll, the pannel's servant, who had been sent express that morning to Fort-William, and who was present at this circumstance, relates it in these words: "That he was hardly an hour returned home, when Glenure's servant came to the door, calling for the pannel; that the pannel went immediately to the door, and asked the servant what was the matter? and what news he had? To which the servant replied, The worst I ever had; my master is murdered in the wood of Lettermore: upon which the pannel said, Lord bless me! was he shot? To which the servant answered, That he was shot, and said, the pannel ought to go and take care of his corpse: that the servant immediately went off; but neither the pannel, nor any of his family, went near the corpse; and the pannel said, that as he and Glenure were not in good terms, and some of the people that were to meet Glenure had arms, he did not care to go near them, not knowing what might happen. And further said, that this was a dreadful accident, and he was afraid would bring trouble on the country; and appeared to be sorry for what had happened."

Here it is evident, that as soon as the deed was over, the pannel's first reflection, from whatever cause that sprung, was an apprehension, that it might bring himself into trouble or danger.

That same night, at the pannel's house, orders were given to the servants by his wife, to hide all the arms about the house; and accordingly John Beg Maccoll and Dugald Maccoll hid a large Spanish gun, that used to stand in the brew-house, and four swords. But here it is remarkable, that none of the servants saw that night the other shorter gun, but of a larger bore, as you have seen, both having been produced, and proved before you; concerning which Dugald Maccoll deposes, "That Allan Stewart, son to the pannel, told him and his fellow-servant, that he himself had concealed the lesser (or shorter) gun, that used to stand at the end of the girmel in the barn, under the said girmel, where he thought it would be safe."

That same night, and after the murder was over, two witnesses have deposed, that they saw Allan Breck Stewart on the hill above the house of Ballachelish, where he had lodged the night before, and not far from the spot where the murder happened. These were Katharine Mackinnish, servant to Ballachelish, a witness called by the pannel, who says, "That in the evening of the 14th of May, she saw Allan Breck Stewart at a goat-house in the moor of Ballachelish, after Glenure was killed; and that Allan Breck then asked her, what was the occasion of the stir in the town? and that she told him, Glenure was murdered: and further asked her, who might have committed the murder? and she told him, she did not know: and farther says, that she told Donald Stewart, (who is nephew and son-in-law to Ballachelish) where she saw Allan Breck; but that she did not tell him to go to the said Allan, nor did he desire her."

O

And this Donald Stewart deposes, "That upon the evening of Thursday the 14th of May, about night-fall, Katharine Mackinnish called him out of Ballachelish's house, and informed him, that Allan Breck wanted him, and that he was a little above the house on the brae (or hill): that the deponent went up the brae, and met Allan Breck, who was then dressed in a great coat, and a dark short coat under it, with white metal buttons: the deponent told him of the murder, and said, It could not be but that he, Allan Breck, was about it: to which Allan Breck answered, That he heard of the murder, but had no hand in it: to which the deponent replied, He did not believe him:—that the said Allan Breck further said, he believed he would be suspected of the murder; and upon that account, and as he was a deserter formerly from the army, it was necessary for him to leave the kingdom."

The events of Friday the 15th of May last, immediately following the murder committed on the evening of Thursday, do no less merit your attention, and these begin very early on that day; for John Macdonald of Glenco deposes, "That on Friday the 15th of May last, the said Allan Breck Stewart came again to the deponent's house at Carnock, at three or four o'clock in the morning, and knocked at a window when the family were all in bed; that the deponent went to the door of his house, and there saw Allan Breck, who gave him the first notice he had of Glenure's being murdered the evening before in the wood of Lettermore; and told him, that he was to leave the country, and to go the Moor-road leading to Rannoek; and came to take leave of the deponent and his step-mother, who is a sister of Ardschiel's; and that the deponent did not ask Allan Breck any questions about the said murder."

And with Glenco concurs Isobel Stewart his step-mother, who also got up, and went out with her step-son, to receive Allan Breck's nocturnal visit at the door: and she says, "That she asked him, what news up the country? To which he answered, a good deal of news; that Glenure was killed, or shot the evening before, in the wood of Lettermore: that he was come to take farewell of the deponent; for he was to leave the country: and that she asked him no more questions about the murder, though she asked him to come into the house; but he answered, he would not stay."

Upon this incident it is an obvious reflection, that neither the pannel's sister, the lady Glenco, nor her son, judged it necessary to ask any question of Allan Breck about the murder, which he now related to them, as what had happened a few hours before he came thus unseasonably and abruptly to take leave: these circumstances superadded the question as superfluous, who it was that did it?

About ten o'clock in the forenoon of this same Friday the 15th, Donald Stewart, the nephew and son-in-law of Ballachelish, deposes, "That he met James Stewart, the pannel, in

Duror, not far from his own house; and that, upon the deponent's regretting that such an accident, as Glenure's murder, should happen in the country; the pannel joined with him and said, that he was informed, that one serjeant More, alias John Cameron, had been threatening harm to Glenure in France; but did not inform the deponent who told him so: and further deposes, that, to his knowledge, serjeant More has not been in Appin these ten years past."

Now this very Donald Stewart, who is a friend and neighbour of the pannel's, had, as you have heard, the night before said to Allan Breck himself, that he was surely the murderer, which was the sense and opinion of the whole country; and yet here it is very remarkable, that, when the thing was recent, and as somebody must have done it who was likely to be capable of such an enormity, this pannel, for want of a better shift, is endeavouring to start a very improbable hypothesis, and to throw the suspicion on this serjeant More Cameron, which, as it was destitute of any foundation in truth, gained no sort of credit or belief; and you are to consider, gentlemen, if it could be started by the pannel, at this time, for any other purpose than to divert the attention and the suspicions of mankind from his friend Allan Breck.

The same day about twelve o'clock, Alexander Stewart, travelling packman in Appin, and first cousin to Allan Breck, deposes, "That the pannel desired him to go to Fort William to William Stewart, merchant there, and get from him five pounds, or five guineas; and told the deponent, that his friend Allan Breck was about to leave the country, as there were troops coming into it, and that he might be suspected of Glenure's murder; and that it was incumbent upon him, the pannel, to supply the said Allan Breck with money; and the pannel desired the deponent to tell the said William Stewart, that he must find him money, though he should borrow it from twenty purses; and also to tell him to give credit in five pounds sterling to John Breck Maccoll, bouman to Appin at Koalisnasean, in case he came to demand such a sum: that in consequence of this message, he went to Fort-William, where he arrived early in the evening, met William Stewart, delivered his message; that William Stewart told him, he had not money, but that next morning he would give him his errand."

William Stewart himself, who received this message, deposes, "That it was about ten o'clock forenoon, or betwixt ten and twelve, that he saw the packman at Fort-William; and his wife swears it was about mid-day;" and if they are both in the right, the packman himself must have been mistaken, when he says, that he was dispatched by the pannel from Aucharn, so late as about noon that day; of which circumstance I shall hereafter have occasion to take some notice.

William Stewart further deposes, "That, at this time, he asked the packman, if he had

come by the road where that unlucky murder of Glenure had happened? and the packman told him he did; but the deponent did not ask him who was suspected for it, nor had any other conversation on that subject, there being a great many people present in the shop at the time." But this apology notwithstanding, (for all the people in the shop at Maryburgh would have been ready to listen to news about such an uncommon event) this William Stewart, who was so well acquainted with the cause of difference betwixt the pannel and Glenure, being so little inquisitive on this occasion of receiving a message from the pannel the day after the murder happened, seems to be no otherwise accountable, than by the supposition that he knew so well who were Glenure's enemies at that time, that it was improper or unnecessary for him to be inquisitive about the authors of his murder.

Dugold Maccoll, the pannel's servant, deposes, "That about four o'clock in the afternoon of this Friday the 15th of May last, the pannel desired the deponent to carry the arms from the houses (at Aucharn), and hide them in the moor; that accordingly the deponent, and John Beg Maccoll, took the foresaid large gun from the back of the sheep-house under the thatch, and the said four swords from under the thatch of the barn, and found the gun that used to stand in the barn under the gurnel, where the said Allan Stewart, the pannel's son, said he hid it, and carried them to the moor, and hid them in the hole of a rock above the peat-moss: that the large or Spanish gun, that stood in the brew-house, was charged with powder and small drops; and that there was no shot in the small or lesser gun that used to stand at the end of the gurnel in the barn; that they overtook Katharine Maccoll, servant to the pannel, in the brae above the house of Aucharn, with a pock or sack, and something in it, under her arm. The deponent asked her what she had got in the sack? to which she answered, that it was Allan Breck's clothes, and that she was going to hide them; and the deponent, and the said John Beg Maccoll, saw her hide the sack in which the said clothes were."

This is confirmed by the oath of John Beg Maccoll, the other servant, who says, "They were desired by the pannel's wife to hide the arms better" (i. e. than they had done the night before); and by the oath of Katharine Maccoll, who says, "That, upon the evening of this Friday, her mistress, the pannel's wife, put up a blue coat and red waistcoat, with something else into a sack, and delivered them to the deponent, desiring her to hide them some way without: that her mistress did not tell the deponent to whom the clothes belonged, but that the deponent thought the said coat and waistcoat were Allan Breck's: and she adds, that some time in summer last, after the above period, Solomon Bane Maccoll, servant to the pannel, told the deponent, that the said Mrs. Stewart, spouse to the pannel, desired her to

conceal what she knew about the above clothes, in case she should be asked or examined about them."

On Saturday the 16th of May, as William Stewart's wife hath deposed, "She being solicitous to have the cows, bought for her husband's use by the pannel, towards stocking a farm they had taken, gave the packman, his messenger, three guineas out of her purse: and the packman deposes, that he got the money from Mrs. Stewart, after he had seen William Stewart himself, on this Saturday the 16th, who told him he would let him go immediately; and that, having got the three guineas, he forthwith returned to Aucharn, and arrived there in the evening, near to which place he found the pannel a prisoner; but the pannel's wife, and the deponent, having had access to converse with the pannel apart, the pannel asked the deponent, what money he had brought from Fort-William? and, upon the deponent's telling him that he had brought three guineas, the pannel pulled a green purse out of his pocket, out of which he took two guineas, and gave them to his wife, who delivered them immediately to the deponent; and the pannel desired that the five guineas should be sent to that unhappy man, meaning Allan Breck, to see if he could make his escape; and pitched upon the deponent, as a person that should go with the money.—That soon after the pannel was carried off by a party to Fort-William; and Mrs. Stewart told the deponent, that he would find Allan Breck in Koalisnacoon; and, some time after night-fall, the deponent got his supper at Aucharn, and then the pannel's wife carried the deponent to the back of the brew-house, where there lay a sack, out of which the said Mrs. Stewart took a blue coat, red waistcoat, black breeches, a hat and some shirts, all which she delivered to the deponent, ordering him to go with the clothes and money to Koalisnacoon immediately, and deliver them to John Breck Maccoll, bouman to Appin, if he did not meet Allan Breck himself; but directed the deponent not to carry the clothes to the bouman's house, lest any body should see them; that the deponent accordingly set out, that same night, for Koalisnacoon."

In the mean while, as John Breck Maccoll, bouman to Appin, hath deposed, "Upon the afternoon of this Saturday the 16th of May, as the deponent was in a fir-bush (or thicker) near Aldavoin, at the foot of the heugh (or deep hollow place) of Corrynakeigh in Koalisnacoon, he heard a whistle, and, upon looking up, saw Allan Breck at a little distance, beckoning to the deponent to come towards him; which he did: that, after salutations, the deponent told him, he was afraid it was no good action that occasioned his being in such a remote place, and at such a distance from any common road; that Allan Breck answered, The place was not very far from a road: that the deponent, having heard the day before of Glenure's murder, charged Allan Breck with

being guilty of it: that Allan Breck asked the deponent, what he had heard about the murder? That the deponent answered, That he had seen no person from the strath (or vale) of Appin; but that two poor women, that had come up Glenco, were telling that Glenure was murdered Thursday evening in the wood of Lettermore; and that two people were seen going from the place where he was murdered; and that he, Allan Breck, was said to be one of them.

"That Allan Breck answered, he had no concern in it; and that, if his information was right, there was but one person about the murder; and that, as he was idle in the country, he was sure he would be suspected of it; but that would give him little concern, if he had not been a deserter, which would bear harder upon him, in case he was apprehended, than any thing that could be proved against him about the murder.

"That the deponent did not believe him, when he said he had no hand in the murder of Glenure; and, not caring to press it much upon him, told him, that, as he was already suspected, it was dangerous to have any intercourse with him; and pressed him to leave the place, lest he should bring the deponent and his family to trouble.

"That Allan Breck said, he did not doubt but that the family of Ardsheel would be suspected of the murder, and it was probable the pannel, and Allan Stewart his son, might be taken into custody about it; and that he, Allan Breck, was afraid Allan Stewart the pannel's son's tongue was not so good as his father's; by which words the deponent understood, that Allan was easier intrapped than the pannel.

"And, the deponent still insisting upon Allan Breck's leaving that neighbourhood, the said Allan Breck told him, he would not leave the town (as the witness expresses it, or the place) for eight days, unless some necessaries he expected came to him; and told the deponent, unless some money came for him before next morning, he, the deponent, must go to Fort-William with a letter; that, though the deponent refused to go, Allan Breck looked about among the trees, and finding a wood-pigeon's quill, made a pen of it, and having made ink of some powder he took out of a powder-horn that was in his pocket, he wrote a letter, which he told the deponent he must deliver to William Stewart, merchant at Maryburgh.

"And, upon the deponent's telling him, that he would by no means undertake that, as he was informed that every body that went to Fort-William was searched, Allan Breck said, it was an easy matter to hide a letter; the deponent answered, If he was caught upon the streets what would he do with it? Allan Breck told him, that the letter must not be found upon him by any means, and, if he was caught with the letter, he must eat it before it was found; that the deponent then told the said

Allan Breck, that he did not know but he would be obliged to go for some beer next day to Fort-William, in which case he might possibly carry the letter; but at the same time told the said Allan Breck, that, if he should be taken up, he would tell all he knew about him.

"That the said Allan Breck desired the deponent to go to Callart, or Glenco's house, for a peck of meal to him; which the deponent refused, and at parting, the said Allan Breck told the deponent, he would see him next day."

The bouman further deposes to the dress in which he met Allan Breck at this time, being the black short coat and trowsers lying upon the table, and produced to him, and proved to have been the property of the pannel.

Early upon Sunday morning, the 17th of May last, as both the packman and the bouman have deposed, they met near to the bouman's house, whereof the latter at first denied to the packman, that he had seen Allan Breck; and upon the other's being surprized at this, and saying, he was informed he would meet Allan Breck there, and had brought some necessaries for him; and the bouman enquiring what he had brought? the packman answered, five guineas and some clothes; and told, that he had a great deal of trouble in getting the money; that he had been sent by the pannel to William Stewart at Fort William, from whose wife he got three guineas, and that the pannel or his wife gave him the other two guineas; and that the pannel's wife gave him the clothes, and informed him that Allan Breck was to meet him at that place; whereupon the bouman owned to the packman, that he had seen Breck the day before, and that he expected these things, and directed the packman how he might find Breck, if he would go to a hill he pointed out to him, near to the heugh of Corrynakeigh, and whistle once or twice, he believed Breck would come to him: but this the packman declined, telling, that he had slept none for two nights, and was very much fatigued; and upon this delivered to the bouman the five guineas, and told, he had left the clothes at some distance, and would shew them to the bouman when he was going away; and then went to sleep in the bouman's house. After the packman had slept some hours here, he dined with the bouman his landlord, and told him, "That the pannel, and Allan his son, were made prisoners the evening before, and sent to Fort William; and, upon the bouman's enquiring who was suspected of Glenure's murder? the packman answered, that it was Allan Breck; and that it was likely the pannel, and Allan his son, would stand the first trial for it." And about noon this Sunday the packman went away, without seeing his cousin Breck, after having pointed out to the bouman a fir-tree, at the root of which he had hid Allan Breck's clothes.

The bouman further deposes, (and indeed every word of his testimony merits your attention, and was given in a most lively, natural, and credible manner) "That, after he had

gone to bed upon the same Sunday evening, he heard one knocking at the window, and imagining it might be Allan Breck, he got up, and went out in his shirt, and saw Allan Breck at a little distance from the house; and upon the deponent's coming up to him, Breck asked him, If any message had come for him? The deponent told him, that his uncle's son had come with five guineas and some clothes: that Allan Breck complained there was but little money, but hoped it would do his business: that the deponent told the said Allan Breck, he was afraid he would starve among the heather, and that he was not able to help him: that Allan Breck answered, He had no occasion for victuals, but wanted a drink very much; upon which the deponent went back to his house, and carried out some whey, or some milk and water in a noggin, and the five guineas, and gave both to Allan Breck: that the deponent then went for the clothes, which he also gave the said Allan Breck, which consisted of a blue long coat, red waistcoat, black breeches, a hat, some stockings and shirts.

"That the deponent told the said Allan Breck, that the pannel and his son Allan were apprehended on account of Glenure's murder: to which Allan Breck answered, That that was no more than he expected; but it would not signify much, as there could be no proof against him; but expressed some apprehension, lest Allan Stewart, son to the pannel, might be betrayed by his own tongue.

"That the deponent desired the said Allan, now that he had got all the necessaries he expected, to go about his business; and the said Allan Breck promised to do so, but told the deponent, that he must meet him, the said Allan Breck, next morning; that he must deliver the deponent the clothes he the said Allan Breck had then on, to wit, the black short coat and trowsers shewn to the deponent in the clerk's hands, in order to be kept by the deponent, till he delivered them to the pannel's wife: that the deponent promised to meet the said Allan Breck next morning, but did not see him; and when the deponent went out next morning, he found the said short black coat, trowsers, and the noggin in which he had carried the drink to Allan Breck, lying together in the place where the deponent parted with Allan Breck the night before; and that he hath not seen the said Allan Breck since."

On Monday the 18th of May, Allan Breck withdrew, as he had proposed, by a very unfrequented road, through the moors, and over the mountains, to Rannoch; and came that same day to the house of Allan Oig Cameron in Rannoch, his uncle, with whom he remained till Wednesday following. The uncle hath said, "He pressed him earnestly to make a clean breast, and tell him all he knew of Glenure's murder. To which Breck answered with an oath, That he had never seen Glenure, dead or alive; the uncle however frequently

repeated his instances, till Breck became angry, and the uncle desisted further enquiry."

Four days after Breck left his uncle's house, that is, on the 24th of May, "the uncle having occasion to be fourteen miles from his own house, (further down the country) and passing by the side of a wood, he heard a whistle from the wood, and, looking about, saw Allan Breck, who then told his uncle, that his only fear was to be apprehended, by the military, as he had been a deserter. The uncle answered, He was very sure the friends of the deceased would procure him his discharge, if he could discover the murderer. And Breck replied, That they were at this time in such fury and rage, that he was very sure, were he apprehended, he would be hanged."

It is unnecessary that I should resume minutely what the other witnesses said, who saw Breck Stewart in Rannoch or Athole, when he passed through that country at this time; his appearances bespoke the situation he was truly in, that of a malefactor studying to conceal himself, and making his escape.

It is however material, that you should further observe, that after Breck Stewart had thus disappeared from the country of Appin, where this murder was committed, every body in that country, and in that of Rannoch, through which he retired, and in both which he was well known, and had relations, imputed to him the actual murder, and to no other person. You have already heard, that Donald Stewart, the nephew of Ballachelish, charged him with it to his face on the night of Thursday the 14th, when the blood of the deceased was hardly yet cold, as the bouman did on the Saturday following: and, on the Monday following, Cameron his uncle discovered the same belief. And I have now to add upon this head of the voice of the country, or the *fama vicine*, that Ballachelish elder, who had been his landlord the night before the murder, says, "That, the morning after the murder was committed, the deponent really thought, that Allan Breck Stewart might be the actor in this murder, because he did not return to the deponent again." And Macinnes, the ferry-man at Ballachelish, says, "That he heard no body suspected for the murder of Glenure, but the said Allan Breck." And James Mann, change-keeper in Rannoch, says, "That, before Allan Breck came to his house in May last, it was reported in that country, that he was concerned in Glenure's murder; and that he himself suspected him at the time, as he came unseasonably, and was wanting provisions."

There are yet other circumstances subsequent to the murder, and to the pannel's commitment at Fort William, that deserve your consideration with the rest of the evidence; one of these is deposed by Hugh Maclean, barber in Maryburgh, who says, "That one day being called by the pannel to shave him, he thinks upon a Saturday, the pannel asked him, what news he heard in the town? The deponent answered, That he, the pannel, was to be carried to Edin-

burgh on the Monday following; whereupon the pannel said, that was a matter that gave him no concern, and wished it had happened sooner; and was afraid of nothing but that his servants might be inticed to take money, and turn against him; and desired the deponent, as from him, to tell his servants to say nothing but truth, to keep their minds to themselves, and he would take care of them,* and accordingly the deponent delivered the pannel's message, in his own words, to two of his servants, who were then in separate custody in the same prison; and that they were both of the name of Maccoll."

Again, gentlemen, you have heard read, and, I dare say, with much regret, the examination of the pannel's wife and daughter, taken before the sheriff upon oath, wherein they say, "That Allan Breck Stewart came to the pannel's house on Monday the 11th, in his French dress (that has been often described), and that he went away next morning, after taking leave of them, dressed in the same habit;" and you have heard by what a cloud of witnesses it was proved, that, from the evening of Monday the 11th, till the morning of Monday the 18th, Allan Breck was seen in no other dress, than the short coat and trowsers belonging to the pannel, now lying in court; and, by the pannel's own servants and the packman, it has been proved, that Breck's French clothes were, by Mrs. Stewart's order, put into a sack, and hid in the moor near the pannel's house, from thence brought back by the same servant maid, by order of Mrs. Stewart, and by her delivered to the packman, by him to be carried to Breck at Keamnacoon; and that the maid-servant, who was employed by her mistress to hide these French clothes, and to fetch them back again, was, by a message from her, desired to conceal what she knew about the clothes, in case she should be asked or examined about them.

These, I think, gentlemen, are the most material facts and circumstances that have been proved before you, which I have resumed in the order of time as they happened, with intent to give you a just view of the case of the pannel, whom you are now trying; and I am persuaded, that the reflections which naturally arise from these facts, in respect of the question before you, must have occurred to yourselves, when you heard the evidence given, and when I have again resumed it; and therefore my observations to you upon the whole shall be as few and as short as possible.

I have admitted, that it is incumbent upon me in this trial, as against James Stewart, the pannel, to make out, that Allan Breck Stewart was guilty of the actual murder in question; and I apprehend, that is done to full conviction, upon these considerations.

And, first of all, gentlemen, here has been a very extraordinary and shocking murder, committed within the county or district of Appin, in the most northern part of this county, of a

gentleman who had an estate and relations in that neighbourhood; a man of a fair character, who was going about the duty of his office, in the king's and the public service, intending no injustice to others, and apprehending no harm to himself; for he and all his attendants were unarmed; and yet he is bereaved of his life, not by an open enemy, upon a declared or a sudden quarrel, but basely assassinated and shot behind his back, by a person lying in wait and lurking among trees for that purpose.

This, gentlemen, is a very strange and shocking event; and, as for every event there must be a cause, somebody must have done it, and upon some reason or temptation, such as it was: and this is not like a murder committed on the streets, or on the highways leading to a populous city, but in the corner of a county, where the deceased was himself a gentleman of note, and where every body of any note is known to every body: the deceased, therefore, must have had one or more enemies fit or capable, or likely to have devised or perpetrated such an action; and who these are, you have been now for many hours enquiring.

And, upon the result of that inquiry, what doubt can there be in the first place, that Breck Stewart was the actor? His character, and his situation as a deserter from the king's service, and now actually listed in the French service, and in this country only as a sojourner, for a visit to his friends, rendered him the most likely person then resident in that country, for being guilty of such a thing; nay, so much the only person likely that the pannel himself, when he cast about for some other man on whom the suspicion of this guilt might be thrown, mentioned only one serjeant More Cameron, who is of a character and situation very similar to that of Allan Breck, but with this very material difference indeed, which rendered it impossible for that solution of the question to pass, that serjeant More had not been seen in Appin for several years past; and surely the absent wanderer could not do it.

But, next, and more closely, the only known quarrel that any body had with the deceased, was that of this pannel James Stewart, about his own removing the last year, and the removing of other tenants of Ardschiel this year; into which quarrel his former pupil or ward, and his intimate friend Breck Stewart, had most vehemently entered, and discovered that on several occasions; and that he considered it as a cause for deadly or mortal hatred, inasmuch that the pannel himself hath declared, "That, if Allan was guilty of the murder, he believes it behoved to be on account of the disturbance given to the tenants on the estate of Ardschiel; and knows no other cause."

And more closely still, you have heard the evidence of what passed immediately before, and after this murder, of the behaviour and actions of this Breck Stewart, who had formerly displayed his hatred to the deceased, for this very cause, frivolous and unjust as it was. On the 10th of May, at Fannochich, within a mile

* See p. 148.

of Glenure's house, he gets intelligence of Glenure's motions, and designs to proceed in removing the tenants of Ardschiel, when he should return from Fort-William. On Monday the 11th he comes to the pannel's house, and there lays aside his French dress, and puts on a country dress belonging to the pannel; and in the same habit next day, sets out to Ballachelish, hard by the ferry over which the deceased was to return; from thence he goes to visit two sisters of the pannel's in the neighbourhood; he returns to Ballachelish on Wednesday; remains there that night, and till about noon next day, when he takes a fishing-rod in his hand, a fit pretext for going out alone, and for staying some time; but, soon after, the fishing-rod was laid aside, and he goes in pursuit of his real game; he calls aside the ferry-man, and enquires if Glenure had yet crossed the ferry, and being assured he was not, he walks off, and was never again seen about that ferry, or the house of Ballachelish; but a few hours after, that same night, and when the murder had been committed, he is seen by Katharine Mackinnish, the maid servant of Ballachelish, at the goat-house in the moor of Ballachelish: and if Donald Stewart speaks true, there also he saw him, and charged him with the murder. Here was then the deserter, now a foreign soldier, and one declared mortal enemy of the deceased, enquiring for the deceased a little before he passed the ferry; and, soon after the murder, found in the hill, near to the spot where it happened, and adjoining to the house where he had lodged the night before; but to which he never returned; but, instead of that, wanders in the fields; beats up Glenure and his mother betwixt three and four in the morning; tells them Glenure was murdered, and he was going abroad; takes leave of them at the door; retires from thence to a den in a desert, the heugh of Corrynakeigh in Koshnacoon, where he was to wait for his baggage and his promised viaticum; and where he durst not even venture to approach the bouman's house, except to come to the door or the window in the night; and when he had got these necessities he waited for, withdraws, as he proposed, a-cross the kingdom, over a tract of moors and mountains uninhabited, till he came to his uncle's house, and is by him, as well as every body else who knew him, reputed and believed to be the murderer. And I have no doubt, gentlemen, but, after the proof of all these things which you have heard, you must be entirely satisfied, that he was truly such; and, upon that persuasion, will proceed to the main question that is directly before you, namely, the evidence of the accession of this pannel to that murder, which may be summed up in the articles following:

First of all, That it was the quarrel of this pannel against Glenure, that had been only taken up and espoused by Breck Stewart, for which Breck committed the murder itself, as the immediate actor; the quarrel, as you have heard, or the cause of offence so highly re-

sented, was, that this pannel was himself removed from his possession last year by Glenure, who at the same time withdrew from the pannel, or forbore to employ him in the office of an assistant or sub-factor, which had given him interest and influence with the tenants of Ardschiel; and that this year he was insisting to remove three or four tenants, whom the pannel had lately placed there; in all which Allan Breck had no personal interest or concern: a strange cause of offence, I admit, to be so highly taken up, and so deeply resented? but every provocation works, according to the temper or turn of mind of the person who receives it; and what those of the pannel were in this respect, you have heard from the evidence, and have seen in his conduct before you, when he himself objected to Stewart in Lagnahaw, as an incompetent witness against him; for that the witness bore him capital enmity, because he, the pannel, had been instrumental in causing the witness to be removed from the possession of Aucharn, in which the pannel succeeded him; nay, the pannel carries this madness so far, as to have threatened Ewan Macintyre and his relations, or posterity (a poor herd who had never served the pannel himself), for no other offence, than that he engaged to be herd to Campbell of Ballieveolan, the tenant who succeeded the pannel in the farm of Glenduror, from which he was removed last year.

The second Article in proof is, that, in consequence of the deep resentment conceived by the pannel for this supposed injury of the removings, he discovered, upon several occasions previous to this murder, an intention or desire to take away the life of Glenure: this he expressed to Appin's bouman in a most inveterate manner, that he would be willing to crawl upon his knees to a window to shoot Glenure: but thereafter he proceeds farther than expressions; his conversation with the Maccolls, his own servants, in the brew-house, about Christmas last, could be intended for nothing but to instigate them, either by themselves, or by finding out proper instruments among the common people of Appin, to cut off Glenure: and, when the late removings came to be in agitation last spring, which the pannel set himself to oppose with all his might, it appears that his malice and fury against Glenure was increased; witness his conversation with his two landlords on his way to Edinburgh, and with Mr. Maclaren of Stirling, his fellow-traveller part of the way; in which, among other things, the pannel told them, that he had actually sent Glenure a challenge to fight him with pistols; and told Maclaren (who says he found the removing was much at the pannel's heart) that, if he should get relief neither at Edinburgh nor at the British parliament, he would take the only remedy that remained. Now, to a man that laboured under this distemper of mind, it was natural or incident, that, after he had returned from Edinburgh in the end of April, with such degree of

success as to obtain a sist on his bill of suspension; and had some hopes given him at Edinburgh, that when the barons of Exchequer should meet they would countermand these removings; when he had called the tenants together, and acquainted them with these operations of his on their behalf, and sent them with a notary on the 1st of May, to intimate the sist to Glenure; and when, after this, he learned, on the 11th of May, that Glenure had gone to Edinburgh in his turn, got the sist removed, was come back to the country, and to proceed in the removings; that, from this fresh disappointment and affront, that must lessen him in the eyes of those tenants whereof he had assumed to be protector, the resentment and hatred which he formerly bore Glenure should be yet higher inflamed, and drive him on to send out Breck, his emissary, to cut off the gentleman whom they both looked on as their enemy, in hopes of safety to Breck, the actor, by his getting abroad, where he was to go however; and to himself, the mandator and accomplice, by his remaining in appearance quiet at his own house.

And the evidence, that in fact this was the case, consists of these further circumstances, of which you have heard the proof; that the actual murderer of Glenure, in the quarrel of this pannel, and in resentment of which this pannel had discovered designs or intentions against his life, when the quarrel itself was wrought up to the highest pitch, sets out from the pannel's house, leaving his own clothes and baggage there, dressed in a suit of the pannel's clothes fitter for the purpose, as being less remarkable or distinguished than his own; goes directly and puts himself in the way of Glenure; passes his time, whilst he waited for him, visiting the sisters of this pannel in that neighbourhood; and with Stewart Ballachelish, who was also in the general interest of the pannel in respect of the removings; retires, when the bloody deed was done, to a deep retreat that was not far off; where he remains till this pannel caused to be sent him his baggage and a viaticum of money, such as he could afford or scrape together, to enable the assassin to get off.

And that this aid and succour was sent in consequence of a concert betwixt them, previous to the murder itself, appears from these circumstances; that on the morning of Thursday, on the evening whereof the murder was committed, the pannel sent an express to William Stewart at Maryburgh, earnestly pressing him to send him eight pounds, as the price of cows not yet delivered; and it hath not been explained, and far less proved, on the part of the pannel, who is a man of some credit and substance, though he had then but little cash in hand, what other pressing exigency he then had for an immediate supply of money, when he was living upon his own farm at Aucharn; he has not shewed you, that he had accepted a bill payable on Friday the 15th of May, or the term of Whitsunday this year, or that he was under distress of any kind, that required such immediate supply.

Again, as the messenger of Thursday brought back no cash, there is another sent on Friday, being the packman, the cousin-german of Breck Stewart himself, who carried two commissions from the pannel: First, That by all means he should send him five guineas, and this, though William Stewart should borrow it from twenty purses; and, 2dly, To tell William Stewart to give credit in five pounds sterling to John Maccoll, bouman to Appin at Koalsnacoon, in case he came to demand such a sum; the pannel at the same time telling the packman, when he gave him this message, that Allan Breck was about to leave the country; that he might be suspected of Glenure's murder; and that it was incumbent upon him, the pannel, to supply Allan Breck in money.

Now, gentlemen, to this message from the pannel to his friend William Stewart, by the cousin of Breck Stewart, you are to join another corresponding circumstance deposed by the bouman, to which I must call for your particular attention; for, in relating what passed betwixt him and Allan Breck on the afternoon of Saturday the 16th, he swears, "That Allan Breck then told him, he must remain there, till some necessities he expected came to him; and that, unless some money came for him before next morning, he, the bouman, must go to Fort-William with a letter, which Allan Breck then wrote to William Stewart, merchant at Maryburgh." Does not this as plainly speak out, '*rebus ipsis et factis*,' the concert betwixt the pannel and Allan Breck, before they parted, as if you had heard it from witnesses present at their conference? Breck was setting out upon an exploit, which, if performed, it would require a little money, of which he, it appears, was then destitute, or very scarce, to carry him off the country; the pannel himself was not then in cash; but the assurances he gave to Breck must have been, that, without loss of time, he, the pannel, would send the money directly to Breck at Koalsnacoon, or otherwise send him credit upon his, the pannel's, friend and correspondent, William Stewart, merchant in Maryburgh. Their respective actions correspond exactly with this concert, and are unaccountable without supposing it. On Friday the pannel sends to William Stewart for five guineas in cash, and an order to give credit to Appin's bouman for five pounds more, in case he should call for it. On Saturday Allan Breck being with this bouman, at a place distant from the pannel, tells the bouman, that unless money came for him before next morning, he, the bouman, must go to Fort-William with a letter, which Breck then wrote to the said William Stewart, merchant at Maryburgh; and such a letter, that Breck tells the bouman, if he was caught with it, he must eat it before it was found upon him.

These circumstances are so pinching against the pannel, upon the capital point now in issue, that he has made an attempt to prove an answer or solution of this difficulty, and that by bringing Katharine Macinnish, then servant to Ballachelish, to depose, that when she met

Allan Breck at the goat-house upon Thursday night, "the said Allan desired her to tell Donald Stewart in Ballachelish to go to the pannel, and desire him to lend the said Allan money;" and that she delivered this message to Donald Stewart that same night.

Again, this Donald Stewart hath deposed, not that Katharine Macinnish delivered him any such message from Allan, but, "That she called him out, and told him that Allan Breck wanted him, and was a little above the house in the brae or hill, where the deponent went and met Allan Breck, who then told the deponent, he was going immediately to leave the kingdom, and was going then for Koalishnacoon; and desired the deponent to acquaint the pannel that he was gone to that place, and desired him, if possible, to send him money there; and the deponent then promised to acquaint James Stewart of the above message." And this Donald Stewart further deposes, "That, after his conversation with the pannel about serjeant More, he delivered the above message from Allan Breck to the pannel; and that the pannel did not say whether he was to send the money or not: that this conversation happened about ten o'clock in the forenoon of Friday the 15th of May last; and that there was nobody present."

And, as I think the only plausible thing proved for defence of the pannel consists of these two testimonies I have just repeated, I must beg your attention, gentlemen, to the remarks I have to offer upon them, that you may be the better able to discern what degree of credit or effect they deserve, or whether they deserve any at all.

And, first of all, this Donald Stewart is nephew and son-in-law to Ballachelish, and lives in family with him; and it appears the whole family are in the general interest of the pannel; for John Stewart the younger of Ballachelish, the brother-in-law of this Donald, hath deposed, "That, in the time of the spring-circuit in this place in May last, he was summoned to be of the jury; but that, at the earnest request of the pannel, that he should be present with a notary at the removing of the tenants from the estate of Ardsiel, he was going on that errand to the pannel's house, but returned to Appin, upon hearing of the murder committed that day;" and has further deposed, "That he was in Edinburgh in August last, and was present at consultations of the pannel's lawyers and agents touching his defence:" You are therefore to weigh the credit due to a single witness of that family, swearing to a fact or conversation betwixt the pannel and him when there was nobody present, that they have judged material to be proved for the pannel.

2dly, I have already observed to you, in resuming the evidence of these two witnesses, the son-in-law and the servant maid of Ballachelish, that there is a manifest discrepancy between them, though it is not a long time since the fact they depose to happened, and it hath ever since been the subject of attention

and conversation in the country where they live; for the maid says, "She received the full message from Allan Breck, and delivered it to Donald Stewart; and that she did not desire Donald to go up to Allan in the hill, nor did Allan Breck desire her to send Donald to him there:" And yet Donald swears, "That the maid informed him, that Allan Breck wanted him, and told him where Breck was; and that Breck himself gave him the message to be delivered to the pannel; which he delivered accordingly about ten o'clock next day to the pannel, whom he met alone in the fields." So that the whole of this tale, attempted to be proved by these two witnesses, appears extremely suspicious, and their accounts hang not well together.

3dly, Donald Stewart's tale, if it be true, and if it be also true, that the packman was not sent away by the pannel to Fort-William, till about twelve o'clock on Friday, might serve to account for, or to have given rise to the packman's message on that day: but how will it serve to account for the former express sent upon the morning of Thursday by the pannel, to the same William Stewart at Maryburgh, to send him down immediately eight pounds sterling by the bearer?

4thly, If it be true, which both William Stewart and his wife depose, that the packman came to them at Fort-William, upon Friday betwixt ten and twelve, as the husband says, or about mid-day, as the wife says, then the packman must have been mistaken in the hour that he was dispatched by the pannel from his house, when he says, it was about twelve o'clock that day; and if Stewart and his wife are rather to be believed, that he got to Fort-William by noon, he must have been dispatched by the pannel long before ten o'clock, when, Donald Stewart says, he delivered Breck's message to the pannel.

And, lastly, that which affords a solid and satisfying reply to the defence founded on these two testimonies, of the son-in-law and servant-maid of Ballachelish, is this consideration, that supposing it true, for argument's sake, which they have sworn as to the substance, that Breck sent notice by Donald to the pannel, that he was going to Koalishnacoon, and wanted money, how will that account for what was observed a little while ago, "of the pannel's writing a letter upon Saturday afternoon, to be sent by the bouman to William Stewart at Maryburgh?" For though here be a tale, I am afraid lately invented by the pannel, of a message from Breck to him after the murder, to tell the place of his retreat, and that he wanted money, he hath forgot to provide witnesses for proving another thing, and that is a message in return from the pannel to Breck, to give Breck notice how the money was to be found or furnished, namely, by the pannel's giving credit to him, or the bouman, upon William Stewart at Maryburgh; for, without such notice, how could Breck, from the bottom of his bough in Koalishnacoon, so

exactly co-operate with what the pannel was doing from his own house at Aucharn, as to write a letter on Saturday to the same William Stewart, merchant in Maryburgh, to be sent by Appin's bouman, to which William Stewart, on Friday, the pannel sends Breck's cousin, to bid him give credit to Appin's bouman for five pounds, if he should call for it?

This circumstance, therefore, which is quite unanswered, as well as the express on Thursday morning for money, before the murder happened, makes the evidence before-mentioned remain in full force, the tales of the message to the pannel, mentioned by these two witnesses, notwithstanding.

There hath been hardly any thing else proved for the pannel's defence, that merits a reply: it is of no moment, that this was not the first time that Breck Stewart made use of the pannel's habit or clothes above-mentioned; he had used them once before in the month of April, when he went to Rannoch, whilst the pannel was at Edinburgh; but it was not the less true, that this habit was far more commodious for the murderous purpose he went about, when he left the pannel's house on Tuesday morning the 12th of May, than his own French clothes would have been.

Again, it is true, that on the morning of Thursday, he writes a letter for a notary, to take protests against the removings, at the same time that he writes for the 8*l*.; and his counsel have said, that this was pursuing quite another scheme: but this is by no means conclusive, to prove his innocence; he was galled and incensed by these removings, and his protest by a notary, after his bill of suspension was refused, would be of very little avail; and yet he writes for one to attend, to be provided for all events, as it was a possible case, that the intended murder of Glenure might have been prevented, by his going another road than the common one, or other accidents.

And as little can it avail the pannel, that, after he was in custody, he wrote a letter to Mr. Macfarlane at Edinburgh, describing Allan Breck, and expressing a desire that he might be apprehended; for this was a letter shewn to colonel Crawford, the commanding officer, and now appears to have been a manifest dissimulation, when, by the shewing of the pannel's own defences, he sent money to Allan Breck in order to help him to escape, on account, as he says, of his relation, and having been formerly his ward or pupil.

When, therefore, gentlemen, you shall consider and duly weigh the whole facts and circumstances proved before you, and which I have now resumed; and when to these I have last mentioned you shall add, that, besides the clothes and the money furnished to Breck, there is a strong presumptive evidence, that the very lesser or shorter gun produced before you, and proved to have been the pannel's, and which is of the wider bore of the two, was the very instrument with which the murder was committed; for none of the servants saw it upon

Thursday night, when they hid the arms; and when they saw it on Friday night, when the arms were carried up to the hill, it was empty; and captain Chapeau and others have deposed, it appeared to them to have been lately fired, when he found it on the 23d of May.

That the pannel, on the first notice he received of the murder being over, discovered an apprehension that he himself might be brought to trouble on that account.

That he made an attempt, though a very un-availing one, to throw the suspicion of the murder upon serjeant More Cameron, who had not been in that country for many years.

That the pannel, being in custody, sent a message by his barber to his servants to keep their minds to themselves, and he would take care of them.

That his wife and one of his children have too strongly discovered their sense of the importance of the article of the clothes furnished by the pannel to Breck, by swearing, that Breck left their house in his own French clothes, though the wife, at least, most certainly knew the contrary.*

I say, gentlemen, when you put all these things together, you will form your opinion, and pronounce accordingly, whether this pannel is, or is not, guilty of accession to this horrid murder? In all circumstantial evidence, there is a possibility of innocence, even without supposing any of the witnesses perjured: for example, in the case of Stewart Abercrombie, which you heard mentioned in the debate on the relevancy in this trial; it was urged for him, and very truly, that some other man without a hat, as well as he, might have been the murderer of the deceased; for there was no witness who could swear he saw him do it: and in the other case of Maccowan you heard mentioned, who was convicted principally upon a shirt and stockings being found in his possession, which the poor woman had carried with her from home; it was possible that Maccowan might have got these garments immediately, or by progress, from some other person who had robbed or murdered the poor woman. But, in both these cases, the pannels were convicted, and suffered accordingly.

And, in the present case, if, notwithstanding what you have heard, you can believe, that Allan Breck Stewart committed this murder purely of his own accord, and without any privity or previous concert with this pannel;

* Lord Coke, after reporting the famous Case, repeated after him by lord Hale, of erroneous conviction upon circumstantial evidence, and execution of an uncle for the murder of his niece, says, "We have reported this Case for a double caveat, 1st, to judges; that they in case of life judge not too hastily upon presumptions: and 2d, to the true and innocent man, that he never seek to excuse himself by false or undue means, lest thereby he, offending God the author of truth, overthrow himself as the uncle did."

and the aid given by the pannel to carry him off, was out of mere compassion, and a resolution first taken after the pannel had heard of the murder itself,* then surely it will be your duty to acquit the pannel; for, better that this murder, atrocious and scandalous as it is, should remain unavenged by human justice, than that one innocent man should suffer.

But, on the other hand, if, upon the whole evidence, you cannot believe the pannel innocent, but are convinced in your own minds, that he has been knowingly accessory to this murder; then, doubtless, your duty to God and your country requires of you to pronounce him guilty.

Mr. Brown, for the Pannel.

Gentlemen of the jury; I appear for the pannel; and, as this trial has already taken up a great deal of time, I shall not follow the honourable and learned gentleman on the other side, in some things which I conceive to be extraneous to the matter in issue; but shall endeavour to sum up what I have to say, in as few words as the importance of the case, and variety of matters to be considered, will admit of.

As I am at all times under no small degree of concern, as often as I appear in any case of this nature; so I must acknowledge I am at present under greater concern than ever I was in any former case, when I consider the many disadvantages which this unfortunate pannel labours under.

In the first place, I am under the necessity of entering the lists with a learned gentleman of great abilities, and of much more experience in these matters than I can pretend to.

But, gentlemen, if I have undertaken what I am not sufficient for, the fault lies at the door of the private prosecutor, who, before the prosecution was commenced, begun early with pre-engaging the whole counsel at the bar, who had most experience in these matters, not with an intention that they should assist in carrying on the prosecution, (for many of the gentlemen who were engaged have not appeared at the trial) but with an intention that they might not have it in their power to appear on the side of the pannel.

A just prosecution scarcely stands in need of an advocate to support it. What then shall be said of a prosecution, where the prosecutor despairs of prevailing otherwise than by depriving the pannel of those who were most able to defend him?

For my own part, I chose rather to have it said of me, that I had imprudently undertaken what I was not sufficient for, than that I had uncharitably refused to give any poor assistance in my power to a gentleman, who imagines that I can be in the smallest degree useful to him.

* See Mr. Burnett's observations as to this, in chap. 14, of his *Treatise on the Criminal Law of Scotland*, p. 285. As to art and part, see vol. 10, p. 807, of this Collection.

I might also take notice of many other hardships which the pannel has suffered from close confinement, during more than four months, contrary to the great charter of liberty in this part of the kingdom,—from the unwarrantable seizure of his papers without any legal authority—and from the shortness of the time allowed him for making his defence: but these things have been so fully insisted on by the gentlemen who have spoke on the same side, that it is unnecessary for me to repeat what has been already said. The facts have not been denied by the prosecutor; and as every man must see, at first sight, what a prodigious loss it is to a pannel, to have access, for so long a time denied to every person who was capable of assisting him in making his defence, so I must be forgiven to say, that if this trial was at all proper for a circuit-court, (which may be doubted) it ought to have been brought on in the ordinary form, by way of presentment, and not summarily in the form of criminal letters. By the former method, the pannel would have had upwards of three months to prepare for his defence, instead of fifteen days, which is all the time the pannel has had, since the criminal letters were executed against him.

But, gentlemen, there is yet another disadvantage, which this pannel labours under, which gives me more uneasiness than all those I have already mentioned, and which, I must beg leave to say, I dread more than all the proof which has been brought against him.

What I mean is an impression, which has been industriously raised, and artfully propagated, as if it were some-how necessary that the pannel should be found guilty; and as if his being acquitted might bring a reflection on this part of the kingdom.

Gentlemen, I do not expect, nor do I desire, that you should return a verdict contrary to evidence: but it is my duty to put you on your guard, not to allow yourselves to be carried off by passion or prejudice: and though I have no doubt of the integrity or honour of any of the gentlemen to whom I now address myself; yet, upon this occasion, it is my duty to say, that if you find the pannel guilty, either without evidence, or upon doubtful evidence, you will thereby bring the blood of an innocent person upon your own heads:—I say, an innocent person; for every man is held to be innocent, till such time as he is convicted, not by doubtful, but by legal and complete evidence.

And if the evidence is insufficient, which I am hopeful I shall be able to shew, I am under no apprehension, that your acquitting the pannel can ever bring any reflection either upon yourselves or upon your country. It is the peculiar happiness of this part of the island, that, in capital cases, the law makes it necessary, that the whole of the evidence should be taken down in writing; and as that has been fairly done in the present case, the authentic record will satisfy every reasonable and thinking person, that the grounds upon which you

have proceeded were solid; and if you have the approbation of such, you ought to disregard what others may say of you.

Having said so much in the general, I shall now proceed to consider the crime which has been charged against the pannel, and the evidence which has been brought in support of that charge. As to the crime itself, I readily agree with every one of the gentlemen who have spoke before me, that it is of so atrocious a nature, that words can hardly be found strong enough to express, in proper colours, its enormity; and I shall also admit, that it is highly aggravated from the particular circumstances which have been very properly mentioned by the honourable gentleman on the other side. But then the prosecutor would do well to observe, that the more atrocious the crime is, the more natural it is to presume, that the pannel was not guilty of it. And it is my duty to put you on your guard, that a just indignation at the heinousness of the crime may not lead you to condemn without proper evidence: for, however foul the crime may be, it is much better that it should escape unpunished, than that an innocent person should suffer for it.

The crime charged against the pannel is, that he entered into a conspiracy with Allan Breck Stewart to murder Colin Campbell of Glenure by the hands of the said Allan, and that the murder was accordingly so committed. And therefore, before the prosecutor can prevail, it behoves him to prove, not only that the murder was committed by the hands of Allan Breck, but also, that the pannel and he were previously in a conspiracy to commit the murder in that manner.

The prosecutor pretends not to have brought any direct evidence of either of these facts; but the guilt of both pannels is inferred from a variety of circumstances, which it now belongs to us to consider, so far as is necessary for the defence of this pannel.

And here I shall not dispute the general proposition laid down by my lord advocate, "That crimes may be proved by circumstances." I admit that any crime may be so proved; but then I humbly contend, that the circumstances ought to be such, as necessarily infer the guilt of the pannel.

In order that this matter may appear in its proper light, I must beg leave to lay down one general rule, which admits of no exception, and ought to be strictly followed in judging of all circumstantiate evidence; which is, that where any fact proved against the pannel, is in its own nature such, that it will naturally admit either of a good or a bad construction, that construction ought always to be received which is favourable for the pannel.

This is founded upon the first principle of natural justice, which directs us, "To do to others as we would have them to do to us:" and as every one of you would think yourself hardly used, if a bad construction were put upon any action of yours, which would natu-

rally bear a good one, the pannel asks no more, than that you should judge of his actions by the same rule.

And here, gentlemen, I do not mean, that, in a circumstantiate evidence, it is necessary, that every circumstance taken separately should be conclusive: if that were necessary, few crimes could ever be proved. But what I intend is, that, in all crimes whatever, it is necessary that the proof should be certain and conclusive; and as the law justly rejects all arguments drawn from conjectures and forced consequences, it is not sufficient to convict a pannel, that he might have been guilty of the crime charged; but the proof ought to be such as to leave no room to doubt that he was so: and though it is not necessary, in a circumstantiate evidence, that every circumstance, considered apart, should be conclusive; yet I conceive I may lay it down as a certain principle, that where the whole of the circumstances are such, that they might naturally have happened without inferring the guilt of the pannel, such circumstances, however numerous, ought to have no authority against him.

To apply this rule to the present case, I am hopeful I shall be able to satisfy you, gentlemen of the jury, that the facts charged against the pannel are either not proved, or they are such, that all of them might have naturally happened; and at the same time the pannel be entirely innocent of the crime of which he is accused.

But before I proceed to consider particularly the several articles of the proof brought against the pannel, it will be necessary to put you in mind of some things which happened previous to the murder, as these may tend to explain many things which occur in the proof, and which shall be afterwards particularly taken notice of.

You have already heard, from the gentleman who spoke first on the same side with me, that, in the month of February 1749, the deceased Colin Campbell of Glenure was appointed factor by the barons of exchequer, upon the forfeited estates of Lochiel, Callart, and Ardshiel; and, as the pannel, who was then tenant of part of the estate of Ardshiel, had always lived in great friendship with Glenure, and had as fair a character as any gentleman in that part of the country, the management of the whole estate of Ardshiel was committed to him by Glenure, and his bill was taken for that yearly rent at which the estate had been rated after survey by the barons of exchequer, leaving it to the pannel to apply the surplus to the use of Ardshiel's children. This is proved by several letters and receipts produced, and in particular from Glenure's letter to the pannel, dated the 11th December 1749, in which he writes as follows: "This moment I had your's by your servant, with 30*l.* 18*s.* 5*d.* sterling, and the warrant I formerly gave you. Receive inclosed your note. Your payments are very good, for which I am obliged to you. I intend, God willing, to be at Edinburgh on, or

a day or two before, the 25th current; that is, I intend to set out from this place this day, or to-morrow eight days; and will go by Glasgow, and make no stop by the way. Remember lady Ardshiel's discharges, and all your other tackling. I heartily wish you a good journey."

About the month of April 1751, Glenure applied to the pannel to give up the farm of Glenduror, which he then possessed, to Mr. Campbell of Bellievelan, Glenure's particular friend, who, it appears, had offered an additional rent; and though the pannel had not been legally warned, and so was not obliged to remove for that year, yet he readily agreed with Glenure's proposal, removed from the possession, and took from Mr. Campbell of Airds the farm of Aucharn, where his family now resides; but he still continued to uplift the rents as formerly from the tenants of Ardshiel, and likewise to possess a small farm called Lettermore, which he had sublet at about 6*l.* sterling per annum.

In the month of April last, Glenure executed a warning, and obtained a decret of removing against no less than five or six tenants of the estate of Ardshiel, and also against as many tenants of the neighbouring estates of Lechiel and Callart, deverting them to remove from their respective possessions as at the term of Whitsunday last; and, among the rest, the pannel's two sub-tenants in the farm of Lettermore were also decreed to remove.

This was complained of as a very great hardship in that part of the country, more especially as the tenants in possession paid their rents regularly, and were willing to take the oaths to the government; and although the pannel's private interest in the matter was not great, yet, as he foresaw that a procedure so severe might be attended with disagreeable consequences, he went and often expostulated with Glenure upon the subject; but he having persisted in his resolution, the tenants upon all the three estates transmitted memorials of their case to be laid before the barons of Exchequer; and, as the pannel was then occasionally at Edinburgh, about some private affairs of his own, he presented the memorials to one of the barons, who disapproved greatly of Glenure's conduct, but could do nothing towards putting a stop to the removings, as a quorum of the barons could not be held till the next Exchequer term; though at the same time, he undertook to represent the case to the whole barons, adding, that he made no doubt but they would give an order to the factor to continue the tenants in possession; which in part appears from a letter wrote by the pannel to Charles Stewart, writer, dated 27th April 1752, and referred to in the inventory subjoined to the libel, in the following words: "Yesternight I arrived here, after a very troublesome jaunt; and as the barons could not be got together, put it out of my power to procure an order for our factor; but baron Kennedy, who I found very kind, and seemed to sympathize much with the tenants' case, gave it as his private opinion,

that they should sit their possessions for this year, and that all justice would be done them; and thought they should take a protest against the factor's proceeding in a body, I mean the Mamore and Appin tenants. The same advice I had from all I advised with, who were not a few, and all were of the same mind, that the tenants had a good chance, once their affair came before the barons."

Upon this the pannel advised with counsel, how the tenants might be kept in possession till the Exchequer term, and by their advice applied to the court of session for a suspension of the removing; and, a bill of suspension having been accordingly presented, a sist was obtained, and the bill ordained to be answered; which sist was intimated to Glenure, upon the pannel's return to the country: but, answers having been thereafter made to the bill by Glenure, who had gone to Edinburgh for that purpose, as the pannel had, through ignorance of the forms, carried off with him the principal bill with the sist upon it, the answers were advised without the bill, and the bill refused by an interlocutor the 5th of May last.

Upon Saturday the 9th of May, Glenure returned to his own house in the country; and so soon as it came to be publicly known, that the bill of suspension was refused, and that upon Friday the 15th of May, being the term-day, Glenure was to execute the warrant of ejection against the tenants of Ardshiel, it was resolved, in consequence of the advice the pannel had got from Edinburgh, that the tenants should take a protest against Glenure, in case he should attempt to put his warrant of ejection in execution; and that they should continue in possession notwithstanding thereof, till such time as their case should be fully heard before the barons, and that their directions should be known.

Accordingly, in prosecution of this plan, upon Tuesday the 12th of May, the pannel wrote a letter to Alexander Stewart, writer in Glenetie, desiring him to come and act as notary to the protest intended to be taken against Glenure; and at the same time he prevailed upon two gentlemen of character in the neighbourhood, viz. John Stewart younger of Ballachelish, and James Stewart younger of Fasnacloch, to undertake to attend as witnesses, and assist at taking the protest; but the said Alexander Stewart, the notary, having happened to be out of the way, when the pannel's servant went to his house, and this having been notified to the pannel upon the morning of Thursday the 14th of May last, (the day on which Glenure was murdered) he dispatched a servant of his own very early, with a letter to Charles Stewart, writer at Auchintour, informing him of the disappointment he had met with by the absence of the notary to whom he had first wrote, and desiring him (the said Charles) to come to his house with all possible expedition that night, in order to act as notary to the protest intended to be taken against Glenure next day.

In this situation matters stood upon Thursday the 14th of May last, being the day upon which this most execrable murder was committed; and therefore, the facts previous to the murder being adjusted, I shall now proceed to consider the evidence which has been brought for proving both branches of the libel; 1st, That the murder was committed by the hands of Allan Breck; and, 2dly, That it was committed in consequence of a previous conspiracy betwixt him and the pannel.

And here it is highly necessary that you should be greatly on your guard, to distinguish accurately between the facts charged against the pannel, and those charged against Allan Breck; which is the more necessary, as in the libel the facts are so intermixed, that it is no easy matter to distinguish the one from the other. And though I must admit, that the learned gentleman on the other side has been very candid in summing up the evidence; yet I could have wished he had been more careful to distinguish the proof, so far as it relates to the different pannels charged in the libel.

With regard to the first question, concerning the guilt of Allan Breck, I shall not take up much of your time; for, though it is incumbent upon the prosecutor to prove that the murder was committed by the hands of Allan Breck, yet it is not absolutely necessary for the pannel to maintain the innocence of that person; as it is of no importance for the prosecutor to prove that the murder was committed by Allan Breck, unless he shall also prove that the pannel was accessory to it.

And therefore I shall very shortly state the objections against this part of the evidence, leaving it to your own consciences to determine you, how far the evidence brought by the prosecutor is sufficient.

And the first circumstance charged in the libel is, "That, upon Monday the 11th of May, Allan Breck having been informed that Glenure had gone that day to Lochaber, and was to return by the ferry of Ballachelish upon the Thursday after, he had laid aside his French clothes, which were remarkable, and had disguised himself in a black coat and trowsers belonging to the pannel, with an intention to commit the murder."

But, in the first place, it is not proved, that, upon Monday the 11th of May, Allan Breck had been particularly informed of Glenure's motions; for though it does indeed appear, from the depositions of some of the witnesses referred to by the prosecutor, that Allan Breck had heard of Glenure's having set out that day for Lochaber, yet it does not appear that he had got any information what road he was to take, or at what time he was to return: none of the witnesses have said so, and, in cases of this nature, no fact ought to be presumed without proper evidence.

2dly, Though it is proved that Allan Breck did change his clothes upon the day libelled, yet it is not natural from thence to presume, that this was done with an intention to com-

mit the murder. It clearly appears, from the depositions of the witnesses relative to this article, "That, upon former occasions, Allan Breck had been in use of laying aside his French clothes, and putting on the dress of the country." And, in particular, it is proved by the depositions of the three Maccolls, (who cannot be said to have been partial for the pannel) "That he had on these very clothes belonging to the pannel, when he went to Rannoch in the month of April last:" and therefore, as it was no new thing, but a common practice of Allan Breck's to lay aside his French clothes, and put on the dress of the country, it is wrong in the prosecutor to lay hold of this circumstance, which is in itself innocent, and to wrest it into an argument against the pannel; especially as it appears from the depositions of the same three witnesses, "That Allan Breck wrought with them in the potatoe-field the greatest part of that afternoon upon which he came to the pannel's house," which was a very natural reason for laying aside his French clothes, as not being proper for that purpose.

The next circumstance charged against Allan Breck is, "That, for some days before the murder happened, he had hovered near to the ferry of Ballachelish, at which it was known Glenure was to pass; that, during that period, he had been twice at the house of Ballachelish, twice at the house of Glenco, and once at the house of Callart."

But, in the first place, it is not proved, that Allan Breck knew that Glenure was to pass at the ferry at Ballachelish; and therefore it is ridiculous to talk of hovering or lying in wait, when it was not known at what ferry Glenure was to pass.

2dly, If Allan Breck had known that the defunct was to pass at Ballachelish, and had intended to lie in wait, he would have kept close at Ballachelish, and would not have gone either to Callart or Glenco, which are each of them at three miles distance, the first on the north side, and the other on the south side of the ferry. It is much more natural to presume, that Allan Breck went to these places with an intention to visit his friends who lived there. And this is another instance where the prosecutor wrests a circumstance, which is in itself innocent, into an argument against the pannel.

The third and strongest circumstance against Allan Breck is, "That he absconded that very night upon which the murder happened, and left the country soon thereafter."

But this circumstance has been in like manner obviated by the proof brought in behalf of the pannel. It is clearly proved, that, in the year 1745, Breck was a soldier in the regiment commanded by colonel Lee; that, immediately after the battle of Preston, he deserted to the rebels; that he remained with them till they were happily defeated at the battle of Culloden; and that, since that time, he had been in the French service: and therefore, as Breck must have foreseen, that, upon

the murder of Glenure, a very strict search would be made, it was very natural for him, though innocent, to abscond and leave the country, and accordingly it appears from the proof, that he gave this account of the matter to every person whom he had occasion to converse with upon that subject; and therefore, as this circumstance, as well as all the rest, may naturally bear a construction favourable for the pannel, it is wrong in the prosecutor to put a bad construction upon an action which will naturally bear a good one.

The only other material circumstance from which the guilt of Allan Breck is inferred, is, that, before the murder, he had, upon different occasions, used threatening or resentful expressions against the defunct: but, as it seemed to be admitted by the learned gentleman on the other side, that expressions alone were not sufficient to infer the crime, I shall have occasion to consider more particularly the effect of such expressions under the second branch of my argument, which properly relates to this pannel.

And whatever may be your opinion with regard to Allan Breck, I must humbly contend, that there is no sort of evidence that the pannel, now at the bar, was in any previous conspiracy to commit this heinous murder; and, as far as the nature of the thing could admit of it, the pannel has proved the improbability of his being any way accessory to it.

In the first place, the character of the pannel goes far to protect him from any suspicion of this kind. Though that part of the evidence was not taken down in writing, yet he has proved by witnesses, beyond all exception, and can appeal to your own consciences for the truth of it, that his character in private life was never stained by any dishonourable action. Is it possible then to believe, that one of such a character can at once plunge himself into the deepest guilt, by committing the crime of assassination, which is of all others the most shocking to human nature?

2dly, The pannel's guilt is still the more improbable, as he could not possibly propose any benefit by it. He was a man of too good understanding, not to see that Glenure's place as factor would soon be supplied; that the strictest search would be made for the authors of this enormous crime; and that his family, as being nearly connected with the forfeited person, would be first suspected: is it possible, that, in such circumstances, it could enter into the imagination of the pannel, to commit a crime of so black a nature, when he could not only reap no benefit by it, but when it behoved necessarily to involve his own family in inevitable distress and ruin?

But, 3dly, There is another circumstance which renders it incredible that the pannel could have been in any previous conspiracy to commit this murder; for it is clearly proved, that at that very time he was pursuing quite contrary measures; that he had provided himself, and was endeavouring to provide the other tenants, in other possessions; and it is further

proved, not only by verbal, but also by written evidence, which cannot lie, that his intention was to proceed in a legal way, by taking a protest against Glenure upon the term-day, in case he should attempt to put his removing in execution. This is clearly proved by the pannel's letter to Charles Stewart, the notary, dated the 14th of May, being that very day on which Glenure was murdered: which letter ought to have the greater weight, as it is not produced by the pannel, but by the prosecutors, the same having been recovered by them out of Charles Stewart's hands.

In this letter (which greatly deserves your attention) the pannel writes to Charles Stewart, That, by the negligence of his servant, he had been disappointed of the notary he first intended, "which he reckons a very great misfortune." And then the letter concludes in these words: "The next best thing I can think of is, that you be here this night, without fail, if you should hire a horse; as every thing must go wrong, without a person can act, and that I can trust. This is such a tie upon all the members of our family, that I'll press you no further, but do depend on seeing you once this night."

It is indeed true, that this letter does not particularly mention that the pannel's intention was to take a protest against Glenure; but then, this is fully explained by the depositions of the witnesses, particularly by the oath of Charles Stewart, who deposes, "That he received a second letter from the pannel, of date the 14th of May, desiring him to attend the next day at the ejection; but he declined the same, because he did not care to disoblige Glenure."

This is further confirmed by the oath of John Beg Maccoll, the person who carried the letter, who deposes, "That, upon Thursday the 14th of May last, the pannel gave a letter to the deponent, to be delivered to Charles Stewart, notary public at Maryburgh; and told the deponent, that the letter was to make or cause Charles Stewart come to the country of Appin to protest against Glenure, in case he had not a sufficient warrant to remove the tenants of Ardschiel: that the pannel desired the deponent to make all possible dispatch, and desire John Breck Maccombie at Kintalline, and John More Maccoll, servant to the pannel, who was then at Kintalline, to ferry the deponent, from Kintalline to Onich, being much shorter than the ferry of Ballachelish: that he sat out from Aucharn about 7 or 8 o'clock in the morning, and made all the dispatch he could to Fort William, where he arrived about twelve o'clock. Deposes, that, when he came to Fort William, he delivered the letter he got from the pannel to William Stewart, merchant in Maryburgh, who told him that Charles Stewart the notary, was not at home, he having gone to the braes of Lochaber in the morning; and told the deponent, that he, the said William, had wrote to the pannel in the morning, and that there was

a notary along with Glenure, who would serve the pannel, as well as Glenure."

And it is further proved, that the pannel had gone so far as to provide proper witnesses to be present at taking that protest, as appears from the deposition of John Stewart younger of Ballachelish, who deposes, "That, in the time of the spring circuit in this place, in May last, he was summoned to be of the jury; but, at the earnest request of the pannel, that he, the deponent, should be present with a notary at the removing of the tenants from the estate of Arishiel, he was going on that errand, to the pannel's house; but returned to Appin, upon hearing of the murder of Glenure committed that day."

And this observation, that the pannel had at this time no thoughts of the execrable murder of which he is now accused, is further confirmed from William Stewart's letter to the pannel, dated the same 14th of May, recovered by the prosecutors from out of the pannel's repository, which concludes in the following words: "I find Glenure has a mind to eject the tenants; but they ought to be deaf to it, and, at all risks, keep possession, as they are in good hands, as it must end in the exchequer; so that I beg they keep possession: as there will be no troops, they ought to repel force by force, and take their hazard of the consequences; as it can be no more than violent profits, which is often modified in inferior courts, besides the exchequer, who will insist for no such: their chief design being to have a sett of peaceable tenantry, and a well-paid rent: so that the people ought to be assured they will be supported as far as law will, which, no doubt, must determine in their favour."

From the depositions of these witnesses, joined with the letters which have been read in your presence, it is incontestably proved, that the plan concerted between the pannel and his friends went no further, than to take a protest against Glenure, in case he should attempt to execute his warrant of ejection against the tenants; or, at furthest, that the tenants should continue in possession notwithstanding the warrant, and run the risk of violent profits. And it is of great importance in the present argument, that these two letters are dated upon the morning of that very day on which the murder happened; a circumstance utterly inconsistent with the libel, which has no other footing to stand upon than this, That the pannel and Allan Breck had concerted the murder previous to the time when Allan Breck changed his clothes, which, as has been already observed, was four days before the murder.

Amidst such glaring improbabilities, it would require the strongest evidence to convict the pannel. And this leads me to consider the several facts, according to the order in which they are laid in the indictment.

And the first thing charged in the libel is, that the pannel had conceived an unjust resentment against the defunct, for three different reasons: 1st, Because he had accepted the

factory of the estate of Arishiel; 2dly, Because he had removed him from the farm of Glenduror; and 3dly, Because that, in the month of April 1752, he had taken measures for removing certain other persons, who were tenants and possessors of that estate.

The first is clearly disproved by letters and discharges under the hand of the deceased, which have been read in your presence; and from which it appears, that, for several years after the date of the factory, the deceased and the pannel were in perfect good terms; and that Glenure had such confidence in the pannel, that he had employed him to uplift the rents from the other tenants.

The second ground for resentment is disproved by the oath of Alexander Stewart of Lunnahyle, who deposes, "That the time when the pannel removed from Glenduror, he told the deponent, that he had had a meeting with Balliveolan, and that there was a compromise betwixt them: that he did not hear of any warning, but that he removed voluntarily."

And therefore the only ground of resentment which remains, is, that the defunct had taken measures for removing some of the other tenants of the estate, as at the term of Whitsunday last: and though it may be true, that the pannel has, upon different occasions, complained, in strong terms, of the hardship of removing these tenants; yet it is impossible to believe, that so trifling a cause of resentment could have so strong an effect, as to push on the pannel to the barbarous murder of which he is now accused; more especially, when it is considered, that he is noways related to any of these tenants, and that none of them are so much as of the same name.

The prosecutor has been pleased to lay great stress upon certain foolish expressions alleged to have been used by the pannel upon the subject of these removings.

It must occur to every man, how extremely dangerous a proof of this kind is: there are very few witnesses who can repeat exactly the particulars of any conversation, and still fewer who can recollect these particulars at any distance of time. In such cases, much may depend upon the tone of voice, or gesture of the person who speaks; and the variation of a circumstance may alter the meaning of the whole expression.

Besides, there is an obvious disadvantage which this pannel labours under, and of which, in the present case, he has no small reason to complain; which is, that the particular expressions charged against him are not taken into the libel, neither are the circumstances of time and place mentioned; by which the pannel is deprived of the opportunity he ought to have had of bringing a contrary proof. If the particular expressions were known to the prosecutor, it was but just that they should have been taken into the libel; and, on the other hand, if they were not known, no such thing ought to have been at all mentioned.

And indeed, with regard to some of the ex-

pressions, it is impossible to believe, that the pannel used the words deposed to by the witnesses. Thus, in particular, the strongest expression is that deposed to by John Maccoll the boatman, who deposes, "That, about two years ago, he heard the pannel say, that he would spend a shot on Glenure, though he went on his knees to the window to fire it." But as this expression is only deposed to by one witness, who seems to have been abundantly forward in deposing against the pannel; so it is utterly incredible, that, at the time deposed to by this witness, the pannel would have used this expression; as it is clearly proved, by the depositions of the other witnesses, that the deceased and the pannel were then in strict friendship together; and that at that time the deceased had such confidence in the pannel, that he was then employing him as sub-factor upon this estate.

It would be very tedious*, and is unnecessary, for me to make particular observations upon the other expressions deposed to by the several witnesses; at the same time it is scarcely possible for me to recollect them, as I had no opportunity to know them, till they were deposed to by the witnesses themselves. It is sufficient for me, in general, to observe,

* It is represented in the 'Supplement,' that in some part of this argument (p. 260, line 15 of the report of the trial referred to in the 'Supplement') Mr. Brown was interrupted by Duncan Campbell of South-Hall, one of the jury, who said aloud to him, "Pray Sir, cut short; we have enough of it, and are quite tired; the trial having lasted long:" upon which the author of the Supplement remarks: "This unprecedented exclamatory interruption disconcerted Mr. Brown, shocked the audience, and showed plainly the settled minds of some folks. It is very true, that the trial had lasted long. But who were they that lengthened it so much? Surely not the pannel's lawyers and witnesses: for the depositions of the witnesses for the prosecutors take up 103 pages, whereas those for the pannel only 8 pages; and the Lord Advocate's speech to the jury against the pannel, fills up 78 pages; but that of Mr. Brown for him, only 51: so that in this long diet of the court, nine hours at least of the time spent was employed by the prosecutors for one hour by the pannel. How little reason then had South-hall to behave so inhumanely, and do a thing, that, I am told, never happened before in a court of justice! One or two more of the jury spoke on this extraordinary occasion; but whether seconding or opposing South-hall's motion, was not then distinctly heard by many. It seems to be agreed upon now, that it was to desire Mr. Brown to proceed; which he did, after expressing his concern for having been thus interrupted; it being a check that behoved to affect his after-pleading, and make him forget to take notice of some things that he would otherwise have done."

VOL. XIX.

that some of them may bear an innocent meaning; that others of them appear to have been uttered when the pannel was in drink; and that none of them are so strong, as that deposed to by the boatman, which has been already answered.

And though it should be admitted, that the pannel had, upon different occasions, expressed himself foolishly in terms which implied resentment against the defunct; yet this, by itself, is by no means sufficient to prove, that the pannel was accessary to the murder which afterwards happened.

And here I have only to appeal to your own hearts, and ask, how often you have heard resentful expressions thrown out in conversation, where you were yourselves conscious, that nothing was seriously intended: and though it may be true, that such expressions may serve as a weight in the scale, with other circumstances, to convict the pannel; yet this holds only where these other circumstances cannot naturally admit of an innocent construction, but can never apply to the present case, where, I am hopeful, I shall be able to shew, that the other circumstances proved against the pannel have no shadow of relevancy in them.

At the same time, it is a circumstance of some weight in the present case, to take off the effect of these expressions, that it is not pretended, that the murder was committed by the pannel; on the contrary, the libel sets forth, that the murder was committed by the hands of Allan Breck: and however it may be true, that expressions importing resentment, proved against the pannel, may go far to presume guilt, where none other is condescended on as the actor and perpetrator of the murder; yet that will noways apply to the present case, where the very libel, upon which the pannel is accused, sets forth, that the murder was not committed by the pannel, but by another.

The second fact charged in the libel, is founded on a concert supposed to have been entered into betwixt the pannel and Allan Breck, upon Monday the 11th of May; in consequence of which concert, it is alleged, the murder happened. But as the prosecutor has brought no evidence of any such concert, or that Allan Breck and the pannel had any conference whatever upon the subject that day; so it is proved, as strongly as the nature of the thing can admit of, by the prosecutors own witnesses, that no such thing could possibly have been concerted that day. The sum of the evidence relative to this matter, is, that Allan Breck came to the pannel upon Monday the 11th about mid-day, the pannel being then sitting in a field of potatoes, in company with three of his servants: that, after they had sit for a quarter of an hour together, a message came from Mr. Campbell of Airds, desiring the pannel to come to him at Keil, which is about two miles distant from the pannel's house: that, in consequence of this message, he immediately went to Keil, leaving Allan Breck with his servants: that he remained

Q

with Airds all that afternoon, and did not return to his own house till late at night, the family being then at supper, and several strangers along with them: that the pannel and Allan Breck had no conversation together in private that night: that they slept in separate places, and that the pannel had left his house next morning, before Allan Breck got out of bed.

As this is a very material circumstance, in respect it is admitted upon all hands, that this was the only occasion the pannel and Allan Breck had of conversing together, between Glenure's return from Edinburgh, upon Saturday the 9th, and the murder, which happened upon the Thursday thereafter, I must beg leave to resume, particularly, the evidence on this head.

John More Maccoll deposes, "That, upon Monday the 11th of May last, he saw Allan Breck come to Aucharn, dressed in his long clothes, and came directly where the pannel, Allan his son, John Beg Maccoll, and the deponent were covering potatoes: that, when Allan came up, they were resting themselves, and sitting by one another: that Allan Breck sat with them; and all the conversation the deponent observed, consisted in some questions about the welfare of the people of Glencrearan; and that he did not observe the pannel have any private conversation with the said Allan Breck; for that, a very little time after Allan Breck's arrival, the pannel had a message to meet Mr. Campbell of Airds at Keil; and that this happened after mid-day: that the pannel immediately, upon receiving the above message, went away, in order to meet Airds; and that nobody went along with the pannel, Allan Breck having stayed with them."

John Beg Maccoll deposes, "That when Allan Breck came, upon the 11th of May last, to Aucharn, the pannel was seeing the deponent, John More Maccoll, and Dougal Maccoll, working at potatoes; and that Allan Stewart, the pannel's son, was likewise there: that, when Allan Breck came, they were all sitting together; and that he seated himself by the pannel, and had some conversation in English, which the deponent does not understand. Deposes, that Charles Stewart, son to the pannel, and — Stewart, daughter to Fasnacloich, came to Aucharn from Fasnacloich a little after the said Allan Breck." And further deposes, "That when Allan Breck came back, upon Monday the 11th of May last, to the place where the pannel, deponent, and others, were covering potatoes, as above, they had sit together but for about a quarter of an hour, when the deponent went to work at potatoes at a greater distance; and before he went away, heard a message had come for his master to meet Airds at Keil, and heard his master speak of going there; but when he went, or who went along with him, the deponent does not know: that the deponent continued working at the potatoes till the evening, and the pannel was not come home when he came from his work: that the pannel came home at bed-

time, accompanied with John More Macilchattan, who lay with the deponent that night."

Dougal Maccoll deposes, "That when the deponent came home from the wood, upon Monday the 11th of May last, the pannel was not at home, and the deponent was told, he was gone to Keil, to meet the laird of Airds; and that the deponent had gone to bed before the pannel came home that night; and that early upon Tuesday morning, when the deponent got up, he saw the pannel without, who told him, that he was going to Appin's house; and that, to the deponent's knowledge, Allan Breck, or the pannel's sons, weren't then up: that he saw the pannel go towards Lettershuna, where Appin lives. Deposes, that Allan Breck left Aucharn before the pannel returned from Lettershuna."

Katharine Maccoll deposes, "That the pannel went in the afternoon of the day (viz. 11th May) to Keils, to meet Mr. Campbell of Airds; and that it was late at night before he came home; but that the family had not supped when the pannel came home; and that the pannel supped in company with Allan Breck Stewart, Fasnacloich's daughter, and Archibald Cameron, nephew to Fasnacloich, and the pannel's family."

Archibald Cameron deposes, "That, upon Monday the 11th of May last, the deponent came from Fasnacloich's house to the pannel's house, after mid-day: that, some little time after he came there, he saw Allan Breck Stewart: that the pannel was not at home when the deponent came first there, but came home before night-fall: that the deponent, pannel, Allan Breck, and the family, sat in one room, and supped together: that he did not observe Allan Breck and the pannel speak in private that night: that the deponent and Allan Stewart, the pannel's son, lay in one bed, and Allan Breck and Charles Stewart, son to the pannel, in another bed in the same barn: that, to the best of his remembrance, they all went to bed much about one time, and got up together next morning: that the deponent did not observe the pannel about the house next morning when he got up."

And the depositions of these witnesses are corroborated by Donald Campbell of Airds, who deposes, "That, upon Monday the 11th of May last, the deponent sent to the pannel, desiring him to come to him at Keils, a farm belonging to the deponent, at about a mile's distance from the pannel's house: that the pannel accordingly came there to him that afternoon, as soon as he expected him: that the deponent's business with him was for his assistance in setting that farm: that the farm was accordingly set, and the pannel himself took part of it, and conducted the deponent a part of his way home, and then they parted: that, before parting, he desired the pannel to go next morning to Appin's house: that the pannel accordingly did so, and the deponent had a letter from him from that place."

From what has been said, therefore, it appears, that the prosecutor has not only not proved, that upon the 11th of May there was any thing concerted with regard to the murder betwixt the pannel and Allan Breck, but, on the contrary, it is proved, as strongly as the nature of the thing can admit of, that no such thing was or could be concerted betwixt them at that time; and if this is once established, it saps the foundation upon which the whole libel stands; as it is not pretended, that the pannel and Allan Breck had ever any other opportunity of conversing together, betwixt Glenure's return from Edinburgh and the time of the murder.

The third article charged in the indictment is, That, in pursuance of the concert entered into upon the 11th of May, the pannel had furnished Allan Breck with a suit of his own clothes, in order to serve as a disguise, that he might be enabled to commit the crime with the greater safety.

But in the first place, it must occur to every man who hears me, that this is a most improbable tale; for if it had been intended that Allan Breck should be disguised at the time of committing the crime, it is impossible it could be seriously intended, that he should be disguised in a coat belonging to the pannel; for, however this might have served for a disguise to Allan Breck, it might serve equally for a point of evidence against the pannel: and therefore this improbable position can gain credit with no mortal, unless it shall first be supposed, that the pannel is not only the most wicked, but also the most foolish among men; which will not be easily credited by you, who have been witnesses to the decent appearance he has made at this trial.

2dly, As the story is improbable, so it is equally destitute of all foundation in truth; for it is not proved by any of the witnesses, that the pannel furnished or gave the clothes to Allan Breck: and though it is proved, that he laid aside his French clothes, and put on a suit of clothes belonging to the pannel, or his son, upon the Monday before the murder; yet it would be ridiculous to say, that a party could be convicted as accessory to a murder, because that the murderer had on his clothes at the time when the crime was committed.

And, lastly, upon this head, the circumstance of changing the clothes has been fully accounted for in the former part of the argument; and as it has been clearly proved, that Allan Breck had been formerly in use of wearing these very clothes, the accident of his having them on at the time when the murder was committed, can have no weight against the pannel.

The fourth article charged in the libel is, That, upon the morning of that day upon which the murder happened, the pannel had sent John Beg Maccoll, a servant of his own, to Fort-William, in order to watch, and give intelligence concerning the motions of the deceased; and great pains have been taken to prove this article.

But, unluckily for the prosecutor, this fact happens to be contradicted by every part of the evidence.

In the first place, it appears, from the oath of John Beg Maccombich, "That it was known over the whole country, that Glenure was to have been that evening at Kintalline, which lies on this side the ferry of Ballachelish:" and therefore, if the pannel's intention had been to watch Glenure's motions, it is natural to ask, what good reason there could be to order his servant to cross the ferry, and go on to Fort-William, when, by waiting at the ferry, he was sure to get intelligence of Glenure's motions?

2dly, The fact is contradicted by the depositions of Fergus Kennedy and John Mackenzie, two witnesses also adduced for the prosecutor, who concur in deposing, "That John Maccoll met Glenure and his company in their way southward, about three miles from Fort-William."—If his errand had been to watch and give intelligence concerning Glenure's motions, he would have certainly returned immediately, and have given intelligence accordingly. But, instead of this, it appears, from the depositions of these witnesses, compared with the oaths of William Stewart and his wife, that John Maccoll did not return, but went on to Fort-William; which is utterly inconsistent with what the prosecutor supposes.

And lastly, this circumstance is flatly contradicted by the oath of John Beg Maccoll himself, who expressly deposes, "That, when he went to Fort-William with the above letter to Charles Stewart, the notary, he had no orders from his master to enquire after the motions of Glenure, or to acquaint any body thereof; but had been sent to Fort-William, in order to bring a notary from thence, to take a protest against Glenure upon the day following:" and as that part of his evidence is confirmed by the pannel's letter to Charles Stewart, produced by the prosecutor; so the remarkable haste with which John Beg Maccoll went to and returned from Fort-William, clearly shews, that it was no sham errand, but that the pannel's real intention was to proceed in a legal way, by taking a protest against Glenure, in case he should attempt to execute the ejection.

The next circumstance charged in the libel is, That when John Mackenzie informed the pannel of the murder, he appeared no ways concerned nor surprized; and that neither he, nor his family, went to look after the dead body.

But as this circumstance is extremely trifling, so the first part of it is clearly disproved by the oath of John Mackenzie, Glenure's servant, who deposes, "That immediately after the murder, he went to James Stewart's house in Duror; and James seeing him weeping, asked what the matter was? and the deponent told him, his master was killed: whereupon James Stewart asked him, by whom, and how it was done? To which he, the deponent answered, that he did not know by whom; and believed

it to be a shot from a gun or pistol." And further deposes, "That when he saw the pannel at his house in Aucharn, as aforesaid, the pannel wrung his hands, expressed great concern at what had happened, as what might bring innocent people to trouble, and prayed that innocent people might not be brought to trouble." And, to the same purpose, the said John Beg Maccoll deposes, "That, when John Mackenzie informed the pannel of the murder, he said, It was a dreadful accident, and he was afraid it might bring trouble on the country; and appeared sorry for what had happened."

It is indeed true, that the same witness has deposed, "That neither the pannel, nor any of his family, went near the dead body:" but as this is a circumstance of no manner of weight; so the witness has accounted for it in a very natural way, viz. That as the deceased and the pannel had not been in good terms together, the pannel did not chuse to go to the place where the body lay; and more especially as he knew that some of those who were to meet Glenure had arms, and it was impossible to know, what unreasonable lengths their resentment might carry them: at any rate, it shews how much the prosecutors are pinched in point of argument, when they are obliged to found upon it, as a circumstance against the pannel, that he did not go from his own house, which is about two miles distant from the place where the murder was committed, merely to assist at the funeral of a person to whom he was no-way related.

The fifth article charged in the libel is, That, upon the second day after the murder, the pannel had sent five guineas by the packman to Allan Breck, in order to enable him to make his escape. As to which, gentlemen, I do admit, that, if at this time the pannel had been in the knowledge that Allan Breck was the murderer of Glenure, his furnishing him with money in order to enable him to make his escape, might have been considered as an offence deserving punishment. At the same time, however wrong this would have been, it might have admitted of an excuse, from the connexion and relation which the pannel had to Allan Breck. And it is now proved, by the concurring testimonies of two witnesses, that the pannel had been left his tutor; and therefore it is much doubted, how far the pannel's sending money to Allan Breck, though he had known him to be the murderer, would have been punishable.

But however the law might have stood upon that supposition, it will not apply to the present case. The pannel denies he knew any thing of Breck's being the murderer: and as he was well acquainted with his particular circumstances, of which he has now brought full evidence, by the concurring testimonies of many witnesses, that he had been first a deserter, next a rebel, and was then in the French service; I conceive it was noways criminal in the pannel to advance this trifling sum, in order to enable him to make his escape; it was doing no

more than what any good-natured man would have done to his friend in the like circumstances: and hard will be the case of the pannel, if he should be condemned merely for doing a good-natured deed, which had nothing criminal in it; more especially as he had reason to believe the message which was sent him from Allan Breck, importing, that he had no access to the murder, but judged it prudent for him to leave the country, in respect of his particular circumstances, explained as above.

And indeed his majesty's advocate does not seem to lay much stress upon this circumstance by itself: but then he has attempted to rear up certain arguments, tending to shew that the sending of this money must have been in consequence of a previous concert with Breck. And, in the first place, it has been said, that the pannel could not have known to have sent the money to Koalimacoon, if it had not been in consequence of such previous concert.

But, with submission, there is a very satisfying answer to this objection, viz. That upon the day after the murder, the pannel had received a message from Allan Breck, informing him where he was, and desiring him to send what money he could spare, to enable him to make his escape. This is distinctly proved by the concurring testimonies of no less than four witnesses, whose depositions, as they connect with one another, fall now to be attentively considered.

Katharine Macinnes deposes, "That, in the evening of the 14th of May last, the deponent saw Allan Breck Stewart at a goat-house in the moor of Ballachelish, after Glenure was killed: that Allan Breck then asked her, what was the occasion of the stir in the town? and that she told him, Glenure was murdered: and further asked her, who might have committed the murder? and that she told him, she did not know: and that the said Allan further desired the deponent to tell Donald Stewart in Ballachelish to go to the pannel, and desire him to send the said Allan money: and that she delivered this message to Donald Stewart that same night; and that she told the said Donald Stewart where she saw Allan Breck."

And Donald Stewart, the next witness, deposes, "That, upon the evening of Thursday the 14th of May last, about night-fall, Katharine Macinnes came to the deponent, and told him, that one without wanted to speak to him: that this message came to him in Ballachelish's own house: that, when he went out, the said Katharine Macinnes told him, that it was Allan Breck that wanted him, and that he was a little above the house in the brae: that the deponent went up to the brae, and met Allan Breck, who was then dressed in a great coat, and a dark short coat under it, with white metal buttons: the deponent told him of the murder, and said, it could not be but that he, Allan Breck, was about it: to which Allan Breck answered, that he had heard of the murder, but had no hand in it: to which the deponent replied, he did not believe him; that the said Allan Breck

Stewart told the deponent, he was going immediately to leave the kingdom, was very scarce of money, and was going then for Koalisnacoon, and desired the deponent to acquaint the pannel, that he was gone to Koalisnacoon, and desire him, if possible to send him money there; and the deponent then promised to acquaint James Stewart of the above message: that Allan Breck said, he believed he would be suspected of the murder; and upon that account, and as he was a deserter formerly from the army, it was necessary for him to leave the kingdom; that, after the conversation with the pannel about serjeant More, he delivered the above message from Allan Breck to the pannel; and that the pannel did not say whether or not he was to send the money; and this conversation happened about ten o'clock in the forenoon of Friday the 15th of May last; and that there was nobody present." And further deposes, "That, upon the deponent's delivering the above message from Allan Breck to the pannel, the pannel asked why Allan Breck himself did not come for money, if he wanted it? To which the deponent, to the best of his remembrance, replied, That Allan Breck told him, he would be suspected for the murder, and was a deserter: to which the pannel answered, That he hoped in God Allan Breck was not guilty of the murder: that during the above conversation with the pannel, Alexander Stewart, Duncan Maccombich, and several other possessors of Auchindarroch, were in the adjoining field delving, but at such a distance, that the deponent cannot think they could hear the above conversation."

From the depositions of these two witnesses, which connect exactly together, it is distinctly proved in what manner the pannel came to the knowledge of the place where Allan Breck was: and their depositions are further supported by the deposition of John Stewart younger of Ballachelish, who deposes, "That, the day after the murder, the deponent was at the pannel's house, who, after twelve o'clock of the day, told the deponent, that he had a message that morning from Allan Breck by Donald Stewart, to send him money; but does not remember whether the pannel told him the place where he was directed to send it; and the pannel told the deponent, that he was resolved to send him money."

And also by the deposition of Alexander Stewart in Auchindarroch, who deposes, "That, to the best of his knowledge, he saw Donald Stewart in Ballachelish and the pannel together, upon the marches between Aucharn and Auchindarroch, in the morning of the 15th of May; and that he himself was at the time digging ground with the other tenants of the town."

The learned gentleman on the other side has been pleased to except against this part of the evidence; that the two material witnesses are both connected with the family of Ballachelish; that, as to some of the facts, they are single witnesses; and that they do not entirely agree

as to the import of the message sent to Donald Stewart by Allan Breck.

I must acknowledge, I am under no small difficulty to find out any foundation for the first part of the objection. It is neither pretended nor proved, that Ballachelish is at all related to the pannel; and as it cannot be said that any valid objection could have been made against Ballachelish himself, if he had been produced as a witness for the pannel, far less does any objection lie against the son-in-law or servant of Ballachelish, upon account of his being in the interest of the pannel, of which, however, no sort of evidence has been brought. And as to the second part of the objection, that there are not two witnesses concurring as to the whole of the facts relative to the message sent by Allan Breck to Donald Stewart;—the learned gentleman would do well to observe, how much of his own proof is founded only upon single testimony; and then let him shew cause, why his packman and bouman, though single witnesses, should be credited, and the like indulgence should not be given to the pannel.

At the same time it must be observed, that the two witnesses who have deposed with regard to this message, are not single; they concur as to the material part, that Allan Breck had sent a message to the pannel, desiring him to send him a present supply: and though the two witnesses differ with regard to the precise words used by the maid in delivering Allan Breck's message to Donald Stewart; yet, as they agree in every material circumstance, no regard ought to be had to trifling variations; and it is believed the gentleman on the other side will admit, that the objection would have been full as strong (if not stronger,) if the two witnesses had both used the same words.

And lastly, As to the observation that the witnesses differ among themselves, as to the precise hour when the packman arrived at Fort William, and demanded the money from William Stewart, it is noways surprising, that, at so great a distance of time, witnesses should not be altogether exact as to hours and minutes. What appears most probable is, that William Stewart and his wife have both mistaken the hour, as, from their oaths, neither of them seem to be positive with regard to that matter: and Stewart the packman seems to have been more attentive to this particular, since he not only swears as to the time when he received his message from the pannel, which he says was about 12 at noon, but also as to the time when he delivered it to William Stewart, which, as the packman says, was early in the evening: and as this agrees entirely with the account which Donald Stewart gives of the matter, when he says, "That he delivered Allan Breck's message to the pannel about 10 o'clock forenoon;" so it is plain there could be no concert betwixt these two, not only as Donald Stewart is above all suspicion of that kind, but also as the packman has been kept under close confinement by the prosecutor, and had

no opportunity of conversing with Donald Stewart from the time of the murder till he was produced as a witness: and I cannot help thinking, that it would sound strangely to say, that the prosecutors should be allowed to give credit to this packman where he swears for them, and, at the same time, to reject his testimony where it happens to make against them.

The prosecutor has been pleased to lay great stress upon the oath of John Breck Maccoll, bouman; and in particular upon that part of it, where he says, that Allan Breck had desired him to go into Fort William with a letter to William Stewart, in case some money did not come to him before next morning; and this, it has been said, agrees exactly with the message sent by the pannel to William Stewart, desiring him to give credit in 5*l.* sterling to John Breck Maccoll, bouman in Koalisnacoon, in case he came to demand it; and it is pretended, that this is a clear proof of a private concert betwixt the pannel and Allan Breck, settling the manner in which he was to be supplied with money.

But as the whole of this argument is founded upon the oath of the bouman, deposing to a long romantic story, in which he is altogether unsupported, I am entitled in law to plead, that his oath is not to be held as legal evidence against the pannel; more especially as it appears, from what has been already said, that his evidence is disproved in one very material article, in which he deposes to a very strong expression, as applied by the pannel against Glenure, at a time when it is proved they were in perfect friendship together.

2dly, The oath of the packman, relative to this article, is as little to be relied on; for, though he has now deposed, that the pannel had desired him to tell William Stewart, not only to send him 5*l.* but also to give credit for the like sum to John Breck Maccoll in Koalisnacoon, in case he came to demand it; yet it is remarkable, that, in the libel, which it must be presumed was taken from his own mouth, no mention is made of the 5*l.* for which credit was to be given to the bouman; and therefore this must have been a new discovery made by the packman since printing the libel. And it is further remarkable, that this part of the packman's evidence is contradicted by the oath of William Stewart, who expressly deposes, that, at the time when the packman delivered his message from the pannel, no mention was made of the name of Allan Breck; and therefore no argument can be drawn from any thing either the packman or bouman have said upon this matter.

But, 3tio, supposing all the bouman has said to be true, viz. That Allan Breck had desired him to carry a letter to William Stewart, it will not follow, that he and the pannel were under any previous concert relative to that matter; ~~as~~ ^{as} Allan Breck was acquainted with William ~~as~~ ^{as} as nearly related to him as he was ~~as~~ ^{as} it was natural for him to have ~~as~~ ^{as} William Stewart to supply him in

his necessity; and therefore his doing so will not prove that it was done upon any previous concert with the pannel. From the commission Allan Breck had given to Donald Stewart upon the Thursday evening, he had reason to expect that the pannel would have sent him a supply with the first opportunity; and as that had not happened, it was natural for him to apply to William Stewart, who was his acquaintance, and as nearly related to him as the pannel.

The learned gentleman has been pleased also to found upon the postscript subjoined to the pannel's letter of the 14th of May, to Charles Stewart; in which he desires, "That William may send immediately 3*l.* sterling, to pay for four milk cows he had bought for his use at Ardshiel:" from which it is inferred, that, before the murder, the pannel was preparing money to give Allan Breck, in order to enable him to make his escape. But as that letter and postscript do not mention the name of Allan Breck, nor to what purpose the money was intended to be applied, the observation does not deserve any answer; though at the same time it clearly proves, that the most innocent circumstances have been laid hold of, and reared up into arguments against the pannel.

Thus it appears, that no argument can be drawn from the circumstance of the pannel's sending money to Allan Breck; as it is not proved, that the pannel then knew that the murder had been committed by him; and far less is it proved, that there had been any previous concert betwixt them concerning the sending of that money before the murder was committed. And indeed, gentlemen, it appears to me, that the circumstances which attended the sending of this money, and in particular the difficulty there was in obtaining it, cannot fail to convince every unprejudiced person, that this horrid murder had not been committed in consequence of any previous concert betwixt the pannel and Allan Breck; for, if that had been the case, it is impossible to believe, that the money would not have been more early provided. It behoved to occur to both parties, that money would be necessary to enable the murderer to make his escape; and as it clearly appears, that neither the one nor the other was in cash upon Monday the 11th, when the time and manner of committing the murder is supposed to have been concerted, it is impossible, that this important matter of providing the money would not have been instantly set about, or that it would have been delayed till the hour when the execrable act was to be committed.

The learned gentleman has been pleased also to lay weight upon another circumstance, viz. That, some days after the murder, two guns were found concealed near the pannel's house, one of them loaded, and the other unloaded: and it has been insinuated, as if the unloaded gun was that, with which Allan Breck committed the murder. But this circumstance is really so trifling, that it scarcely

deserves a serious answer. It is well known, that the part of the country where the pannel lives, fell under the Disarming Act; and therefore it was noways surprising, that the guns were found hid, and that orders were given to hide them at a time when it was foreseen, that a strict search was to be made by the military; and, though one of the guns was unloaded, it is a strange flight of imagination, from thence to infer, without evidence, that this was the gun with which the murder was committed.

Besides, it appears from the oaths of John Beg and Dougal Maccolls, both witnesses produced for the prosecutor, that the little gun, which was found unloaded, was in such miserable bad order at the time when the murder happened, that it is impossible it could have entered into the head of any mortal to use it for the purpose supposed by the prosecutor. Dougal Maccoll deposes, "That he, the deponent, has no skill about guns; but heard Allan Breck and Allan Stewart the pannel's son, complain more than once, that the guns were in bad order."

John Beg Maccoll deposes, "That neither of the guns were in good order; that the large or loaded gun was in use, when going to be snapped, to stand at half-cock; and that the little gun was in use to snap or miss fire: that the little gun had an old worn flint in it, and that he observed this flint in the said gun, when he was in use to see it stand at the end of the girnel as above; but did not observe whether it had a flint or not, when he took it from under the girnel: that he knows no fault the lock of the little gun had, but its being in use to miss fire; and that the lock was on the said gun when he hid it on the Friday evening: that Allan Breck carried it out one morning, and told that it misgave with him thrice at a black cock, and he shot with it the fourth time, without killing the cock."

And, in like manner, captain David Chapeau and Patrick Campbell concur in deposing, that this little gun, at the time when it was found, was in such bad order, that, for want of a screw-nail, the lock was tied to the stock by a string:—and therefore, upon the whole, I leave it to you to judge, how far it is possible that a gun in such order would have been used for the purpose supposed by the prosecutor; or that it would have been carried back so quickly, as it must have been, to the pannel's house at a time when every person was on the watch enquiring about the murder.

And it is of no importance, that neither John Beg nor Dougal Maccoll saw this gun, at the time when the other arms were hid upon the Thursday evening; for as neither of these two witnesses say that they looked for it, so they have both deposed, "That Allan Stewart, the pannel's son, had then told them, that he had hid it below the girnel;" and as they accordingly found it so hid upon the day following, it removes all ground of suspicion, which might otherwise arise from the circumstance, that this gun was not hid with the rest of the arms

on the Thursday evening. At the same time the pannel must beg leave to say, that it would require some explanation how it has happened; that the lock of this little gun comes to be now missing, when such care has been taken to preserve every other particular, which could possibly furnish any handle for an argument against the pannel. A good deal of weight has been also laid upon another circumstance of the like nature with the former, viz. That, upon the day after the murder, Allan Breck's clothes were hid, in consequence of an order by the pannel's wife: but as it is not easy to figure how an order given by the pannel's wife should have any effect against the pannel; so it is humbly thought that this circumstance may be easily accounted for.—It was foreseen, that as Allan Breck was about to leave the country, he would be immediately suspected as guilty of the murder; and, as there was great reason to believe that a search would be forthwith made in every place where Breck was in use to visit, it was natural for the pannel's wife to put his clothes out of the way, that they might not be the occasion of suspicion against the pannel or his family.

His majesty's advocate was pleased to found upon the oath of John Maccoll, bouman, who deposes, "That Allan Breck had said to him, that the apprehending of the pannel and his son would not signify much; but expressed some concern, lest Allan Stewart, son to the pannel, might be betrayed by his own tongue." But as the bouman is only here deposing to an expression of Allan Breck's, when he was endeavouring to free himself from suspicion; as the bouman is at best only a single witness; and as the expression supposed to have been used by Allan Breck does not imply, that either the pannel, or his son, had been guilty of the murder; this circumstance, supposing it true, ought not to be regarded.

And here I cannot omit putting you in mind of one circumstance deposed by Alexander Stewart the packman, which shews pretty clearly, that no regard ought to be had to the oath of the bouman; and besides it is single, and not supported by other evidence. The packman deposes, "That the bouman had desired him to conceal his carrying the clothes and money to Koalishnacoon; told him that he could not prove it against him; and that he could safely depose he did not deliver the clothes to him, since he only pointed out where they were." I leave to you, gentlemen, to judge, what credit can be given to a witness whose principles were such, as to suppose that perjury might be avoided by so poor an evasion.

It has been also said, "That the pannel's wife, his two sons, and his daughter, have, in some things, contradicted each other, in the declarations made by them severally at Fort-William."

The pannel cannot help thinking it hard, that extrajudicial declarations made by his own family should have been received as evidence against him; more especially as it has been

hitherto held to be an established principle in our law, not only that extrajudicial declarations by third parties cannot be taken, or received as evidence against any pannel, but also that those who stand in the relation of wife or children to the pannel, cannot be received as witnesses against him.

However, as these declarations have been allowed to be read in court, though objected to by the counsel for the pannel, he must acquiesce in the judgment given; but, at the same time, I am fully persuaded, that, upon perusing these declarations, the jury will be of opinion, that the differences (if there are any) are so trifling, that they can have no weight against the pannel: and though it should be supposed that the wife or daughter of the pannel, from a mistaken notion of duty to a parent and husband, who had been always indulgent to them, have endeavoured to conceal that Allan Breck went from the pannel's house on Tuesday morning, dressed in a coat belonging to the pannel; yet, as it has been demonstrated, it is hoped to your conviction, that there is no sort of relevancy in this circumstance, it can have no other effect, but to show how extremely improper it is, that so near relations should be examined against any man upon trial; but can never be used as an argument against the pannel. On the contrary, gentlemen, I cannot help thinking, that these declarations afford a very strong argument for the pannel; for as no less than sixteen different declarations appear to have been taken from the pannel himself, his wife, and children, (one of his sons having been examined no less than five different times) it is really surprising that so great a number of declarations, signed by different parties, all relative to the same matter, should agree so exactly together; and, as all the attention of the prosecutor has not been able to draw from these declarations any thing which can fix the most distant suspicion of guilt against the pannel, it tends strongly to fortify the legal presumption of his innocence.

As to the letter wrote by the pannel to John Macfarlane, referred to in the libel, I am still at a loss to discover what argument can be drawn from it; for as that letter (which was wrote soon after the murder, and before any advertisement had been published by the friends of the deceased for apprehending Allan Breck) contains an exact description of Breck's person and dress, and also of the place where he was most likely to be found, it rather proves fur, than against the pannel; and it was but natural, at this period, for the pannel to express an anxiety to have Allan Breck apprehended; as it appears from the proof, that before this time it was the common report of the country, that the murder had been committed by Allan Breck; and therefore it behoved naturally to occur to the pannel, that the easiest and shortest way to obtain his own liberty, was to find out and secure the person by whom the murder was supposed to have been committed.

The learned gentleman on the other side

still insists, that it is not proved, that any other person, besides the pannel, had any quarrel or resentment against the deceased; and it has been further said, "That if Allan Breck was the actor in the murder, he was only revenging the quarrel of the pannel."

But the weight of this observation is fully taken off by the evidence produced for the pannel. It is clearly proved by the depositions of Angus Macdonald, Duncan Campbell, Robert Stewart, and Charles Stewart, "That Allan Breck had sworn revenge against Glenure, upon a belief, that he had given information against him as a deserter." And though colonel Crawford has deposed, "That the deceased had never given him any such information;" yet this does not at all vary the argument, as it is undeniably proved, that Allan Breck still believed, that such information had been given, and upon that account bore deep resentment against the deceased: and therefore, supposing that the murder had been committed by Allan Breck, (which is not admitted) it will not follow, that it was done with a view to resent any quarrel the pannel might have had with the deceased; since it might have been done with a wicked purpose of avenging his own private quarrel: and, at the same time, it is very proper to be here observed, that the deceased had executed a warning, and obtained a decret of removing, against a great many of the tenants of Ardschiel and Lochiel; and if it is true, that in that part of the country a step of this sort is considered as a cause of mortal hatred, it was, at least, as much so to the tenants removed, as it could possibly be to the pannel: and therefore it is wrong in the prosecutor to say, that there was no other person who had any cause of resentment against the deceased, but only the pannel; whereas it is plain, that every one of the tenants who had been decreed to remove from their respective possessions, had at least as strong a cause of resentment against the deceased, as that which is libelled against the pannel; and besides, I might also observe, that it is proved, by the depositions of the two last witnesses produced for the pannel, that one serjeant More Cameron (who in that part of the country is known to be of a most abandoned character) had threatened to shoot Glenure, or to be upides with him, in case he should happen to meet him.

Upon the whole, gentlemen, I flatter myself, I have shewn to your conviction, that all and each of the circumstances proved against the pannel are such, that they can easily bear a good construction, and might have happened naturally, though he had been innocent of the crime laid to his charge: and when to this it is added, that the character of the pannel in private life, renders it highly improbable that he could have been accessory to so vile a crime; that he could not possibly reap any benefit by it; and that is proved by incontestable evidence, that, at the very time when the murder was committed, he was anxiously pursuing another measure, which was utterly in-

consistent with the supposition of his being any way accessory to the murder; I persuade myself that you will be careful to divest yourselves of any impressions you may have received without doors; that you will judge upon the evidence impartially as it lies before you; and that, upon the whole, you will find the pannel not guilty of the crime laid to his charge.

At the same time, in case you shall have any difficulty in finding the pannel not guilty, or in case you shall be of opinion, that there is a shadow of relevancy in any of the circumstances proved against the pannel, it is your duty to return a Special Verdict* upon the

* A special verdict under the Criminal Law of Scotland, seems to differ essentially from a special verdict in the Law of England. In England, a special verdict must find facts and not evidence of facts; and where any matter is by special verdict submitted to the court for their opinion in point of law, no inference of facts not stated on the record, however strong the evidence of these facts may appear, can be supplied by the court. The conclusion resulting from the whole should be found and stated by the jury. See Peake's Law of Evidence, p. 4, where the law is well stated.

In Scotland, the legal guilt of the fact charged upon the pannel is established by the interlocutor of relevancy before remitting the pannel with the libel to the knowledge of the assize, and the question left for their consideration is, whether the fact charged has been proven.

"A special verdict," says Mr. Hume (Commentaries, Trial for Crimes, vol. 2, c. 16, pp. 220, 226, et seq.) "is a return of certain facts or circumstances as proved, without the addition of any general inference from them, with respect to the pannel's guilt of the crime libelled; an inference which is left to be made by the judge, according to his opinion of the lawful construction and character of the facts thus laid before him.

"It is necessary that the verdict make a clear and absolute return of certain facts as proved; not a return in a doubtful, or provisional, or alternative shape, or such as leaves some separate matter of fact still to be enquired into by the Court. For to settle the whole fact is the proper and peculiar province of the jury; and this cannot be done by any other authority, if they shall leave it in any ways uncertain. Such an uncertainty may arise in several ways. And first the jury may report the facts in such a form, as to leave it doubtful, whether the crime in question has been committed at all. As happened in the case of Andrew Cochrane, in whose trial for using false weights and measures, the jury found his weights light and his measures short, but found no grounds for specifying the degree of the deficiency, whether so great as to imply dolo, or inconsiderable only, and such as might be owing to mistake or inattention. In like man-

facts proved for and against the pannel; and in that case you ought to be particularly careful to omit no circumstance which may have any tendency to exculpate the pannel.

Sunday, 24 September, 1752, (betwixt 7 and 8 o'clock in the morning.)

"The Lords ordain the Assize instantly to inclose in this place, and to return their Verdict upon Monday next, the 25th current, at 11 o'clock before noon; and adjourn the Court, and hail diets thereof, till that time; and ordain the hail fifteen assizers there to attend, and the pannel to be carried back to prison."

uer, an alternative return of facts, may sometimes issue in the acquittal of the accused. Thus, in a trial for sheep-stealing, the pannel cannot have judgment as a thief, if the jury say, that the sheep in question were stolen or had strayed; how full soever the verdict be in finding the pannel's possession of the sheep, and other presumptions of his dishonesty and evil conscience. Or again, in a case of robbery, as little is there a good conviction, if the verdict bear that the pannel assaulted A. B., meaning to rob him, and that in the course of the scuffle, his pocket-book either was carried off by the pannel, or fell to the ground and was lost. And here, I may refer to the trial of William and James Carruthers and others, in 1731. These men were indicted on a certain statute, for deforcing the revenue-officers, as also at common-law, for an assault and robbery, having carried off certain arms and other things, belonging to the officers. Now as to this article, the jury 'fand proven that the above Robert Kneall and his crew, at the time and place libelled, brought in some fire-arms to the house of the above John Hill, and that they were lost, or taken away by the foresaid mob.' Sentence passed on this verdict, for seven years transportation, in terms of the statute, as on a conviction of the deforcement only, and nothing more.

"In like manner, on an indictment of more persons than one for the same fact, the verdict is faulty, if it find that the thing was done by one or other of them, and do not afford the means of discerning which of them was truly the guilty person. And on this ground chiefly, as I take it, proceeded the absolvitor in the case of Buchanan and Lilburn in 1771, where the jury convicted the pannels in the precise terms of their own confession, which was thus: 'That the pannels, irritated by the continued attacks of the dog, and having each of them the spit of a jack in their hands, both or either of them in the fray, gave a stroke or strokes upon the head of the said Joseph Martine, with the spits in their hands, of which stroke or strokes and the wounds thereby given, the said Joseph Martine died the day following, in the house of the said Robert Anderson.' It could not be determined on this verdict, whether both pannels had struck the deceased, or,

R

CURIA ITINERIS JUSTICIARII, S. D. N. Regis,
tenta apud burgum de Inverarii, vicesimo
quinto die mensis, Septembris, anno Do-
mini millesimo, septingentesimo quinquage-
simo secundo, N. S. per nobilem et præ-
potentem Principem Archibaldum ducem
de Argyll, Dominum Justiciarium Gene-
ralem, et Patricium Grant de Elchies, ar-
migerum, et Dominum Jacobum Fergus-
son de Kilkerran, Dominos Commissiona-
rios Justiciarii dicti S. D. N. Regis.

Curia legitime affirmata.

Intrat. The above James Stewart, pannel.

The Persons, who passed upon the Assize of

if one of them only struck, which of the two it was.

"Another kind of uncertainty in a special verdict seems also to be vicious; which is, if it does not announce an explicit opinion of the jury respecting the facts mentioned in the verdict, whether they are proved or not. In this view, I may take notice of the verdict in the case of Margaret Anderson; which, however, was followed with sentence of death. She was indicted of child murder on the act 1690. The verdict was thus: 'Find the libel proven, in so far as she brought forth a child without calling for help in the time of the birth: and also they find by plurality of votes, that the two witnesses in exculpation are not concurring, in so far as the pannel's declaration ament her being with child, was not positive to them.' Now, in the first passage, the jury omit to say that the child was dead or missing, or that the woman concealed her pregnancy, which, in terms of the statute, are necessary articles of the prosecutor's case; and in the sequel, relative to the woman's exculpation, they cannot be said to have given a decision, but to have expressed a doubt only, concerning the import and sufficiency of her proof. It is true, it may be answered, and probably the Court took it up in this view, that it lay with her to prove the disclosure of her pregnancy; and that the jury could not be said to have found explicitly in her favour, that she had done so. But neither had they found for the prosecutor, that she concealed it.

"Again; if a verdict be returned, saying with respect to one fact, that it is admitted in the pannel's declaration, and as to certain other circumstances, that they are sworn to by single witnesses, and as to others still, that they are affirmed by several witnesses, and are denied by one, and here stopping short of any conclusion of proved or not proved, respecting these several particulars, or, which is much the same, referring it to the decision of the Court, whether these things be proved or not; this too seems to be at least a questionable verdict. For it is the duty of the assize, themselves to form and report their own opinion respecting the sufficiency of these modes of evidence; and although, in doing so, they will naturally pay regard to the sentiments which

the said James Stewart, returned the following Verdict:

"At Inverary the 21th day of September, 1752 years, New Style, The above assize being inclosed, did make choice of the said Colin Campbell of Skipnish to be their chancellor, and James Campbell, late bailie of Inverary, to be their clerk; and, having considered the Criminal Letters pursued at the instance of William Grant of Prestongrange, esq. his Majesty's Advocate, for his majesty's interest, and also at the instance of Janet Mackay, daughter to the honourable Hugh Mackay of Bighouse, esq. and relict of the deceased Colin Campbell of Glenure, for herself, and on be-

fall from the Court touching the law on that head; yet can they not properly decline to exercise their own judgment on the proof, with the help of that advice, or thus, by a reference, devolve their office on the judge, who cannot lawfully use or accept it.

"It is true, that in every special verdict, it is referred to the Court to make some inference, which the assize have not made for themselves. But then, the inference so to be made, is of a general and scientific nature, and one for which the verdict itself supplies the materials: it is an inference in point of lawful construction, that the matter found proven in the verdict implies, and has all the characters of the crime libelled; or else, that the circumstance found proven amount to a relevant or sufficient proof of the charge. Whereas, in such a verdict as has now been supposed, no materials are laid before the Court, on which to make any general inference: the assize themselves do nothing: they delegate their whole office to the Court; and refer it to them to determine respecting each particular circumstance, whether it be proven or not; so that properly speaking, there are no facts for the Court to construe or consider. Nevertheless, I cannot but feel diffident in expressing this opinion, when I observe, that in more than one instance, judgment has passed on verdicts, which approach at least to that ambiguous character of which I have been speaking; though I shall not affirm that the Court, in these instances, took that view of the matter, but probably rather considered them as cases where the assize had unnecessarily made report of the grounds, and these in themselves sufficient, on which they proceeded in convicting. One instance is in the trial, mentioned on a former occasion, of James Hog and Thomas Soutar, for attempting to suborn witnesses. The jury found a verdict as follows: 'By a plurality of voices, find, that the crime of subordination, or, endeavouring to suborn people to be witnesses, as libelled against the pannel Mr. James Hog, proven in sundry facts, each fact only by one single witness; as to Thomas Soutar, the other pannel, find him art and part in the said subordination.' On this verdict, which has the appearance of being a reference of the mean of proof, as some-

half of Elizabeth and Lucy Campbells, her infant children, with concurrence of his Majesty's Advocate, for his majesty's interest; against James Stewart, pannel; the lord justice general, and lords commissioners of justiciary their interlocutor thereupon, with the deposi-

what a doubtful matter, to the decision of the Court, there ensued a long debate; whereof the main scope on both parts was, to try by arguments and authorities the sufficiency of this sort of evidence, as applicable to cases of this description. The issue was, that the pannels had judgment, as lawfully convicted of the crime laid to their charge.

"How clear soever the verdict in its application, and in the finding of facts, yet still it is not a good conviction, if those facts do not amount to a crime, or cognizable degree of guilt. In like manner as a libel for perjury or reset of theft is not relevant, if it omit to state in the one case, the pannel's knowledge of the quality of the goods, or in the other, his conscience of the falsehood of his oath; so a special verdict on a charge of these crimes is void and fruitless, if it happen to be defective in the like particular. And again, in a trial for child murder, on the act 1690, it is not a lawful ground of sentence, if the assize return a special verdict, and fail to mention therein any of the statutory requisites of the crime; such as the concealment of pregnancy, the unassisted birth, or that the child is dead or missing. And on this ground, at least I conjecture so, went the absolvitor in the case of Magdalen Alexander, who was indicted on that law, in August 1715. Agreeably to the practice of those times, the lords 'sustained the defence' proposed for the pannel, that during the time 'of her being with child she revealed the same,' relevant to restrict the libel to an arbitrary 'punishment.' The verdict was thus: 'Find it 'proven, that about the time libelled, the pannel had the symptoms of a green lighter 'woman' [a woman recently delivered of a child] 'upon her, and also find it proven, that 'during the time she was with child she revealed the same.' Whereupon this woman was justly assolizied; in as much as the assize had not found that she was delivered without help, nor that the child was dead or missing.

"The like question occurred in another case of child-murder, of a later date. At Dumfries, on the 4th of October 1762, this verdict was returned in the trial of Agnes Walker: 'By plurality of voices find the pannel guilty of having brought forth a child 'without discovering the pregnancy, or calling 'assistance during her labour according to the 'act of parliament, &c. entitled, An Act anent 'murdering of children. They are sorry to 'observe that this law is not so well published 'and generally understood as it ought to be, 'and they therefore presume humbly to recommend the misfortunate pannel to the compassion of the judge, and to such exertion 'thereof as to his wisdom shall seem meet.'

tions of the witnesses adduced for proving thereof, and depositions of the witnesses adduced for the pannel, together with the writings, and other particulars contained in the inventory subjoined to the libel, and the writings produced for the pannel; find unanimously"

Besides other objections of a more critical nature, her counsel, Mr. Crosby, stated, that this verdict did not take notice of the fundamental circumstance, of the child being dead or missing. The issue was, that she petitioned banishment from Scotland; to which the prosecutor agreed, rather than run the risk of a judgment in her favour."

The following Case, and Mr. Burnett's remarks upon it, will well illustrate the nature of a Scots Special Verdict.

"In the case of William Doig, tried at Perth for murder and robbery before lords Tinwald and Minto, in May 1755; the jury returned the following special verdict, on which sentence of death followed: 'Find it proved, that part of the 'goods found in the pannel's possession when apprehended were the property of the deceased. 'As also all in one voice find that, time and place libelled, Patrick Maxton's body was found in a 'ditch, or hole full of water, in the Mosswood 'end; and from the marks of violence on his 'body, find it proven that he was murdered: 'and likewise they, all in one voice, find it 'proven, that, time and place libelled, the pannel and the deceased met on the road betwixt 'Perth and Methern, and travelled westward, in 'company with several others, till they came to 'the Milne-town of Carshead, when the defunct and the pannel parted from the rest, and 'went together, as they gave out, towards the 'Moss side of Matherly: that the pannel came 'there alone; but that Patrick Maxton was not 'seen afterwards, till the body was found murdered as above.'" "Here," says Mr. Burnett, the robbery is inferred as committed by the prisoner from the possession of part of the goods of the defunct; and the murder from this circumstance also joined to the parties being left alone together; and the prisoner afterwards only appearing, without giving any account of his associate. The prisoner's counsel were Wedderburn (afterwards lord Rosslyn,) and Rae (afterwards lord justice-clerk.) No debate appears to have taken place on the verdict." Burnett's Treatise on various branches of the Criminal Law of Scotland, p. 522.

* "It is currently reported that three of the jurymen dissented in opinion from the rest, but if so, they had not the courage to desire their dissents to be marked, as perhaps availing not in Scotland, where a majority of the jury determines the question whether guilty or not." Supplement to the Trial of James Stewart.

It appears that in the report of this trial to which the 'Supplement' refers, it is made that "this Interlocutor [ordaining the assize

the pannel James Stewart Guilty, art and part, of the murder of Colin Campbell of Glenure. In witness whereof, our said chancellor and clerk have subscribed these presents in our names, and in our presence, place and date above-written.

(Signed) "COLIN CAMPBELL, Chan.
"JA. CAMPBELL, Cl."

After reading this verdict the Court proceeded to give judgment; which, being written down in the book, and signed by the whole judges, was read by the clerk, and in the usual manner, repeated pronounced by the dempster to the pannel, as follows:

to inclose] having been pronounced by the three judges, the lord Elchies said to the jury words to this purpose,—That as they had been much fatigued by the extraordinary length of the trial; and as the case now to be left to them, was of the utmost consequence, no less than life or death, it deserved their most serious and deliberate consideration: and that therefore a long time (full twenty-seven hours) was given them to return their verdict. And his lordship added, that he thought it might be very proper for them to refresh themselves with sleep, before they should proceed to consider the case, and make out their verdict; for which he said, couches, &c. should be ordered into the place where they were to be inclosed." Upon which the author of the 'Supplement' remarks, "It would, doubtless, have been commendable in the jury, if they had complied with this seasonable advice of the lord Elchies, considering that they had now been sitting in court about fifty hours without sleep; which as they wanted much, so after being refreshed with it, they might have deliberately and with their eyes open considered the case of the poor pannel. The jury, however, were pleased to refresh themselves only with wine and the like, and immediately thereafter to fall to their business, with the same drowsy noddles; in which they made such dispatch, as to have it dressed up and ended soon after eleven o'clock of the same forenoon; a time shorter than four hours at most.

"—O horrid to relate!

"About man's life they did not hesitate.

"In the afternoon of this day, Mr. Stewart younger of Ballachelish meeting Mr. Campbell of Ederline, one of the fifteen, on the street of Inverary, told him, that every one was surprised at the dispatch the jury had made in examining so long a case; and asked Mr. Campbell, How it was possible they could do so much in so short a time? To which Mr. Campbell answered, We only considered the exculpatory proof; as for the other, (viz. the proof against the pannel), we all had it in our heads before. Few will doubt the truth of this answer. They had made up their minds before."

"The Lord Justice General, and Lords Commissioners of Justiciary, having considered the verdict of assize, of date the 24th current, according to the present stile, returned this day against James Stewart, pannel, whereby he is found Guilty, art and part, of the murder of Colin Campbell of Glenure; they, in respect thereof, by the mouth of John Mackenzie, dempster of court, decern and adjudge the said James Stewart to be carried back to the prison of Inverary, and therein to remain till the 5th day of October next, according to the present style; and then to be delivered over by the magistrates of Inverary, and keeper of the said prison, to the sheriff-depute of Argyllshire, or his substitutes; and to be by them transported to the shire of Inverness, and delivered over to the sheriff-depute of Inverness, or his substitutes; and to be by them transported to Fort William, and delivered over to the governor, deputy-governor, or commander in chief, for the time, of the said garrison, to be by them committed to prison in the said fort, therein to remain till the 7th day of November next, according to the present style; and then again to be delivered over to the sheriff-depute of Inverness-shire, or his substitutes; and to be by them transported over the ferry of Ballachelish; and delivered over to the sheriff-depute of Argyllshire, or his substitutes, to be by them carried to a gibbet to be erected by the said sheriff on a conspicuous eminence upon the south side of, and near to the said ferry: and decern and adjudge the said James Stewart, upon Wednesday the 8th day of November next, according to the present style, betwixt the hours of twelve at noon and two afternoon, to be hanged by the neck upon the said gibbet, by the hands of an executioner, until he be dead; and thereafter to be hung in chains upon the said gibbet; and ordain all his moveable goods and gear to be escheat and inbrought to his majesty's use; which is pronounced for doom.

(Signed)

"ARGYLL.

"P. GRANT.

"JA. FERGUSON."

After which the Lord Justice-General spoke to the pannel to the following effect:*

James Stewart, you have had a very long and most impartial trial: you have been prosecuted with all the moderation consistent with the crime you stood accused of; and your counsel have defended you with great ability, and with decency. The jury have unanimously found you guilty of having been accessory to this horrid murder, which, upon due consideration of all circumstances, seems to be according to the evidence.

* "The L—— J—— G—— spoke to the condemned pannel, in an augry stile, as many of the bystanders then thought: and we affirm, that the speech spoke was much more acute and bitter than the speech printed." Supplement to the Trial of James Stewart.

My brethren, in delivering their opinions, have endeavoured to make you sensible, how heinous the crime is of which you stand convicted; a base and most infamous murder and assassination, in defiance of the laws of God and man, and the common principles of humanity! I must add one circumstance more, which aggravates your guilt; and that is, your ingratitude to that gentleman, who, by your means, is now no more. You had, by your artifices, got into his confidence, before he had time to be well informed of the circumstances of the estate of which he was appointed steward. This confidence you abused so much, as to raise sums of money from the tenants for your own purposes: but when, in obedience to the orders of his superiors, he was removing you and others from the farms they did possess, then, according to the malice always prevailing in uncivilized parts of the Highlands, your inveterate hatred began: so that it may be said of you, That you first eat his bread, and then shed his blood.

To trace your crime from its true original source, I will use the words of our statute-book, Those barbarous cruelties and lawless oppressions practised in the Highlands during several centuries, against which the laws made so long ago as the year 1587, and enforced in 1690, were so severe, that the clans were bound to deliver hostages, as securities for the peace, who were even to be put to death, if no redress was made. To this I must add that obstinate and almost incurable disaffection and aversion to the government in several Highland clans, and in particular your own, ever since the happy Revolution, and the establishment of the crown in the Protestant line.

In the year 1715, there broke out a most unnatural and unprovoked rebellion, soon after the accession of his late majesty to the throne; in which the part your clan acted is well known, so many being here present that were witnesses of their composing part of the rebel army, which besieged this town. This I myself have reason to know. A royal indemnity soon followed after those treasons then committed: but, in the year 1719, your clan, unmindful of their lives and fortunes having been granted them only two years before, did again rise in rebellion, and assisted a foreign enemy in an invasion: in this you are said to have acted a part, though at that time very young.

In the year 1745, the restless spirits of the disaffected Highlanders again prompted them to raise a third rebellion, in which you and your clan formed a regiment in that impious service, and in which you persevered to the last. The Divine Providence at first permitted you to obtain some advantages, which has possibly been to give you time to repent of your crimes. But who can dive into the secrets of the Almighty! At last Heaven raised up a great prince, the son of our gracious king, who, with courage equal to that of his ancestors, and with conduct superior to his years, did, at one blow, put an end to all your wicked attempts.

If you had been successful in that rebellion, you had been now triumphant with your confederates, trampling upon the laws of your country, the liberties of your fellow-subjects, and on the Protestant religion: you might have been giving the law, where you now have received the judgment of it; and we, who are this day your judges, might have been tried before one of your mock courts of judicature, and then you might have been satiated with the blood of any name or clan to which you had an aversion.

I have thought it my duty to put you in mind of these facts, only to mark out those wicked paths which have led you to destruction: and though you don't now stand accused as a rebel, nor am I permitted to call you a traitor, because his majesty's undeserved mercy to you did several years ago restore you to the state of an innocent man; yet I may say, with great force of truth, that this murder has been visibly the effect and consequence of the late rebellion.

You may yet, during the short time you have to live, be of great service to your friends and neighbours, by warning them against those principles and practices which have brought you to this untimely end; and may the Lord have mercy upon your soul!*

Immediately after sentence of death had passed upon James Stewart, and the Lord Justice-General had ended his speech, the pannel said,

"My lords, I tamely submit to my hard sentence. I forgive the jury, and the witnesses, who have sworn several things falsely against me: and I declare, before the great God, and this auditory, that I had no previous knowledge of the murder of Colin Campbell of Glenure, and am as innocent of it as a child unborn. I am not afraid to die; but what grieves me, is my character, that after-ages should think me capable of such a horrid and barbarous murder."

Thereafter the pannel was ordered back to prison, and executed according to his sentence; and the morning before he went to execution, he declared to the sheriff his innocence of the fact for which he was convicted; and did the same at the gallows, with many protestations of his innocence, calling God to witness the truth of what he declared.

Of this case Arnot, in his Collection of Criminal Trials, has inserted an abstract, to which he has subjoined the following observations:

"The guilt charged against the pannel is, that he was accessory to, and art and part in

* When the sentence was pronounced against James Stewart at Inverary, the gentlemen who attended the trial the preceding days, having been all tired with it, did not take notes the last day: but, as far as they can recollect, the substance of what the Lord Justice-General then said to the pannel, was as is above set down. *Former Edition.*

conspiring the murder of Glenure, which was perpetrated by Allan Breck Stewart. Therefore, if there be not legal evidence that Allan Breck was the murderer, the charge of guilt vanishes, and it becomes perfectly unnecessary to consider the second proposition, viz. the prisoner's accession to the murder alleged to have been committed by Allan Breck.

"The only positive evidence relative to the perpetrator of this murder, is, that it was committed by 'a man with a short dark coloured coat,' and this is, in some respect, applicable to Allan Breck, as he was seen on the day of the murder, not far from the place where it was committed, dressed in a dun coloured great coat, and dark short coat. Allan Breck did frequently use threatening expressions against the deceased, and he did display the most indubitable signs of fear and guilt. But it is certain that his guilt, as a deserter, was heightened by his having been in the rebellion, and that his life was thus forfeited to his country; and the reader must determine with himself whether Allan Breck's fear of being apprehended proceeded from the desertion, of which he was notoriously guilty; or from this recent murder, of which, even independent of guilt, he had reason to conclude he would be suspected, on account of his connection with the family of Ardsheal, and of his fugitive and wandering life.

"The circumstances from which the prosecutors inferred the prisoner's accession to this murder, may perhaps be fit enough to excite a suspicion of guilt in the speculations of the closet, but I apprehend them to be in the highest degree improper and dangerous, to be produced as evidence to affect the life or fortune of a prisoner in the tribunal of justice.

"The circumstances were shortly these: that Allan Breck, a kinsman of the prisoners, paid him a visit three days preceding the murder, sat with him and other company at supper, and slept in a barn: that Allan Breck put off his French clothes, dressed himself in a short coat belonging to the prisoner, or his son, ere he went to work in a field of potatoes; and next morning, when he left the house, went off dressed in the short clothes, and left his own; which, by the bye, he had done upon former occasions: that the prisoner, upon the search which was to be made for the murderer of Glenure, supplied with money, for the purpose of making an escape, his kinsman, Allan Breck, a fugitive, and a deserter: that the guns about the prisoner's house were hid, in a country where it was a crime to be possessed of arms: that the prisoner had used repeated expressions of resentment and of vengeance against Glenure; and that, after the murder, Allan Breck expressed his apprehension lest the prisoner or his son should be betrayed by their own tongue.

"These are the amount of the evidence against the prisoner, which resulted from a scrutiny, by no means warrantable, into his life and conduct. The rigorous durance in which he himself was confined, and his son and servants being

kept close prisoners in separate apartments, have been already mentioned. His repositories were thrice searched by the prosecutors relations without legal warrant, and attended by a military force: and every circumstance of his life and conversation, for a period of two years, was raked into with the most invidious industry. But this last mode of extracting evidence, and the result which flowed from it, require to be particularly considered.

"Where there is no positive evidence demonstrating the author of a mischief which an individual has sustained, menacing expressions may be justly admitted, along with other circumstances, as a link of the chain of circumstantial evidence against a prisoner. But, to lay much stress upon general expressions of resentment, and even of vengeance, such as, 'I wish he were hanged;' 'he is unworthy to live;' 'I will cause him to repent it,' or the like, would lead to a conclusion equally false and fatal. In social intercourse, the energy of our expressions of applause or of censure, of gratitude or of resentment, is often proportioned to the strength rather of our language than of our feelings. But, if a deep and mortal blow be meditated, I apprehend the deviser, instead of suiting his expressions to his purpose, would endeavour, by the smiles of his countenance, and the smoothness of his language, to conceal the rancour of his heart.

"Let any person who has laboured under embarrassed circumstances, who has felt for the distress, for the impending ruin of his family; who has been chastised by the rod of power, reflect upon the expressions of resentment and of anguish which may have escaped him when his heart was open to a friend, when his passions were inflamed by liquor; and then let him condemn (if he can) the prisoner as a murderer, on account of the expressions of vengeance which are proved against him in the course of this Trial.

"The only part of the evidence affecting the prisoner which makes a serious impression upon me, is what fell from Allan Breck in the wood of Koalisnacoon, that he was afraid lest the prisoner's son 'might be betrayed by his own tongue.'* The following reasons, how-

* "Unless that rule in the scriptures, of visiting the sins of the father upon the children, is to be inverted by our law, and the sins of the children are to be visited upon the father, I entertain a faint suspicion that a mistake has been committed in the course of this Trial, and that (if any of the family was guilty) the prisoner has been hanged instead of his son Allan. The circumstances of the little gun in the depositions of Dugald and John Beg Maccolls, and Allan Breck's fear lest the prisoner's son's tongue should betray him, afford a more pointed evidence against the son than any which is adduced against the father. Besides, it is worthy of remark, that the prisoner's son had a coat precisely of the same make and colour with that which Allan Breck wore on the day Glenure was murdered." Arnot.

ever, lead me to doubt the safety and propriety of making such an expression as this the foundation of taking away the life and fame of a prisoner: 1mo, The witness who deposed to it trembled under the rod of power; he had been confined to close custody in Fort William, and perhaps dreaded that he himself might be brought to trial for this murder. 2do, The smallest variation from Allan Breck's expression, proceeding from misconception, or want of memory in the witness, or from the mistake of the interpreter who translated the evidence, might make an important difference in the conclusion to be drawn from Allan Breck's words. For instance, if Allan Breck, instead of saying he was afraid the prisoner's son 'might be betrayed by his own tongue,' did say, he was afraid the prisoner's son 'might fall a victim to his own tongue;' in this case, Allan Breck would have said no more than what was notoriously just and true, viz. that the resentful expressions used by the prisoner and his son against Glenure would bear hard upon them.

"This trial, upon the whole, points out the propriety of two alterations being adopted in the criminal law of Scotland: 1mo, That the prisoner should here, as in England, have a power of challenging a certain number of the jurors, without cause assigned. 2do, That, in the Highlands of Scotland, where the districts are peopled by tribes or clans, between many of which inveterate feuds did subsist, a prisoner should have it in his power to say, 'I who am a Stewart will not be tried by a jury of Campbells, for the murder of a Campbell;' or, 'I who am an officer of excise, will not be tried for the murder of a smuggler, in a country where all the merchants, farmers, &c. are smugglers.' And, as the lawyers for the crown have it in their power to bring a prisoner from the district where he lives, or where a crime has been committed, to stand trial before the High Court of Justiciary at Edinburgh, so a prisoner likewise should have it in his power to avoid the prejudices which may be entertained of him in a particular district, and to claim being tried at Edinburgh."

The following passages are extracted from "The Supplement to the Trial of James Stewart:"

"From this unhappy period, until the fatal day of execution, James Stewart behaved, in every respect, so like a good Christian, that his greatest enemies were forced to commend him. Nothing now afflicted him, but the thoughts of leaving a most kind wife, with a pretty numerous family, not provided for; and a reasonable concern for his own character, because of the determined ignominious manner of his death, and the alleged cause given for it. To

* "Former sufferings, six years ago, had left him no estate; and the expence of this trial exhausted all he had acquired since." Suppl.

die, he said, on a gallows, for having acted a part in an assassination, was, he believed, what few that knew him could ever have thought was to be his end. This he regretted at first to his friends who came to see him in his condemned state; but after being assured by the gentlemen who had been his counsel, that they had all kept notes of their pleadings, in order to the publishing his trial, he became quite satisfied and easy in his mind. 'If that shall be done, (said he), the world will have an opportunity of seeing and judging of my share in the murder, a crime I ever abhorred, and the justice done me in the trial.' *Res ipsa nunc loquitur*. At his receiving the holy sacrament, from the hands of a worthy clergyman, the necessity of confession and repentance was strongly set forth to him, and the question then put, 'Are you guilty of the murder of Glenure?' He answered, in a most solemn manner, 'I am not guilty of it, even in the smallest degree. If I be, may this which I am about to do, tend to my eternal damnation!' In a word, he gained the esteem and regard of every body; and his military guard admired and pitied him so much, that many of them shed tears at his death; thereby convincing me, that their hearts are not so callous as is commonly thought. I appeal to themselves if this be not true. But let the dying man first speak for himself, when come to the last period of his life. The hour of death, you know, is the hour of truth!"

THE DYING SPEECH OF JAMES STEWART.

My dear countrymen; The several motives that induced me to offer the world a narrative of my uncommon misfortunes, are as follows:

First of all, My innocence makes my sufferings easy, and alleviates all afflictions, be they never so severe in the eyes of man.

Secondly, That my silence upon this occasion might not be constructed to my prejudice by my prosecutors; as my silence at the bar, when I was hearing some of the evidences aver untruths against me, was said to have proceeded from conviction of guilt, and that if I should challenge them, they would say more than they did.

Thirdly, In order to let the world know the hardships put upon me since my confinement, contrary to the known laws of this nation; which effectually disabled me from making many defences I otherwise might produce.

Fourthly, That it came to my ears my prosecutors had spread a false report, that I made a confession of that crime when in livery gaol after receiving my hard sentence.

Fifthly, That I might offer my public advice to my friends and relations upon this melancholy occasion.

These are the chief reasons for the following narration of facts; which I hope to make appear so clear, as will convince the unprejudiced part of mankind how much I am injured, and that I die, as I endeavoured to live, an honest man.

As to the first article, of my being art and part, accessory to Glenure's murder, I positively deny, directly or indirectly; nor do I know who was the actor, further than my suspicion of Allan Breck Stewart, founded upon circumstances that have cast up since the murder happened: and I do declare, that it was not from any conviction of his being guilty of that crime I sent him money to carry him off the country; but out of charity and friendship I had for him, not only as a relation, but likewise as a pupil left to my charge by his father; and as a person who kept close by my brother in his greatest distress, when lurking, before he got off the country; and that I knew he was a deserter, so durst not stand a precognition. I also declare, it was without my knowledge he carried any part of my clothes with him, from my house, upon the Tuesday before the murder. Nor did I know where he was, or where he had gone to from that time, until Donald Stewart, nephew to Ballachellish, came to me Friday after that unlucky action happened, and told Allan Breck was at Koalisnacoon, and begged I might send him some money to help him off the country, as he durst not appear publicly, for fear of being secured for the above reason of his being a deserter; and the said Donald Stewart told me, that Allan Breck assured him he had no hand in the murder.

I likewise declare, though it is set forth in my indictment that Allan Breck frequented my house and company most of any place since he came to the country in March last, that I did not see him but thrice from his coming till he went away from the country. The first time was, two nights before I went to Edinburgh in the beginning of April last. The next or second time was about eight days after my return from Edinburgh, which was about the last days of April, as I best remember, when he stayed but one night that I was at home. The third and last time was upon the Monday before Glenure's murder, that he came to my house about one of the clock after noon, and stayed that night; and the next morning I went from home, which was Tuesday, before he was out of bed: nor did I see him that day, or since. Nor can I remember Glenure's name was spoke of in his company either of the two last times, unless it was he that told me Glenure was gone for Lochaber upon the Monday; as to which I cannot be positive; but I am very sure there was no word of destroying him in any way spoke of. The first time he must have heard me talk of Glenure, as I told him I was going to give in a memorial for the tenants to the barons of exchequer.

It is also set forth in my indictment, that it was of my own accord, and not at the desire of the tenants, I went to make application for them in law. I do declare it was their desire that all lawful ways should be taken to keep them in possession; and do assure myself that nothing obliged them to refuse that, but fear and ignorance; believing, that if they should

own it, they would be made prisoners; as all the poor people were put in such a terror by a military force kept in different parts of the country, that they, I mean the poor country-people, would say whatever they thought pleased my prosecutors best.

I declare what John Dow Breck Maccoll, bouman in Koalisnacoon, deposed in regard to my coming to Glenure's window, was false; and that at the time he condescended on I should have said so, being two years ago, I was in very good friendship with Glenure, which his letters to me about that time testify.

As to the story John More Maccoll, Dougal Maccoll, and John Beg Maccoll, my servants told, they heard me say in my brew-house, that if Glenure did live five years, he would be laird of Appin; and that I saw people in Appin that would not allow Glenure to go on at such a rate; this I do not remember. But this I can safely say, that John Beg Maccoll came into the gaul at Inverary to see me, next day after my sentence was passed, crying and tearing as if he was half-mad, and told me, that the night Dougal Maccoll and he himself were on their way to Inverary, at the strath of Appin, Ewan Roy Maccoll, porter of Glasdrum, and the said John More Maccoll brought two bottles of aquavite into the barn where they were confined, and wrought upon them to make up that story; and made them believe that it could not hurt me, and would gain them friendship at Harekeldine's hand. I truly believe, though it were truth, that it could not hurt any other person, though any thing was proof enough against a man so ill looked upon as I seemed to be.

Alexander Stewart, packman, deposed several falsehoods; particularly in regard of the five guineas he said I desired him to tell William Stewart merchant in Maryburgh, to give John Dow Breck credit in, for Allan Breck's use; and his saying I desired him to get only 4*l.* sterling from William Stewart, for paying milk-cows bought for his use at Ardsbiel; whereas he was only desired to get 8*l.* sterling for paying these cows, as they in truth were bought for William Stewart's use.

I declare the reason why I did not challenge them at the bar was, that my lawyers desired me, though I heard a witness swear falsely, not to speak, otherwise I should be worse looked upon: so that I hope the unbiassed will believe that my silence did not proceed from fear, as alledged by my enemies; but in obedience to the advice given me by my counsel, which I was determined to follow whatever should happen.

That there were plenty of bribes or rewards offered to several, I am well assured. Particularly, Donald Ranken, herd to Ballachellish, a young boy, was offered eighteen hundred marks; which are his own words: but he was kept close prisoner at Inverary, so that none of my friends had access to put any questions to him. John Maccombich, late miller in the mill of Ardsbiel, was offered his former pos-

session of the mill, for telling any thing would answer their turn. Duncan Maccombich and Duncan Maccoll, both in Lagnaba, were offered as much meal as they pleased to call for at Fort-William, if they would make any discoveries. I now leave the world to judge, what chance a man had for his life, when such bribes were offered to poor, ignorant country-people? or what assurance can any man have but such bribes prevailed with some of those who did make oath?

As to the uncommon hardships put upon me under my confinement, they were many: such as, being taken into custody without any written warrant, upon the 16th day of May last; carried through night to Fort-William, where I was kept close prisoner; not allowed to see any of my friends, or any that could give me counsel, until, about the 20th of June, there came a letter from Mr. William Wilson, directed to my wife, with the act of parliament discharging close imprisonment longer than eight days; which, when shewn to colonel Crawford, who then commanded the fort and troops, he allowed my wife and some others to see me: but would not allow such as I thought could be of most use to me to come near me; particularly Mr. Stewart younger of Ballachelish, who came with some law-advice to me, would not be admitted; nor would Charles Stewart writer, or William Stewart merchant in Maryburgh, get any admittance. In short, any who could be supposed to be of any service to me in making my defences, were not permitted access to me. I do not impute this usage to colonel Crawford, for whom I retain a very great regard, and who did not want humanity, had he not got a very bad impression of me from my prejudiced prosecutors. And when col. Crawford left Fort-William some time in the beginning of July, the new governor would allow none to come near me, turned my wife twice from the fort, and discharged her to stay in Maryburgh. And in that close situation was I kept, until my indictment came to hand about the latter end of August; so had no way to make up my defences: nor durst any of my friends in the country offer to do for me, otherwise would be laid up prisoners; and those who I expected had most to say for my exculpation, were taken prisoners, and kept close till my trial, so had not access to put any questions to them,* by which they were not ready to make their answers when called at the bar. I am far from charging the governor with this hard usage, who appears to be a good-natured man, but had his orders so to use me.

When my trial came on, I found it was not only Glenure's murder I had to answer for, of which I thank God my conscience could easily clear me, but the sins and follies of my forefathers were charged against me, such as the

* "An application to give admittance to the pannel's sons and servants was refused."—See Suppl. p. 16.

rebellion in 1715, in 1719, and 1745; so could not be allowed the character of an honest man: notwithstanding that I firmly believe, there was none present but who was either himself, or came of people that were concerned in rebellion some time or other. God forbid they should be all called villains upon that account; as the greatest sinner, upon his repenting, may turn saint.

I was a schoolboy in the year 1715, and was but little more in the year 1719; and if I had the misfortune to be concerned in the year 1745, I was indemnified; and have done nothing since to incur the government's displeasure, that I am conscious of.

Another surprising charge against a man in a Christian country came in against me; which was, that I was a common parent to fatherless children, and took care of widows in the country, which gained me great influence over the people, by which they were much led by me; or some words to that purpose. I hope soon to appear before a judge who will reward charity and benevolence in a different way: and I only regret how little service was in my power to do, not only to the fatherless and widows, but to all mankind in general; as I thank God I would make all the race of Adam happy if I could.

Another charge, and a heavy one, was, that when subfactor to Glenure I exacted more rents of the tenants than was paid to the exchequer, and which superplus rents I wrongously applied, either to my own use, or to the behoof of my brother Ardsheil's children.

I own I did get some acknowledgments from some of the tenants, with the knowledge and consent of the factor Glenure; and do declare, that I was as assiduous as in my power, in acting for the benefit of said children, and that I did account to their behoof for all I could, make of these lands, over and above the rent paid to the factor: and thought it no crime so to do; but to the contrary, thought it my duty, to which I was bound by the ties, not only of nature, but also of gratitude, being the distressed offspring of a very affectionate, loving brother, to whom I was under many obligations; and whose misfortunes (I am well assured) proceeded from a conviction of his doing his duty, which may be construed by some to be owing to the prejudice of his education.

I do declare, that I made no confession of the crime alleged against me, at Inverary, or elsewhere; and that I had it not to make. Nor can I remember, that any there asked me the question, excepting Mr. Alexander Campbell minister; who, I am persuaded, could not be capable of being author of that false calumny, which must have been raised by some malicious persons. May God forgive them! It is very true, that I told Mr. Campbell I had no personal love for Glenure, and that I was sorry how few in his neighbourhood had. But I hope no man would construct that as if I had an intention to murder him.

I also told him, that I had the charity to be-

lieve, that the bulk of the jury thought I had some foreknowledge of the murder. Yet I still think, and not without some reason, that they gave themselves too little time to consider the proofs of either side, but gave in their verdict upon the prepossessed notion of guilt. What must convince all well-thinking people of their being so prepossessed, is their stopping one of my lawyers twice in his speech to them after the witnesses were examined. Mr. Campbell of South-hall, if I noticed right, was the first that interrupted my lawyer. There was some other who also spoke, and who I did not know.* I am told this is not often practised in Christian countries; but there are many ways taken upon some emergencies for answering a turn; and it appears I must have been made a sacrifice, whoever was guilty.

As to what Alexander Campbell in Tynan-lub deposed, That I did not know what I should help any of his name to, if it was not to the gallows; I do remember part of what passed, though my memory is not quite so good as Mr. Campbell's, or Colin MacLaren's: but this far I can safely say, upon the word of a Christian going into eternity, that I had no other intention in what I said, than a joke; and if I had any grudge at himself for being Campbell, I was under no necessity to go into his house, as there was another public house within a gun-shot of his door.

As to what Ewan Murray and Colin MacLaren deposed, in regard to my telling them, that I had given a challenge to Glenure; I own I was wrong in telling them that story, as it was a thing they had no concern in.

And as to what Colin MacLaren deposed I should have said upon the road, after parting with Ewan Murray; I solemnly declare I do not remember one word that passed, being much the worse of liquor, as he himself owned upon oath.

I do declare, that I frankly forgive all these evidences and jury, as freely as I want forgiveness of my sins; and do from my heart pray, that God may pardon them, and bring them to a timeous repentance; and that they may not be charged with my innocent blood, as I never intended any of them the least harm.

My dearest friends and relations; I earnestly recommend and intreat you, for God's sake, that you bear no grudge, hatred, or malice, to those people, both evidence and jury, who have been the means of this my fatal end. Rather pity them, and pray for them, as they have my blood to answer for. And though you hear my prosecutors load my character with the greatest calumny, bear it patiently, and satisfy yourselves with your own conviction of my innocence. And may this my hard fate put an end to all discords among you, and may you all be united by brotherly love and charity.

* "Two of the jury did speak, when the panel's lawyer was summing up the proof, which disconcerted him." See Supplement, p. 64.

And may the great God protect you all, and guide you in the ways of peace and concord, and grant us a joyful meeting at the great day of judgment.

I remember Mr. Alexander Campbell minister at Inverary, for whom I have a great value for his kind and good advices, told me, that the fear of discovering any of my friends might be a temptation to me from making any confession of my knowledge of that murder.

Therefore, to do my friends justice, so far as I know, I do declare, that none of my friends, to my knowledge, ever did plot or concert that murder; and I am persuaded they never employed any person to accomplish that cowardly action; and I firmly believe, there is none of my friends who might have a quarrel with that gentleman, but had the honour and resolution to offer him a fairer chance for his life, than to shoot him privately from a bush.

Mr. Brown of Colston, Mr. Miller, Mr. Stewart younger of Stewarthall, and Mr. Mackintosh, were my counsel, and Mr. Stewart of Edinglassie my agent. I do declare, that I am fully satisfied they did me justice; and that no part of my misfortune was owing to their neglect, or want of abilities. And as they are men of known honour, I hope they will do justice to my behaviour during the trial.

I give it as my real opinion, that if Allan Brock Stewart was the murderer of Glenure, that he consulted none of his friends about it.

I conclude with my solemn declaration, that I tamely submit to this my lot, and severe sentence; and that I freely resign my life to the will of God, that gave me my first breath; and do firmly believe, that the almighty God, who can do nothing without a good design, brought this cast of providence in my way for my spiritual good.

I die an unworthy member of the episcopal church of Scotland, as established before the Revolution, in full charity with all mortals; sincerely praying God may bless all my friends and relations, benefactors and well-wishers; particularly my poor wife and children, who in a special manner I recommend to his divine care and protection; and may the same God pardon and forgive all that ever did or wished me evil, as I do from my heart forgive them. I die in full hopes of mercy; not through any merit in myself, as I freely own I merit no good at the hand of my offended God; but my hope is through the blood, merits, and mediation of the ever blessed Jesus, my Redeemer and glorious Advocate, to whom I recommend my spirit. Come, Lord Jesus, come quickly.

JAMES STEWART.

Mr. Coupar, minister, showed me some queries a few days ago, which he was desired to put to me. They are all answered already in my speech, excepting two; which are; Whether I knew Allan Brock's route from Bal-lachelish to Koolismacoon, and from thence to Rannoch, before the murder happened? Answer, I declare before God, I did not. Whe-

ther I interceded with James Drummond, in the Tolbooth of Edinburgh, to persuade or entice his brother Robert, who was already outlawed, to murder Glenure, and that I would give him a good gun for that purpose, and money for carrying him off the country, and that Ardabiel's interest would procure him a commission in France? Answer, I declare before God, there never passed such words betwixt James More Drummond and me, or any proposals to that effect. JAMES STEWART.

"Notice has already been taken of this James More Drummond; a fellow nursed in villany; who having been disappointed in the scheme, he owned, he had laid for procuring favour to himself, did, in order to supply the want of his *visa voce* testimony against James Stewart at Inverary, send thither one in writing, declaring as above in the postscript of the dying speech. This declaration had been perused, and was rested upon by one at least of the lawyers of the other side, as may be seen in the penult and following lines of the 34th page of the trial; and was, it is said, handed about among the jury men in court. It was acknowledged

afterwards by Macgregor himself, who had the impudence to call at a gentleman's house, November 17, the day after he made his escape out of Edinburgh castle; where being challenged for making such a declaration, he did not pretend to deny it, but averred, that every thing he had said in it was true." Supplement to the Trial of James Stewart.

The notice which had been already taken of James More Drummond, alias Macgregor, in p. 4 of the Supplement, is, that he was a son of the noted Rob Roy Macgregor, (as to whom see Home's History of the Rebellion) that his name had been inserted in the list of witnesses against the prisoner James Stewart, when he, Drummond, was a prisoner in the Tolbooth of Edinburgh, having been only three weeks before (*viz.* Aug. 5,) found guilty of a capital crime, and ordered by the lords of justiciary to be kept in close prison till sentence should be passed upon him, that he was not carried to Inverary by reason of an express prohibition from above, but was removed soon thereafter from the city prison to that of Edinburgh castle for the benefit of better air.

530. The Trial of MARY SQUIRES and SUSANNAH WELLS, Widows, for an Assault and Felony committed on the Person of Elizabeth Canning, at the Sessions-House in the Old-Bailey, before the Right Hon. Sir Crisp Gascoyne, knt. Lord Mayor of the City of London, the Hon. Mr. Justice Wright, the Hon. Mr. Justice Gundry, the Hon. Mr. Baron Adams, William Moreton, esq. Recorder, and others his Majesty's Justices of Oyer and Terminer of the City of London, and Justices of Gaol-Delivery of Newgate, holden for the said City and County of Middlesex, on Wednesday the 21st of February, and continued till Monday the 26th: 25. GEORGE II. A. D. 1753.*

MARY SQUIRES, widow, and Susannah Wells, were indicted; the first, for that she, on the 2d of January, in the dwelling-house of

* The story of Elizabeth Canning excited a most lively and extensive interest. Her veracity was maintained and denied with the utmost vehemence of opposition. It occasioned daily litigations in the news-papers, and other periodical prints, and gave rise to numerous separate publications, of various sorts and dimensions. The eager simplicity with which the partizans of the girl (like the foolish consultants of a conjuror) had by their questions suggested to her materials for her answers, is well exhibited by Mr. Ramsay the painter, in an essay which he published under the title of a Letter from a Clergyman to a Nobleman.

Susannah Wells, widow, on Elizabeth Canning, spinster, did make an assault, putting her the said Elizabeth Canning in corporal fear and danger of her life, and one pair of stays, value 10s., the property of the said Elizabeth, from her person, in the dwelling house, did steal, take, and carry away. And

The latter, for that she, well knowing her the said Mary Squires to have done and committed the felony aforesaid on the said 2d of January, her the said Mary did then and there feloniously receive, harbour, comfort, conceal, and maintain, against his majesty's peace, and against the form of the statute.

Elizabeth Canning sworn.

Elizabeth Canning. I had been to Salt-Petre Bank to see an uncle and aunt; his name is

Thomas Colley. I set out from home about eleven in the forenoon, and stayed there till about nine at night, on the 1st of January; then my uncle and aunt came with me as far as Aldgate, where we parted; I was then alone, so came down Houndsditch, and over Moorfields by Bedlam wall; there two lusty men, both in great-coats, laid hold of me, one on each side; they said nothing to me at first, but took half a guinea in a little box out of my pocket, and 3s. that were loose.

Q. Which man took that?—*Canning*. The man on my right hand. They took my gown, apron, and hat, and folded them up, and put them into a great-coat pocket. I screamed out; then the man that took my gown put a handkerchief, or some such thing, to my mouth.

Were there any persons walking near you at that time?—I saw nobody. They then tied my hands behind me; after which one of them gave me a blow on the temple, and said, Damn you, you bitch, we'll do for you by and bye. I having been subject to convulsion-fits these four years, this blow stunned me, and threw me directly into a fit.

Are these fits attended with a struggling?—I don't know that.

What happened afterwards?—The first thing that I remember after this was, I found myself by a large road, where was water, with the two men that robbed me.

Had you any discourse with them?—I had none; they took me to the prisoner Wells's house.

About what time do you think it might be?—As near as I can think, it was about four o'clock in the morning. I had recovered from my fit about half an hour before I came to the house. They lugged me along, and said, You bitch, why don't you walk faster? One had hold on my right arm, and the other on the left, and so pulled me along.

Can you form any judgment in what manner you was conveyed to the place before you recovered of your fit?—I think they dragged me along by my petticoats, they being so dirty.

When you came to Wells's house, was it day-light?—No, it was not; I think it was day-light in about three hours, or better, after I was there; which is the reason I believe I was carried in about four o'clock.

When you was carried in, what did you see there?—I saw the gypsy-woman Squires, who was sitting in a chair, and two young women in the same room; Virtue Hall (the evidence) was one; they were standing against a dresser.

Did you see the prisoner (Wells) there?—No, I did not. As soon as I was brought in, Mary Squires took me by the hand, and asked me if I chose to go their way, saying, if I did, I should have fine clothes. I said, No.

Did she explain to you what she meant by going their way?—No, Sir. Then she went and took a knife out of a dresser-drawer, and cut the lace of my stays, and took them from me.

Had you, at that time, any apprehensions of danger?—I thought she was going to cut my throat, when I saw her take the knife.

Did you see the prisoner (Wells) at that time?—No, I did not.

Was any thing else taken from you?—There was not then; but Squires looked at my petticoat, and said, Here, you bitch, you may keep that, or I'll give you that, it is not worth much, and gave me a slap on the face.

Had she the petticoat in her hand?—No, it was on me. After that, she pushed me up stairs from out of the kitchen, where we were.

Describe the kitchen?—The kitchen was at the right hand going in at the door, and the stairs are near the fire.

How many steps to them?—There are four or five of them.

What did they call the name of the place where they put you in?—They call it the hay-loft. The room-door was shut as soon as I was put up.

Was it fastened?—I don't know that; it was at the bottom of the stairs in the kitchen. After she shut the door, she said, If ever she heard me stir or move, or any such thing, she'd cut my throat.

Did you see any thing brought up to eat or drink?—I saw nothing brought up. When day-light appeared, I could see about the room; there was a fire-place and a grate in it, no bed nor bedstead, nothing but hay to lie upon; there was a black pitcher not quite full of water, and about twenty-four pieces of bread. [A pitcher produced in court.] This is the pitcher, which was full to near the neck.

How much in quantity do you think these twenty-four pieces of bread might be?—I believe about a quartern loaf.

Had you nothing else to subsist on?—I had in my pocket a penny mince-pye, which I bought that day to carry home to my brother.

How long did you continue in that room?—A month by the weeks, all but a few hours.

What do you mean by a month by the weeks?—I mean a four-weeks month.

Did any body come to you in the room during that time?—No, Sir, nobody at all. On the Wednesday before I came away, I saw somebody look through the crack of the door, but don't know who it was.

Did you, during the time you was in this confinement, make any attempts to come down stairs, or make your escape?—No, Sir, I did not till the time I got out.

Had you any thing to subsist on during the time, besides the pieces of bread, penny-pye, and pitcher of water?—No, I had not.

At what time did you get out?—I got out about four o'clock in the afternoon on a Monday, after I had been confined there four weeks, all but a few hours.

How did you get out?—I broke down a board that was nailed up at the inside of a window, and got out there.

How high was the window from the ground?—(She described it by the height of a place in

the Sessions-house, which was about eight or ten feet high.) First I got my head out, and kept fast hold by the wall, and got my body out; after that I turned myself round, and jumped into a little narrow place by a lane, with a field behind it.

Did not the jump hurt you?—No, it was soft clay ground.

Was it light then?—It was.

What did you do for clothing?—I took an old sort of a bed-gown and a handkerchief, that were in this hay-loft, and lay in a grate in the chimney. [Produced in court.] I made my ear bleed at getting out; the handkerchief I tied over my head instead of a cap, it was very bloody.

Did you see any body when you jumped out at the window?—No, nobody at all; then I went on the back-side the house up a lane, and crossed a little brook, and over two fields, as I think, but I did not take notice how many fields; the path-way brought me by the road-side. Then I went by the road straight to London.

Did you know the way?—I did not.

Did you call at any house?—No, I did not. It struck ten o'clock just as I came over Moorfields. I got home about a quarter after to my mother's house in Aldermanbury.

Did you acquaint any body with your misfortune coming along?—No, I did not.

Who did you meet with first?—I met with the apprentice first; then I saw my mother and the children. She went into a fit directly.

Did you give an account to any body how you had been treated?—Yes, I did to Mrs. Woodward, who came to see me, that I had lived on bread and water. She was so affrighted, she could not ask me any questions then: then Mr. Wintlebury came in, with whom I lived servant before I went to live with Mr. Lyon; he took me by my hand, and asked me where I had been? I said, Sir, in Hertfordshire road; he said, Bet, how do you know that? I said, because I saw my mistress's coachman go by, which she used to go into the country into Hertfordshire, that was Mrs. Wintlebury; I knew the coach, because I used to carry things to it, and fetch them back again.

Was you asked any questions about the room or jug that night, and what you had to subsist on?—Yes, there were many people came in, and I told them I had a jug which was not quite full of water; they asked me how much? and I said, I believed better than a gallon of it: they asked me also, how I got out? and I said, I broke out of the window, and had torn my ear in getting out, which bled all the way coming home.

What things did you observe in this hay-loft?—There was a barrel, a saddle, a bason, and a tobacco-mould.

What do you mean by a tobacco-mould?—I mean such a thing that they do up penny-worths of tobacco with.

[Cross-examination.]

How long might these two men continue with you in Moorfields?—About half an hour.

Did any body pass by at the time?—Nobody at all.

Was this box, that contained your half guinea, taken out of your pocket?—Yes, Sir, it was.

Had you any thing else in your pocket?—I had a pocket-handkerchief with a pye in it, which I did not lose.

Was there any light near this place where you was first attacked?—There was a lamp.

Have you recollected how long you lay in this fit before you came to yourself?—I cannot be sure, but it was about half an hour before I arrived in Wells's house.

During the time of your first being attacked, whether you had any degree of sense at all?—Not till half an hour before I came to that house.

Had you sense enough of any sort to know by what means you was conducted?—I think they dragged me along by my petticoats, they were made so dirty; but I was not sensible.

Was you in any surprise when she took your stays?—I was in a great surprise, and all of a tremble.

Then how can you tell who was there at the time?—The terror made me look about me to see what company was there.

How long did the two men stay in the room?—They stayed no longer than till they saw my stays cut off, then they went away, before I was put up in the loft.

Did not you make an attempt to get out before that Monday you talk on?—I did not.

How came you not to make an attempt before?—Because I thought they might let me out; it never came into my head till that morning.

Where was you sitting, when you saw somebody peep through the crack of the door?—I was walking along the room.

How wide was this crack?—It was about a quarter of an inch wide.

Did not you, in the whole twenty-seven days, perceive where you was?—I did in about a week after, by seeing the coach go by.

Was not you extreme weak?—I was pretty weak.

Was you ever that way before?—No, I never was.

Did not you pass many houses in your way home?—I did, and asked my way of people on the road.

How came you, being in that deplorable condition, not to go into some house, and relate the hardships you had gone through?—I thought, if I did, may be I might meet somebody belonging to that house.

Did you see the prisoner (Wells) while you were in that confinement?—I never saw her in the house at all till I went down afterwards.

Had you any of your fits while in that room?—I had not, but was fainting and sick.

Squires. I never saw that witness in my lifetime till this day three weeks.

How was the prisoner (Squires) dressed, when you was carried in?—She was sitting in her gown, with a handkerchief about her head.

Did you never, during all the time, try if the door was fastened or not?—I did once push against it with my hand, and found it fast.

Had you used to hear any body in the kitchen?—I heard people sometimes blowing the fire, and passing in and out. There was another room in which I heard a noise at nights, but the house was very quiet in the day-time.

Did you eat all your bread?—I eat it all on the Friday before I got out; it was quite hard, and I used to soak it in the water.

When did you drink all your water?—I drank all that about half an hour before I got out of the room.

(Upon being asked where she did her occasions while in the room, she answered, she never had had any stool while in confinement, she had only made water.)

Virtue Hall examined.

Hall. I know the two prisoners at the bar; Wells lived at Enfield-Wash; I went and lived there as a lodger. Mary Squires lived in the house, and had been there about seven or eight weeks.

Q. How long before E. Canning was brought in?—*Hall.* About a fortnight before, which was on the 3d of January, about four in the morning; she was brought in there by two men; John Squires was one of them, he is son to Mary Squires; the other man I don't know any thing of; I never saw him before.

How was she dressed when brought in?—She had no gown on, or hat or apron.

Who was in the house at the time?—There was I and Mary Squires, the prisoner and her daughter. The gypsy-man said, Mother, I have brought you a girl, do you take her: then she asked E. Canning, whether she would go her way?

What did she mean by that?—She meant for her to turn whore; but she would not.

Do you mention this by way of explanation, or as words that she said?—As words that she said; then Mary Squires took a knife out of a dresser-drawer in the kitchen, and ripped the lace of her stays, and pulled them off, and hung them on the back of a chair in the kitchen, and pushed her up into the room, and said, Damn you, go up there then, if you please; then the man that came in with the gypsy's son, took the cap off E. Canning's head, and went out a door with it; the gypsy-man John Squires took the stays off the chair, and went out with them.

Where was E. Canning, when the two men took away the things?—She was then up in the room.

Had you ever been in that room?—I had, before she was brought there, several times.

What was the name they call it by?—They call it by the name of the workshop; there was a great deal of hay in it; they only put

lumber in it: there was a great many pieces of wood, a tobacco-mould, and this black jug; about three hours after the young woman was put up, Mary Squires filled the jug with water, and carried it up.

How do you know it was three hours after?—Then it began to be lightish.

Did you hear any talk between them after she was in the room?—They took care I should know but little.

Has Susannah Wells a husband?—No, she has not: when I went out of the kitchen, I went into the parlour; Wells said, Virtue Hall, the gipsy-man came in and told me, that his mother had cut the stays off the young woman's back, and he had got them; and she bid me not to say any thing to make a clack of it, fearing it should be known.

How long was you in that house?—I was there a quarter of a year in all, if not more; I was there the whole time E. Canning was there; but I never saw her once after she was put up into that room. I was the first that missed her; I asked the gypsy-woman once, whether that girl was gone? She answered, What is that to you, you have no business with it: but I durst not go to see if she was gone; if I had, very likely they would have served me so.

Did you ever see the other man after that night?—No, I never did.

Who lodged in the house at the time besides?—There was Fortune Natus did.

Did Mary Squires continue in the house long after this?—She did, till we were all taken up, which was, I think, on the Thursday after the young woman was gone.

What was you in that house?—I went there as a lodger; but I was forced to do as they would have me.

Mary Squires. What day was it that the young woman was robbed?

Court. She says on the morning of the 2nd of January.

M. Squires. I return thanks for telling me, for I am as innocent as the child unborn.

Wells. How long were these people (meaning the gypsies) at my house in all, from first to last?

Hall. They were there six or seven weeks in all; they had been there about a fortnight before the young woman was brought in.

Did you ever see this cap or bed-gown before?—Not to my knowledge.

Thomas Colley sworn.

Colley. I am E. Canning's uncle; I live at Salt-Petre Bank; on the New-year's day she dined and supped at my house, and went away about nine in the evening, as near as I can guess; I and my wife went along with her to Houndsditch, almost to the Blue-Ball; there we parted with her, about a quarter or very near half an hour after nine o'clock.

How was she clothed?—She had a gown, hat, and white apron on.

Elizabeth Canning sworn.

Canning. E. Canning that has given her evidence is my daughter; after she was missing from New-year's day, I advertised her three times; she came back on the day before king Charles's Martyrdom, about a quarter after ten o'clock at night; she had nothing but this ragged bed-gown and a cap; I fell into a fit directly; my daughter is subject to fits; there was a garret-cieling fell in upon her head, which first occasioned them; and at times, when any body speaks hastily to her, or at any surprize, she is very liable to fall in one; she has sometimes continued in one seven or eight hours, sometimes three or four; she is not sensible during the time she is in one, no more than a new-born babe; when I came to myself, my daughter was talking to Mrs. Woodward and Mr. Wintlebury; they asked her where she had been? she said on the Hertfordshire road, which she knew by seeing a coach going by; she gave the same account she has here. When she came into her warm bed, she was very sick, and had no free passage through her for stool or urine, till she was supplied with glysters, for seven days after she came home, but what was forced by half a cup-full at a time.

John Wintlebury sworn.

Wintlebury. I saw Elizabeth Canning the night she came home; she appeared in a very bad condition, and had this dirty bed-gown and cap on. Hearing she was come home, I went to her mother's house, and said, Bet, how do you do? She said, I am very bad. Said I, Where have you been? She said, I have been somewhere on the Hertfordshire road, because I have seen the Hertfordshire coach go backwards and forwards.

Q. Have you heard the evidence she has given here in court?—*Wintlebury.* I have; she gave the same account that night, but not quite so fully that night, as she did before the sitting alderman on the Wednesday after; but all agrees with what she has said here. I found her in a great flurry, so did not ask her many questions that night.

Joseph Adamson sworn.

Adamson. I have known Elizabeth Canning the younger some years. I never saw her after she came home, till the day we went down to take the people up. I, and several neighbours of us, agreed to go to the place, some on horseback, and some in the coach with E. Canning. I was down about an hour, or an hour and half, before the coach came, and had secured all the people we found there. I seeing the room before she was brought in, thought she was capable of giving some account of it: I returned to meet her and asked her about it; she described the room with some hay in it, a chimney-place in the corner of it, an odd sort of an empty room. I went with her to the house, and carried her out of the obaise into

the kitchen, and set her on the dresser, and ordered all the people to be brought to her, to see if she knew any of them; she was then very weak. I took her in my arms like a child. Upon seeing Mary Squires, she said, That is the woman that cut my stays off, and threatened to cut my throat if I made a noise.

Q. Did any of the people seem unwilling to be inspected?—*Adamson.* Yes, they were very unwilling to be stopped, when we went down in the morning, particularly Mary Squires; after the girl had said this of Squires, Squires said to her, She hoped she would not swear her life away, for she never saw her before. E. Canning pointed to Virtue Hall, and said, That young woman was in the kitchen when I was brought in: she pointed also to another young woman, and said, she was there at the time. Then we carried her up to examine the house; she said, none of the rooms she had seen, was the room in which she was confined. Then I asked if there were any other rooms; they said, Yes, out of the kitchen (I had before been in it, but did not say so then, because I had a mind to see if she knew it). We had her up into it: she said, This is the same room in which I was, but here is more hay in it than there was then: I laid my hand upon it, and said, It has lately been shook up, it lay hollow. She was then pretty near a casement; said I, If you have been so long in this room, doubtless you are able to say what is to be seen out here. She described a hill at a distance, which is Chinkford-hill: I believe she could not see it at the time she spoke about it, for I was between her and the casement, with my back towards the casement. She also said, there were some houses on the other side the lane; then I opened the casement, we looked, and it was as she had described. I asked where was the window she broke out of? she shewed it us (there were some boards nailed up against it), and said, That is the window I used to see the coach go by at: then we pulled down the board; it was big enough for me to have got out of it; it appeared to me to be the same window, before she came to the house, for I saw some of the plaster broke off on the outside; that window was one story high.

Edward Lyon sworn.

Lyon. The young woman lived servant with me till she was missing. I live in Aldermanbury. I was one of the persons that went down to Wells's house. I went after the rest of the gentlemen on the 1st of February; we were there some time before she came, and had taken the people up; when she came, she was carried into the kitchen, and set on a dresser, and the people set all around her: I said to her, Bet, don't be frightened or uneasy, you see your friends about you, and on the other hand don't be too sure, without you really can swear to what you say, therefore be very careful. She pitched upon Mary Squires to be the person that cut her stays off; she pitched upon a young woman that was said to be daughter

to Mary Squires, and said, she was in the kitchen at the time, and likewise Virtue Hall, but said they did nothing to her. This black jug was brought down, a basin, and the tobacco-mould: she said, they were both in the room where she was confined; she had described this jug before, and said it was broken at the mouth, as it now appears to be.

Robert Scarrat sworn.

Scarrat. I went down to Enfield-Wash; there were six of us in all: her mother and two women were with her in the chaise; she described the fields, and likewise a bridge, that night she came home, near the house; I asked her, if she perceived a tanner's house near? she said, she believed there was.

Q. Have you heard the other evidences that went down give their evidence?—*Scarrat.* I have, and what they have said is the truth, which I heard also; I also heard E. Canning examined before the sitting alderman, she gave the same account she has done here.

Was John Squires in the room at the time she pitched upon his mother and the rest?—He was; she said she could not swear to him; he had his great coat on at our first going there, but he had pulled it off; she said, he looked like the person, but she could not swear to him; they made him put his great coat on before the justice; then she said, he looked more like one of the two men that brought her there.

Edward Rossiter sworn.

Rossiter. I went down with the rest on the Thursday. I heard E. Canning examined before Mr. Tashmaker the justice; she gave the same account then as now; she said, John Squires was much like one of the men, when he had got his great coat on; she said she did not see Wells in the house, but she once saw her out at a window, but did not know she was the woman that belonged to the house.

Sutherton Backler sworn.

Backler. I am an apothecary; I saw E. Canning the day after she came home, on the 30th of January about noon; she was extremely low and weak; I could scarcely hear her speak, her voice was so low, and her pulse scarcely to be felt, with cold sweats; she told me she had no passage during the whole time of her confinement; she was then in such a condition, she had a glyster administered the same day; she had many glysters given her, which after some time relieved her.

Q. Whether a person that is extremely costive cannot subsist longer without food, or with less food, than a person that is not so?—*Backler.* I cannot answer to that.

Each of the persons that said they went down to take the prisoners, were asked where they went to? and answered, to Enfield-Wash, the house of the prisoner Wells.

Mary Squires said nothing in her defence, but called the following witnesses.

John Gibbons sworn.

Gibbons. I live at Abbotsbury, six miles from Dorchester; I am master of the house called The Old Ship; on the 1st of January 1753, the prisoner Squires came into the house; there was George her son, and Lucy her daughter with her, as she called them; she came with handkerchiefs, lawns, muslins, and checks, to sell about town; she stayed there from the 1st to the 9th day of the month, and lay at my house.

Q. How long have you kept that house?—*Gibbons.* I have kept it two years, come Lady-Day.

Look at the woman, are you sure that is she?—[He looks at Squires, and says, I am sure it is.]

[Cross-examination.]

How long have you known her?—I have known her three years, and have seen her there three years ago.

How long have you lived there?—I was born at that town: I am a married man, have a wife and one child; I was bred in the farming way at Fisherton.

By what do you recollect the day?—There came an exciseman to officiate there for one John Ward that was sick, and I put the day of the month down when he came; the excise-office is kept at my house; the man that came was Andrew Wicks, or Wick.

Did you see the prisoner sell any of these goods you mentioned?—No, I did not; they offered them to sell to me, and others; my wife bought two check aprons.

William Clarke sworn.

Clarke. I live at Abbotsbury, and have for seven years; I remember seeing the gypsy there; the last time I saw her was on the 10th of January last; I met with them on the road; we went some way together; we parted at Crudeway-foot, four miles from Abbotsbury, and three from Dorchester.

Q. Where were they going?—*Clarke.* I cannot tell that.

Had you ever seen her before?—I saw her, and her son and daughter, three years ago come March, at Abbotsbury; they came with handkerchiefs, lawns, and muslins to sell: I saw the landlord's wife at the Ship buy some aprons of them the last time they were there.

[Cross-examination.]

How came you to take particular notice of the day?—By keeping my other accounts; I carried goods out with me the same day to Portersham.

Have you your book with you?—No, I have not; but I cannot forget the day, because I do not go so often.

Which way were they going?—They were making for London; they talked so.

Did they give you any account to what place they were bound next?—They did not;

they lodged at this man's house (pointing to Gibbons) at Abbotsbury.

Did you see them there?—I did, on the 1st of January: I commonly go there of an evening, to have a pot of liquor.

Do you remember when you kept Christmas-Day?—I do not.

Can you give any account of New Stile or Old?—No, I cannot; but if I was to die for the woman, I'll speak the truth.

How was she clothed there?—The same as now, and the son in a blue coat and a red waistcoat, and had a great coat with him.

What size is he?—He is about five foot seven or eight inches high; the girl was in a camblet gown.

You are sure you saw her the time you mention?—I undertake to swear positively to that, that I saw her there on the 1st of January last, and either on the 9th or 10th afterwards; and saw them going about the town in the time, to sell things.

What are you?—I am a house-keeper, and have been in business about six years; I am a cordwainer.

Thomas Greville sworn.

Greville. I live at Coombe, three miles from Salisbury; I keep a public-house there, the sign of the Lamb; I saw Mary Squires at my house on the 14th of January.

Q. How many miles is Coombe from Dorchester?—*Greville.* I cannot tell.

Who was with her there?—There was her sister and her brother, as she said; they sold handkerchiefs, lawns, and such things.

How long did she stay at Coombe?—They stopped there but one night.

[Cross-examination.]

What January do you mean?—I mean last January, five weeks ago last Sunday.

How came you to take such particular notice of it?—There was a carpenter at my house; he had spent the biggest part of his money; it being Sunday night, I would have him go about his business, and put him out of the house two or three times, and after that he went over the way to another house, and pawned his axe.

[These three witnesses shewed their subornas, as the cause of their coming to give their evidence.]

John Iniser sworn, for the Crown.

Iniser. I sell fish and oysters about Waltham-Cross and Theobalds. I know the prisoner Squires very well by sight; the last time I saw her before now, was at the time she was taken at Susannah Wells's house; before that I had seen her several times every day up and down, before she was taken.

Q. Are you very certain of that?—*Iniser.* I am, that I saw her three weeks before; that she walked into people's houses, pretending to tell fortunes. She told me mine once.

Did you see any goods she had to sell?—No,

VOL. XIX.

I did not; I always saw her by herself. I saw a young man in blue-grey when she was taken up, and two young women, all taken in the house of Wells.

Wells being called upon to make her defence, said, As to her character, it was but an indifferent one; that she had an unfortunate husband, who was hanged; and added, she never saw the young woman (meaning E. Canning) till they came to take us up; and as to Squires, she never saw her above a week and a day before they were taken up.

Squires Guilty, Death. Wells Guilty.

Squires, the last day of the sessions, being asked what she had to say before she received sentence, answered, "That on New-year's day I lay at Coombe at the widow Greville's house; the next day I was at Stoptage; there were some people who were cast away, and they came along with me to a little house on the top of the moor, and drank there; there were my son and daughter with me. Coming along Popham-lane, there were some people raking up dung. I drank at the second ale-house in Basingstake on the Thursday in the New-year week. On the Friday I lay at Bagshot-heath, at a little tiny house on the heath. On the Saturday I lay at Old Brentford at Mrs. Edwards's, who sells greens and small beer. I could have told this before, but one pulled me, and another pulled me, and would not let me speak. I lay at Mrs. Edwards's on the Sunday and Monday; and on the Tuesday or Wednesday after, I came from thence to Mrs. Wells's house at Enfield."

The time drawing near for the Report of the convicts, sir Crisp Gascoyne laid before his Majesty, not only the whole Evidence given at the Trial; but also the several Informations and Certificates he had received since her conviction, accompanied by the following Memorial:

To the KING's Most Excellent MAJESTY.

"May it please your majesty to permit your dutiful subject, the lord mayor of your faithful city of London, with the most profound humility and respect to represent to your majesty, that before the Trial of Mary Squires, for the robbery of Elizabeth Canning, and of Susannah Wells, as accessory, many unfair representations were printed and dispersed, which could not fail to excite public prejudice against them.

"The fatal consequence whereof, in depriving those unhappy wretches of a material part of their evidence, engaged me, from the high station I have the honour to bear, to express my duty to your majesty, and the public, by making this inquiry.

"In which the utmost caution has been observed.—All the witnesses have been strictly, separately, and publicly examined, and their credit well certified.

"Many other informations, to the same effect, have been offered; but I declined troubling your majesty with further evidence, as humbly apprehending it totally unnecessary.

T

"In the course of this inquiry, Virtue Hall, a principal witness, voluntarily and publicly retracted the whole of the evidence she gave upon the trial.

"To this I presume, by your majesty's leave, to add, that amidst all the examinations I have taken, there has not appeared any variation or inconsistency, or the least circumstance or suspicion, that could lead me to doubt the innocence of those unhappy convicts.

"All which is humbly submitted to your majesty's great wisdom and judgment, by your majesty's faithful subject,

"CRISP GASCOYNE, Mayor."

"On the 10th of April following, the Report was accordingly made of the convicts under sentence of death; when his majesty was graciously pleased to respite the execution of Mary Squires for six weeks; and to refer the consideration of the evidence on both sides (for evidence against her had been presented) to his attorney and solicitor-general.—Soon after the attorney and solicitor-general made their Report, with their opinion, That the weight of evidence was in the convict's favour: whereupon his majesty was graciously pleased to grant her a free pardon." Thus far from sir Crisp Gascoyne's Address to the Livery, p. 26, 27.

The friends of Canning, in their Refutation of sir Crisp Gascoyne's Address, say, "But of the purport of this Memorial, and what in particular was annexed to it, the friends of

Canning were totally ignorant till the publication of The Address; and therefore could not examine any witnesses with a particular view to contradict it. They had indeed, upon the recantation of Virtue Hall, taken some affidavits to prove, that the gypsey was at Enfield when the robbery was committed; and the duke of Newcastle (on whom they waited) having acquainted them, that his majesty had referred the consideration of the evidence on both sides to his attorney and solicitor general, they took many other affidavits to prove the same facts; but when these affidavits were presented to the attorney and solicitor general, they rejected them, because they were not at liberty to examine any evidence that was taken after the day of reference: It necessarily followed therefore, that the weight of evidence was in the convict's favour; and so it was reported, and she pardoned. Upon this view of the case, however, it does not become in any degree more probable, that she was innocent." See the Refutation of sir Crisp Gascoyne's Address to the Livery, in folio, p. 18.

These friends of Canning likewise gave an answer to sir Crisp's Memorial presented to the king, &c. But sir Crisp's Address, and Canning's friends' Refutation of it, make two large folio pamphlets; and the many other pamphlets published on both sides at that time, are too numerous to insert here, or take any notice of; and, as Canning's friends thought, did not clear up that mysterious affair; probably the following trial of Canning, for perjury, may be said to have done it. *Former Edition.*

531. The Trials* of JOHN GIBBONS, WILLIAM CLARKE, and THOMAS GREVILLE,† for Wilful and Corrupt Perjury, at the Sessions House in the Old-Bailey, held on Thursday the 6th, Friday the 7th, Saturday the 8th, and Monday the 10th Day of September, before the Right Hon. the Lord Chief-Justice Willes, William Moreton, esq. Recorder, and other his Majesty's Justices of Oyer and Terminer: 26 GEORGE II. A. D. 1753.

JURY.

Robert Groom,
John Trimmer,
Joseph Tenniswood,
Richard Graham,
John Allen,
Henry Bland,

William Remnant,
William Champion,
Barnard Townsend,
Bartholomew Pain,
John Merry,
Samuel Watlington.

ACCORDING to the course of the Court, the Trials of Gibbons, Clarke, and Greville, the

three Abbotsbury witnesses upon the trial of Mary Squires for the robbery of Elizabeth Canning, being called on, the right honourable the lord mayor quitted the chair, and retired out of court. But in order to remove the indictments into the court of King's-bench, and to supersede the jurisdiction of this Court, three parchment writings, said to be writs of Certiorari, were presented to the Court: whereupon Mr. Davy, of counsel for the defendants,

* *Mem.* Sir Crisp Gascoyne, kn. lord mayor of London, withdrew when these trials came on, as he always declared he would.

† "These Abbotsbury witnesses were indicted for perjury, for the evidence they gave

in the trial of Squires and Wells. Canning's friends had moved the court of King's-bench for a Certiorari to remove the indictment, which had been refused. But the attorney for her insisted, that according to ancient practice, a

informed the Court, that he was greatly surprised at this attempt, not only as the court of King's-bench had, on the last day of last term, absolutely refused to grant these writs, although applied for by the prosecutors; but as the defendants had acted so very fairly, as to have given them (what they were not obliged to give) eight days notice of trial, and had now near an hundred witnesses attending, many of them brought from great distances, at a vast expence, to manifest the innocence of the defendants to the world. Upon which the person who attended with these writs, being asked by the Court, Who he was? How he came by them? And how those writs had been obtained? He informed the Court, that he was clerk to Mr. Miles, (an attorney) who was out of town; that he had the writs delivered to him by Mr. Miles's brother, the distiller; and that he himself knew nothing further of the matter. Which answer not being satisfactory to the Court, the Court was pleased to order him to take the writs back again, to recommend an inquiry how these writs had been obtained, and the trials to be called on. Whereupon the jury were charged with the following indictment against John Gibbons:

FIRST INDICTMENT.

London. The jurors for our lord the king

Certiorari might be obtained by application to a judge during a vacation, at the instance of a prosecutor in a criminal cause, as a matter of right; because it is the king's privilege, who in criminal causes is the plaintiff, to sue in what court he will. Therefore the attorney for Canning was unwilling to try them at the Old Bailey, where sir Crisp Gascoyne had a seat; and went down to Totteridge, to lord chief justice Lee's, and got his hand to the Fiats; upon which the Certioraris were issued out to remove the indictment into the court of King's-bench; and next term a motion was made to enforce a return of them. Upon this motion a rule was made, for the Court at the Old Bailey to shew cause, why a return should not be enforced. The attorney against her prayed a particular day, which was allowed; and he undertook to be ready on that day. He moved, that the Certioraris might be superseded; alledging, that the lord chief justice had been imposed upon in signing the fiats: but his lordship not being present, a rule was made for hearing the merits of that suggestion at a future day. On this future day the counsel for the countrymen moved, that the writs might be superseded, in the absence of the lord chief justice. But as the motion to supersede these writs was founded on a suggestion, that the lord chief justice had been imposed upon; and as none but his lordship could know, whether he was imposed upon or no; both motions were ordered to stand over, till his lordship should be present: but as he died without ever coming into court afterwards, the writs are not superseded to this hour." *Refutation of sir Crisp Gascoyne's Address to the Livery, p. 20, 21.*

upon their oath present, that at the delivery of the king's gaol of Newgate, holden for the county of Middlesex, at Justice-hall in the Old Bailey, in the suburbs of the city of London, on Wednesday the 21st day of February, in the 26th year of the reign of our sovereign lord George the second, king of Great Britain, &c. before sir Crisp Gascoyne, knt. mayor of the city of London, sir Martin Wright, knt. one of the justices of our said lord the king, assigned to hold to hold pleas before the king himself, Nathaniel Gundry, esq. one of the justices of our said lord the king of the court of Common Pleas, sir Richard Adams, knt. one of the barons of the court of Exchequer of our said lord the king, and others their fellows justices of our said lord the king, assigned to deliver the gaol of our said lord the king, of Newgate, of the prisoners therein being, Mary Squires, late of the parish of Enfield, in the county of Middlesex, widow, was tried and convicted upon an indictment against her, for that she, on the 2d day of January, in the 26th year of the reign of our sovereign lord George the 2nd, king of Great Britain, &c. with force and arms, at the parish aforesaid, in the county aforesaid, in the dwelling-house of one Susannah Wells, widow, there situate, upon one Elizabeth Canning, spinster, in the peace of God and our said lord the king then and there being, feloniously did make an assault, and her the said Elizabeth in bodily fear and danger of her life then and there feloniously did put, and one pair of stays of the value of ten shillings, of the goods and chattels of the said Elizabeth, from the person and against the will of the said Elizabeth, in the dwelling-house aforesaid, then and there violently and feloniously did steal, take, and carry away, against the peace of our said lord the king, his crown and dignity. Upon which same trial, one John Gibbons, late of Abbotsbury, in the county of Dorset, victualler, on the 21st day of February, in the year aforesaid, to wit, at Justice-hall aforesaid, in the parish of St. Sepulchre, in the ward of Farringdon Without, in the city of London, came in his own proper person as a witness on the behalf of the said Mary Squires, of and upon the matters contained in the said indictment; and the said John Gibbons, then and there in the court aforesaid, before the said justices last above-named, and others their fellows assigned as aforesaid, upon the trial aforesaid, was in due manner and form sworn, and took his corporal oath upon the holy gospel of God, as such witness (the same Court then and there having a sufficient authority to administer the same oath to the said John Gibbons in that behalf.) And the said John Gibbons, on the said 21st day of February, in the year aforesaid, not having God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly and unjustly devising and intending to pervert justice, and to procure the said Mary Squires unjustly to be acquitted of the said crime laid to her charge in the said indictment, then and there

upon the trial aforesaid, upon his oath aforesaid, falsely, maliciously, wilfully, wickedly, and corruptly, did say, depose, swear, and give in evidence to the said Court, and the jurors of the said jury, upon the trial aforesaid, as follows, (that is to say) on the 1st day of January, 1753, (meaning the year of our Lord 1753) the prisoner Squires (meaning the above-named Mary Squires) came into the house (meaning the house of the said John Gibbons, at Abbotsbury aforesaid, in the said county of Dorset.) There was George her son, (meaning George the son of the said Mary Squires) and Lucy her daughter (meaning Lucy the daughter of the said Mary Squires) with her (meaning the said Mary Squires.) And that the said John Gibbons, upon the trial aforesaid, upon his oath aforesaid, on the said 21st day of February, in the year aforesaid, at Justice-hall aforesaid, in the parish of St. Sepulchre aforesaid, in the ward of Farringdon Without aforesaid, did falsely, maliciously, wilfully, and corruptly, say, depose, swear, and give in evidence as follows: she (meaning the said Mary Squires) came with handkerchiefs, lawns, muslins, and checks, to sell about town (meaning Abbotsbury, in the county of Dorset); she (meaning the said Mary Squires) stayed there (meaning at Abbotsbury in the said county of Dorset) from the 1st to the 9th day of the month (meaning from the 1st to the 9th day of the month of January, in the said year of our Lord 1753,) and lay at my house (meaning the house of him the said John Gibbons, at Abbotsbury aforesaid, in the said county of Dorset.) And the said John Gibbons, then and there, upon the said trial being demanded to look at the said Mary Squires, then a prisoner at the bar there, and being asked whether or not he was sure that she was the same Mary Squires, whom he had so as aforesaid deposed and sworn to have come to his said house at Abbotsbury aforesaid, on the said 1st day of January, in the said year 1753, and to have stayed there from the said 1st day of January aforesaid to the 9th day of the said month; he the said John Gibbons, upon the trial aforesaid, upon his oath aforesaid, in answer to the said demand and question, did falsely, maliciously, wickedly, wilfully, and corruptly, further say, depose, swear, and give in evidence as follows: I (meaning himself the said John Gibbons) am sure it is (meaning that he the said John Gibbons was sure that the said Mary Squires, then a prisoner at the bar there upon the said trial, was the same Mary Squires, whom he the said John Gibbons had as aforesaid deposed and sworn to have come into his said house at Abbotsbury aforesaid, on the said 1st day of January, in the year of our Lord 1753, and to have stayed there from the said 1st day of January, aforesaid, to the 9th day of the said month.) Whereas, in truth and in fact, on the said 1st day of January, in the year of our Lord 1753, the said Mary Squires did not come into the house of the said John Gibbons at Abbotsbury, in the said county

of Dorset. And whereas, in truth and in fact, the said George, the son of the said Mary Squires, and the said Lucy, the daughter of the said Mary Squires, or either of them, were not in the house of the said John Gibbons, at Abbotsbury aforesaid, in the said county of Dorset, on the said 1st day of January, in the year of our Lord 1753, with the said Mary Squires. And whereas, in truth and in fact, the said Mary Squires did not stay at Abbotsbury, in the said county of Dorset, from the 1st to the 9th day of the month of January, in the said year of our Lord 1753. And whereas, in truth and in fact, the said Mary Squires did not lie at the house of the said John Gibbons, at Abbotsbury aforesaid, on the said 1st day of January, in the year of our Lord 1753, until the 9th day of the same month. And whereas, in truth and in fact, the said Mary Squires did not lie at the house of the said John Gibbons, at Abbotsbury aforesaid, on the said 1st day of January, in the said year of our Lord 1753, nor on the said 9th day of the said month of January, in the year last-mentioned, nor at any time between the said 1st day of January, in the said year of our Lord 1753, and the said 9th day of the same month of January. And whereas, in truth and in fact, the said Mary Squires, on the said 1st day of January, in the year last before mentioned, was not at the house of the said John Gibbons, at Abbotsbury aforesaid, nor at any other house or place at Abbotsbury aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said John Gibbons, on the said 21st day of February, in the 26th year aforesaid, at Justice-hall aforesaid, upon the trial aforesaid, in the court aforesaid, (the same Court then and there having a competent authority to administer the said oath to the said John Gibbons in that behalf) falsely, maliciously, wilfully, wickedly, and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

All the witnesses, on the back of the bill, were called out to give evidence; but no one appearing, except Mary Woodward, and she declaring she knew nothing of the matter, an officer was sent to the prosecutors to attend the Court; but none of them appearing, the jury acquitted the defendant.

A second indictment to the same purpose was read against William Clarke; but he was acquitted for want of evidence.

A third indictment was preferred against Thomas Greville, for swearing he saw Mary Squires at Coombe on the 14th of January; and he was acquitted likewise for want of evidence.

During the time a messenger was sent to the prosecutors to attend the Court,

Mr. Dery, counsel for the defendants, took

that opportunity of addressing himself to the Court as follows :

My lord ; I have the honour to appear before your lordship in behalf of the three defendants ; who stand indicted for perjury, supposed to have been committed by them in this place, upon the trial of Mary Squires, for the robbery of Elizabeth Canning, at Enfield-Wash, in January last.

Gibbons and Clarke are charged with falsely swearing, that Mary Squires was at Abbotsbury from the 1st to the 9th of January ; and Greville, that she was at Coombe on the 14th.

If their testimony was true, Mary Squires was unjustly accused ; but it was hers, and their misfortune, that it then obtained no credit.

They were strangers, unknown to every body at the trial.—Canning was positive, and being by unfair means confirmed in her evidence, Squires was convicted.

Upon this charge of perjury, great care hath been taken, attended with great expence, on either side, to search this matter to the bottom ; every circumstance hath been scrutinized, and nothing omitted to investigate the question thoroughly.

It hath a long while been the general subject of conversation, and hath engaged the attention of the public, more, perhaps, than any private transaction ever did before.

Here are the names of no less than fifty witnesses indorsed upon each of their indictments ; yet only one, of them, a poor woman, whose evidence is immaterial, appears to prosecute.

This desertion may occasion various conjectures, and many false reasons will probably be suggested for not prosecuting these indictments.

It may perhaps be attributed to a compromise.—It may be said, that these defendants are to be acquitted by consent, and that the indictment against Canning is to be dropped. One cannot easily imagine what rumours malice may raise.

For this reason, and to prevent any imputation upon those who are concerned for the defendants, I beg leave to assure your lordship, and all who hear me, that the defendants now come prepared for trial ; that their witnesses attend your lordship, ready to give their testimony with such clear, ample, convincing circumstances, as would demand universal assent ; and fully prove the innocence of the three defendants, and the falsity of Elizabeth Canning's story in every particular.

Here are witnesses, more in number than perhaps ever appeared in any one cause, collected together at a vast expence, and from different remote places.

Here is other evidence also ready to be produced, such as, in its nature, cannot deceive.

The prosecutors have been invited to meet them here before your lordship and the jury ; and so desirous were the friends of the defen-

dants that this matter should be fairly tried, that they have offered to bear part of the charges of this prosecution.

The public hath been a long while amused with promises, that, in the trials of these indictments, the guilt of the present defendants should be clearly manifested, and the whole of this mysterious transaction unravelled.

The time is come to perform these promises, and thousands expect it.

Why do all these boasters now hide their faces? Because they are covered with confusion.

They are aware how dangerous it is to pursue a prosecution, founded in the foulest and most daring perjury ; and wisely withdraw themselves from a trial which would involve them in ruin.

Had I considered the case of the defendants alone, without regard to any other person, I should have thought it needless to give the Court any trouble upon this occasion.

They are private countrymen, without any connexions in this part of the world, and totally unconcerned at any reports which may prevail here :—within the narrow circle of their acquaintance, their characters will remain unblemished, let fame do its worst ; because the charge against them is the attestation of a fact, which all their acquaintance, all their parish, and their whole country, know to be true.

But there is one, whose near relation to this great city makes it necessary for me to say thus much.

It is impossible for him to be unsolicitous for public approbation, after having done so much to deserve it.

Yet all the reproaches which malice could suggest to little, dark, designing men, have been levelled at the chief magistrate of this city, only for doing what the love of justice and humanity inspired him to do.

For his sake, therefore, I have thus trespassed upon your lordship's patience, and only beg leave to add a few words more, to shew how unmerited those reflections were.

As his lordship was at the head of the commission at the trial of Mary Squires, and was totally uninfluenced by the infamous endeavours which at that time had been used to give credit to a most improbable narrative ; he was directed, merely by a regard for truth, to make further inquiry into a story pregnant with absurdities, and unlike any transaction that ever went before it.

And the evidence of Elizabeth Canning depending entirely upon this question, whether the account which these three men had given was true, where could his lordship so properly direct his inquiry, as to those places, where they swore they had seen her ?

The success of that inquiry answered the wishes of his humanity ; and the most indubitable proofs of the convict's innocence warmed the royal heart to mercy.

One should have thought, that this conduct of a magistrate, whose sole motive to it was a desire of rescuing a wretched, friendless con-

vict, from the miseries into which perjury and popular prejudice had thrown her, should at least exempt him from censure.

But his enemies could never forgive him the merit of this action: as it raised him still higher in the esteem of good men, he became more the object of envy; and no arts were un-essayed to diminish the reputation he had so justly acquired.

Had my lord-mayor been present, I should not have said so much; but I have been the more encouraged to it from observing, that his

lordship withdrew himself as soon as these causes were called, because he was pleased to think it improper for him to preside, where any thing that might be thought to concern himself should come before the Court.

I have an apology to make for giving your lordship any trouble, where there is no prosecution; but as the Court waits for the return of a messenger, and no business is now proceeding upon, I hope I have given no offence. [Vide Sessions-paper in Gascoyne's mayoralty, September 1753.] *Former Edition.*

532. The Trial of ELIZABETH CANNING, Spinster, for Wilful and Corrupt Perjury, at Justice-Hall in the Old Bailey, held by Adjournment on Monday the 29th of April, Wednesday the 1st, Friday the 3d, Saturday the 4th, Monday the 6th, Tuesday the 7th, and Wednesday the 8th of May, before the Right Hon. Thomas Rawlinson, esq. Lord Mayor of the City of London, Sir Edward Clive, knt. one of the Justices of his Majesty's Court of Common Pleas, the Hon. Heneage Legge, esq. one of the Barons of his Majesty's Court of Exchequer, William Moreton, esq. Recorder, and others the Justices, &c.*
27 GEORGE II. A. D. 1754.

AT the General Session of Oyer and Terminer, holden for the city of London, at Justice-hall, in the Old-Bailey, within the parish of St. Sepulchre, in the ward of Farringdon Without, in London aforesaid; on Wednesday the 24th day of April, in the 27th year of the reign of our sovereign lord George the 3d, king of Great-Britain, &c. before Thomas Rawlinson, esq. mayor of the city of London; sir Edward Clive, knt. one of the justices of our lord the king, of the Court of Common-pleas; Heneage Legge, esq. one of the barons of the Exchequer of our said lord the king; William Moreton, esq. recorder of the city of London; Robert Scott, esq. Samuel Fludyer, esq. aldermen of the said city, and others their fellows justices of our said lord the king, assigned, &c. and continued by several meane adjournments to Monday the 13th of May following.

On Monday the 29th of April, 1754, the Court being opened, the prisoner Elizabeth

Canning was set to the bar, in order to take her trial upon the following indictment, which had been preferred against her in the June session 1753, and to which she had appeared and pleaded Not Guilty, in the February session following.

Gentlemen of the Jury.—William Manning, John Wilding, William Webster, John Langley sworn; James Waugh, Charles Moore, challenged by crown; Richard Frome, sworn; Robert Smith, challenged by defendant; John Soott, William Evered, sworn; William Nash, challenged by crown; John Carter, sworn; John Potter, John Kent, John Rogers, William Martin, Richard Linch, Robert Rampshire, challenged by crown; Joseph Russell, sworn; Stephen Prew, challenged by crown; John Nemes, challenged by defendant; Wilkinson Brathwait, challenged by crown; William Walker, sworn; John Mitchell, Martin Newth, challenged by crown; Benj. Glanville, challenged by defendant; Edward Baxter, John Whipham, challenged by crown; William Parsons, sworn; Thomas Stracey, Daniel Deatlen, challenged by crown; Edward Dymoke, sworn;

Clerk of the Arraigns. Cryer, count these.

JURY.

William Manning, Richard Frome,
William Webster, William Evered,

* Taken in short-hand by Thomas Gurney, Samuel Rudd, and Isaac Harman, all eminent short-hand writers, appointed by the Court for that purpose; and after being carefully examined together, faithfully transcribed by the said Thomas Gurney, many years short-hand writer at the said court. Printed by the authority and appointment of the right hon. Thomas Rawlinson, esq. lord-mayor.

Joseph Russell,
William Parsons,
John Wilding,
John Langley,

John Scott,
John Carter,
William Walker,
Edward Dymoke.

Cl. of Arr. Cryer, make proclamation.

Crier. Oyez, oyez, oyez! If any one can inform my lords the king's justices, the king's serjeant, the king's attorney, on this inquest to be taken, of any crimes or misdemeanors done or committed by the defendant at the bar, let them come forth, and they shall be heard. God save the king.

Cl. of Arr. Gentlemen of the jury; the defendant at the bar stands indicted by the name of Elizabeth Canning, late of London, spinster; and the indictment sets forth, That at the general session of the peace holden for the county of Middlesex, at Hicks's-hall in St. John's-street, in the county aforesaid, on Monday the 19th day of February, in the 26th year of the reign of our present sovereign lord George the 2d, by the grace of God, of Great-Britain, France, and Ireland, king, defender of the faith, and so forth; before Luke Robinson, esquire, sir John Cross, baronet, Thomas Lane and Pierce Galliard, esquires, and others their fellows justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the same county, by the oath of Edmund Kaue, gent. John Jennings, George Fry, David Reynolds, Thomas Foreman, Arthur Hancock, Isaac George, Lewis Powell, William Meads, Henry Haines, John Greenhill, Thomas Hibbins, John Brooke, Thomas Bowman, Richard Westmerland, Elias Lock, Henry Colman, John Knowles, Henry Carthrup, William Fort, Thomas Woorell, Job Blandford, and Robert Rewell, good and lawful men of the county aforesaid, then and there sworn and charged to enquire for our said lord the king, for the body of the said county; it was presented that Mary Squires, late of the parish of Enfield, in the county of Middlesex, widow, on the 2d day of January, in the 26th year of the reign of our sovereign lord George the 2d, king of Great-Britain, &c. with force and arms, at the parish aforesaid, in the county aforesaid, in the dwelling-house of one Susannah Wells, there situate, upon one Elizabeth Canning, spinster, in the peace of God and our said lord the king then and there being, feloniously did make an assault, and her the said Elizabeth in bodily fear and danger of her life then and there feloniously did put; and one pair of stays of the value of ten shillings, of the goods and chattels of the said Elizabeth, from the person and against the will of the said Elizabeth, in the dwelling-house aforesaid, then and there, violently and feloniously did steal, take, and carry away, against the peace of our said lord the king, his crown and dignity: and thereupon such proceedings were had, that afterwards (to wit) at the delivery of the gaol of our said lord the king, of Newgate,

holden for the county of Middlesex, at Justice's hall in the Old-Bailey, in the suburbs of the city of London, on Wednesday the 21st of February, in the 26th year of the reign of our said lord the king, before sir Crisp Gascoyne, knight, mayor of the city of London; sir Martin Wright, knight, one of the justices of our said lord the king, assigned to hold pleas before the king himself; Nathaniel Gundry, esquire, one of the justices of our said lord the king of the court of Common Pleas; sir Richard Adams, knight, one of the barons of the court of Exchequer of our said lord the king, and others their fellows justices of our said lord the king, assigned to deliver his gaol of Newgate of the prisoners therein then being; and before whom the indictment aforesaid, against the said Mary Squires, was then depending; came the said Mary Squires in the same indictment named, under the custody of sir Charles Augill, knight, and sir Richard Glynn, knight, sheriffs of the said county (into whose custody in the gaol of Newgate aforesaid, she the said Mary Squires, for the cause aforesaid, had been before committed): and the said Mary Squires being then brought to the bar there in her proper person, and being then and there asked how she would be acquitted of the premisses specified in the said indictment as aforesaid, she the said Mary Squires did then and there say, that she was not guilty thereof; and thereupon for good and ill she put herself upon the country: whereupon such proceedings were had, that afterwards (to wit), at the same session of the delivery of the gaol aforesaid, holden for the county aforesaid, at Justice-hall aforesaid, on the said Wednesday the 21st day of February, in the 26th year aforesaid, and before the same justices of our said lord the king, in that behalf above-named, and others their fellows aforesaid, by a certain jury of the county between our said lord the king, and the said Mary Squires in that behalf in due manner chosen, tried and sworn, the issue aforesaid was tried. And the said present jurors for our said lord the king, now upon their oath aforesaid, do further present, that upon the said trial between our said lord the king and the said Mary Squires, at London aforesaid, (that is to say) at the parish of St. Sepulchre, in the ward of Farringdon without, in London aforesaid, (to wit) at Justice-hall aforesaid, in open court aforesaid, the said Elizabeth Canning, late of London, spinster, did appear as a witness for and on behalf of our said lord the king, against the said Mary Squires; and the said Elizabeth Canning then and there did, before the said justices last named, in open court aforesaid, take her corporal oath, and was duly sworn upon the holy gospel of God, to speak the truth, the whole truth, and nothing but the truth, of and upon the premisses so as aforesaid put in issue between our said lord the king and the said Mary Squires (the same justices then and there having a competent authority to administer an oath to the said Elizabeth Canning in that behalf.) And the said Elizabeth Canning being so

sworn, and not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and having no regard for the laws and statutes of this realm, nor fearing the punishments therein contained, and unlawfully, wickedly, maliciously, and deliberately advising, contriving, and intending to pervert the due course of law and justice, and to cause and procure the said Mary Squires untruly to be convicted of the felony and robbery charged upon her in and by the indictment aforesaid, afterwards, (to wit) upon the 21st day of February, in the 26th year afterwards, before the justices of our said lord the king last above-named, at the same session of delivery of the gaol aforesaid, at London aforesaid, (that is to say) at the parish of St. Sepulchre aforesaid, in the ward of Farringdon Without aforesaid, in London aforesaid, did falsely, wickedly, voluntarily, and corruptly, by her own proper act and consent, and of her own most wicked and corrupt mind, upon her said oath, so by her taken as aforesaid, say, depose, swear, and give in evidence (among other things) to the jurors of the jury, who were then and there in due manner chosen, tried, and sworn to try the said issue, That she the said Elizabeth Canning had been at Salt-Peter Bank to see an uncle and aunt, and stayed there till about nine at night, on the 1st day of January (meaning the month of January in the said indictment mentioned): that then her uncle and aunt came with her as far as Aldgate, when they parted: that she the said Elizabeth Canning was then alone, so came down Houndsditch and over Moorfields by Bedlam wall: that there two lusty men, both in great coats, laid hold of her: that they took her to the prisoner Wells's house (meaning the dwelling house of the said Susannah Wells in the said indictment mentioned, situate at Enfield aforesaid, in the county aforesaid). And the said Elizabeth Canning being then and there, at and upon the said trial, asked and examined upon her said oath, at what time she thought it might be that she was taken to the said Susannah Wells's house; she the said Elizabeth Canning then and there, in the said court, at that trial, falsely, wilfully, and corruptly, upon her said oath, said, deposed, answered, and gave evidence to the jurors of the said jury, so as aforesaid chosen, tried and sworn to try the said issue, that as near as she could think, it was about four o'clock in the morning (meaning the morning of the said 2nd day of January). The indictment, gentlemen, farther sets forth, that the said Elizabeth Canning, being so sworn as aforesaid, did then and there, upon the said trial, further falsely, voluntarily, and corruptly, by her own proper act and consent, and of her own most wicked and corrupt mind, upon her said oath so by her taken as aforesaid, say, depose, swear, and give in evidence (among other things) to the jurors of the said jury, so chosen, tried, and sworn to try the said issue as aforesaid, that she the said Elizabeth Canning saw the gypsy woman Squires (mean-

ing the above-named Mary Squires) sitting in a chair (meaning sitting in a chair in the said dwelling-house). That as soon as she the said Elizabeth Canning was brought in, (meaning into the said dwelling-house) the said Mary Squires took her by the hand, and asked her if she chose to go their way, saying, that if she did, she should have fine clothes. That she the said Elizabeth Canning said, No. That then she the said Mary Squires went and took a knife out of a dresser-drawer, and cut the lace of her the said Elizabeth Canning's stays, and took them (meaning the said Elizabeth Canning's stays) from her. That she the said Mary Squires gave her the said Elizabeth Canning a slap on the face: that she the said Mary Squires pushed her up stairs (meaning certain stairs leading from the kitchen of the said dwelling house) into a certain room called the workshop, belonging to the said dwelling-house from out of the kitchen (meaning the kitchen of the said dwelling-house) where they were. And the said Elizabeth Canning being then and there, upon the said trial, asked and examined upon her said oath, concerning the name of the place she was put into; she the said Elizabeth Canning then and there, at that trial, falsely, wilfully, and corruptly, upon her said oath deposed, answered, and gave in evidence to the jurors of the said jury, so as aforesaid chosen, tried, and sworn to try the said issue, that they call it (meaning the said room called the work-shop) the hay-loft (meaning by such answer so given to such question, that she the said Elizabeth Canning had been pushed up the said stairs by the said Mary Squires into the said room called the work-shop). The indictment, gentlemen, further sets forth, that the said Elizabeth Canning being so sworn as aforesaid, did then and there, upon the said trial, further falsely, voluntarily, and corruptly, by her own proper act and consent, and of her own most wicked and corrupt mind, upon her said oath, so by her taken as aforesaid, say, depose, swear, and give in evidence (among other things) to the jurors of the said jury so chosen, tried, and sworn to try the said issue as aforesaid, That the room-door was shut as soon as the said Elizabeth Canning was put up: that after she the said Mary Squires shut the door, she said, that if ever she heard the said Elizabeth Canning stir or move, she would cut her the said Elizabeth Canning's throat. That when the day light (meaning the day-light of the 2d of January) appeared, she could (meaning that she did) see about the room (again meaning the said room called the work-shop): that there (again meaning the said room called the work-shop) was a fire-place and grate in it: that there (again meaning the said room called the work-shop) was a black pitcher not quite full of water, and about twenty-four pieces of bread; and that a certain pitcher then and there produced to the said Elizabeth Canning, at the time of her giving her evidence as aforesaid, was the pitcher, and that it was full (meaning

full of water) to near the neck. And the said Elizabeth Canning, being then and there, at and upon the said trial, also asked and examined upon her said oath, how long she continued in the said room called the work-shop; she the said Elizabeth Canning then and there, in the said court, at that trial, falsely, wilfully, and corruptly, upon her said oath, said, deposed, answered, and gave in evidence to the jurors of the said jury, so as aforesaid chosen, tried, and sworn to try the said issue, a month by the weeks, all but a few hours. The indictment, gentlemen, further sets forth, that the said Elizabeth Canning being so sworn as aforesaid, did then and there upon the said trial, further falsely, wickedly, voluntarily, and corruptly, by her own proper act and consent, and of her own most wicked and corrupt mind, upon her said oath, so taken as aforesaid, say, depose, swear, and give in evidence (amongst other things) to the jurors of the said jury, so chosen, tried, and sworn to try the said issue as aforesaid, that on the Wednesday (meaning Wednesday the 24th day of the said month of January) before the said Elizabeth Canning came away, she saw somebody look through the crack of the door (again meaning the door of the said room called the work-shop): that she the said Elizabeth Canning got out, (meaning out of the said room called the workshop) about 4 o'clock in the afternoon, on a Monday, (meaning Monday the 29th day of the said month of January), after she the said Elizabeth Canning had been confined there four weeks, all but a few hours; that she the said Elizabeth Canning broke down a board that was nailed up at the inside of a window, (meaning a window of and belonging to the said room called the workshop) and got out there (meaning out of the said window): that she the said Elizabeth Canning took an old sort of a bed-gown, and a handkerchief, that were in the said bay-loft, (again meaning the said room called the work-shop) and lay in a grate of the chimney (meaning the chimney of the said room called the work-shop). And the said Elizabeth Canning being then and there, at and upon the trial, asked and examined upon her said oath, concerning the time she drank all her water, (meaning the water she so as aforesaid gave in evidence to have been in the said pitcher) she the said Elizabeth Canning then and there, in the court at that trial, falsely and corruptly, upon her said oath, said, deposed, answered, and gave in evidence to the jurors of the said jury, so as aforesaid chosen, tried, and sworn to try the said issue, that she drank all that (meaning all the water she so as aforesaid gave in evidence to have been in the said pitcher) about half an hour before she got out of the room (meaning the said room called the work-shop): whereas, in truth and in fact, she the said Elizabeth Canning was not, about 4 o'clock in the morning of the said 2d day of January, taken by two men to the said dwelling-house of the said Susannah Wells; and whereas, in truth and in fact, she the said Elizabeth Can-

ning was not taken or brought into the said house on the said 2d of January; and whereas, in truth and in fact, she the said Elizabeth Canning was not on the said 2d day of January, or at any other time in the said month of January, in the said house; and whereas, in truth and in fact, she the said Elizabeth Canning did not, on the said 2d day of January, see the said Mary Squires in the said house; and whereas, in truth and in fact, she the said Elizabeth Canning did not, at any other time in the said month of January, see the said Mary Squires in the said house; and whereas, in truth and in fact, she the said Mary Squires, on the said 2d day of January, was at Abbotsbury in the county of Dorset, and was not on that day in the said house; and whereas, in truth and in fact, the said Mary Squires did not take her the said Elizabeth Canning by the hand, and ask her if she chose to go their way, saying, that if she did she should have fine clothes; and whereas, in truth and in fact, the said Mary Squires did not take her the said Elizabeth Canning by the hand, and ask her if she chose to go their way; and whereas, in truth and in fact, the said Mary Squires did not go and take a knife out of a dresser-drawer, and cut the lace of her the said Elizabeth Canning's stays, and take them from her; and whereas, in truth and in fact, the said Mary Squires did not cut the lace of her the said Elizabeth Canning's stays; and whereas, in truth and in fact, the said Mary Squires did not take the said Elizabeth Canning's stays from her; and whereas, in truth and in fact, the said Mary Squires did not give the said Elizabeth Canning a slap on the face; and whereas, in truth and in fact, the said Mary Squires did not push the said Elizabeth Canning up the said stairs leading from the said kitchen into the said room called the workshop; and, whereas, in truth and in fact, the said Mary Squires did not push the said Elizabeth Canning upon the said stairs into the said room called the workshop; and whereas, in truth and in fact, the said Mary Squires did not push the said Elizabeth Canning up any stairs into the said room called the workshop, or bay-loft, or into any other room or place whatsoever; and whereas, in truth and in fact, the said Mary Squires did not say, that if she ever heard the said Elizabeth Canning stir or move, she would cut her throat; and whereas, in truth and in fact, when the day-light of the said 2d day of January appeared, she the said Elizabeth Canning could not see about the said room called the workshop; and whereas, in truth and in fact, the said Elizabeth Canning did not, on the said 2d day of January, see about the said room called the workshop; and whereas, in truth and in fact, the said Elizabeth Canning was not, on the said 2d day of January, in the said room called the workshop, or in any room or place belonging to the said dwelling-house; and whereas, in truth and in fact, the said Elizabeth Canning was not, at any other time between the said 2d day of January, and the

said 29th day of January, in the said room called the workshop, or in any other room or place belonging to the said dwelling-house; and whereas, in truth and in fact, there was not, on the said 2d day of January, any black pitcher, and about 24 pieces of bread, or any other number of pieces of bread, in the said room called the workshop; and whereas, in truth and in fact, the pitcher so produced to the said Elizabeth Canning, at the time of her giving evidence as aforesaid, was not, on the said 2d day of January, in the said room called the workshop; and whereas the said pitcher so produced to her the said Elizabeth Canning as aforesaid, was not, on the 2d day of January, full of water, to near the neck; and whereas, in truth and in fact, the said Elizabeth Canning did not drink all the water, in and by her said evidence pretended to have been in such pitcher, about half an hour before the time, she so as aforesaid gave in evidence, that she got out of the said room called the workshop; and whereas, in truth and in fact, she the said Elizabeth Canning did not, at any time on the said 29th day of January, or at any other time between the said 2d day of January and the said 29th day of January, drink any water out of the said pitcher, in the said room called the workshop, or in any other place or room belonging to the said house; and whereas, in truth and in fact, the said Elizabeth Canning did not continue in the said room called the workshop a month by the weeks, all but a few hours; and whereas, in truth and in fact, the said Elizabeth Canning was not, at any time in the said month of January, confined in the said room called the workshop; and whereas, in truth and in fact, the said Elizabeth Canning was not, in the said month of January confined in any other room of or belonging to the said house of the said Susannah Wells, for one month by the weeks, all but a few hours, or for any other space of time; and whereas, in truth and in fact, she the said Elizabeth Canning did not, on the said Wednesday the said 24th of January, see any person look through the crack of the door of the said room called the workshop; and whereas, in truth and in fact, the said Elizabeth Canning did not, at any other time in the said month of January, see any person look through the crack of the said door; and whereas, in truth and in fact, the said Elizabeth Canning did not break down any board that had been nailed up at the inside of any window of or belonging to the said room called the workshop; and whereas, in truth and in fact, she the said Elizabeth Canning did not get out of the said room called the workshop on Monday the said 29th day of January; and whereas, in truth and in fact, she the said Elizabeth Canning did not get out of the said window; and whereas, in truth and in fact, she the said Elizabeth Canning did not get out of any window of or belonging to the said room called the workshop; and whereas, in truth and in fact, the said Elizabeth Canning did not take an old sort of a bed-gown and

a handkerchief, that were in the said room called the workshop, and lay in a grate of the chimney of the said room; and whereas, in truth and in fact, she the said Elizabeth Canning did not take any bed-gown or handkerchief out of a grate in the chimney in the said room; and whereas, in truth and in fact, there was not any grate in the chimney of the said room on the 2d day of January; and whereas, there was not any grate in the chimney of the said room, at any other time, during the time she the said Elizabeth Canning so as aforesaid gave in evidence that she continued or had been confined in the said room called the workshop; and whereas, in truth and in fact, there was not, on the said 2d day of January, or at any other time between that day and the said 29th day of January, any grate in the fire-place of the said room called the workshop, as she the said Elizabeth Canning, by her false and corrupt testimony aforesaid, at and upon the said trial, did most falsely, voluntarily, and corruptly, by her own proper act and consent, upon her said oath, so taken as aforesaid, say, depose, swear, and give in evidence to the jurors of the said jury, in manner aforesaid. And then, gentlemen, the indictment in this place concludes, That she the said Elizabeth Canning, at and upon the said trial, upon the said 21st day of February, in the 26th year aforesaid, at London aforesaid, (that is to say) at the said parish of St. Sepulchre, in the said ward of Farringdon without, in London aforesaid, before the said justices of our said lord the king last abovenamed, and others their fellows aforesaid, by her own proper act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, did falsely, voluntarily, and corruptly, upon her said oath, so taken as aforesaid, commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our said lord the king and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity. The indictment, gentlemen, further charges, that at the session of the delivery of the gaol of our said lord the king, of Newgate, holden for the county of Middlesex, at Justice-hall in the Old-Bailey, in the suburbs of the city of London, on Wednesday the 21st day of February, in the 26th year of the reign of our said sovereign lord George the second, king of Great Britain, &c. before sir Crisp Gascoyne, mayor of the city of London; sir Martin Wright, knight, one of the justices of our said lord the king, assigned to hold pleas before the king himself; Nathaniel Gundry, esq. one of the justices of our said lord the king of the Court of Common Pleas; sir Richard Adams, knight, one of the barons of the Court of Exchequer of our said lord the king, and others their fellow justices of our said lord the king, assigned to deliver the said gaol of Newgate of the prisoners therein being; one Mary Squires was in due form of law, tried by a jury of the country, duly taken between our

said lord the king and the said Mary Squires in that behalf, upon another indictment, for the robbery of Elizabeth Canning, spinster, of a pair of stays of the value of ten shillings, of the goods and chattels of her the said Elizabeth, in the dwelling-house of one Susannah Wells, widow, situate in the parish of Enfield, in the said county of Middlesex, on the said 2d day of January, in the 26th year aforesaid; and that upon the said last-mentioned trial, Elizabeth Canning, late of London, spinster, did then and there appear as a witness for and in behalf of our said lord the king, against the said Mary Squires; and she the said Elizabeth Canning did then and there, before the said justices last-mentioned, in open court aforesaid, take her corporal oath, and was duly sworn upon the holy gospel of God, that the evidence which she should give for our said lord the king, against the said Mary Squires, should be the truth, the whole truth, and nothing but the truth (the same last-mentioned justices then and there having a competent authority to administer the said oath to her the said Elizabeth Canning in that behalf); and she the said Elizabeth Canning being so sworn, and not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, upon the said 21st day of February, in the 26th year aforesaid, at London aforesaid, (to wit) at the parish of St. Sepulchre, in the ward of Farringdon Without aforesaid, in London aforesaid, before the said justices last-mentioned, in the open court aforesaid, did falsely, willingly, and corruptly, by her own proper act and consent, say, depose, swear, and give in evidence to the jurors of the said jury, according to the purport and effect following; I (meaning herself the said Elizabeth Canning) had been to Salt-Petre-Bank to see an uncle and aunt, his name is Thomas Colley: I (again meaning herself the said Elizabeth Canning) set out from home about eleven in the forenoon, and stayed there till about nine at night, on the 1st day of January (meaning the 1st day of January now last past); then my uncle and aunt came with me (again meaning herself the said Elizabeth Canning) as far as Aldgate, where we parted: I (again meaning herself the said Elizabeth Canning) was then alone, so came down Houndsditch, and over Moorfields by Bedlam wall; there two lusty men, both in great coats, laid hold of me. And that the said Elizabeth Canning, being so sworn, did then and there, upon the said last-mentioned trial, falsely, willingly, and corruptly, by her own proper act and consent, say, depose, swear, and give in evidence to the jurors of the said jury, according to the purport and effect following, (that is to say) They (meaning the said two men) took me (again meaning herself the said Elizabeth Canning) to the prisoner Wells's house (meaning the dwelling-house of the said Susannah Wells, situate at Enfield aforesaid, in the county aforesaid). And that she the said Elizabeth Canning being then and there, upon

the said trial, asked and examined upon her said oath, concerning the time of her being so taken to the said house of the said Susannah Wells; she the said Elizabeth Canning, being so sworn, did then and there further falsely, willingly, and corruptly, by her own proper act and consent, say, depose, answer, and give in evidence, according to the purport and effect following, (that is to say) As near as I (again meaning herself the said Elizabeth Canning) can think, it was about four o'clock in the morning (meaning the morning of the 2d day of the said month of January). And that she the said Elizabeth Canning being then and there, upon the said trial, asked and examined upon her oath, concerning what she saw at the said house of the said Susannah Wells, at the time that she as aforesaid gave in evidence that she was taken there; she the said Elizabeth Canning, being so sworn, did then and there further falsely, willingly, and corruptly, by her own proper act and consent, say, depose, answer, and give in evidence, according to the purport and effect following, (that is to say) I (again meaning herself the said Elizabeth Canning) saw the gypsy woman Squires (meaning the said Mary Squires), who was sitting in a chair (meaning sitting in a chair in the said house). And that she the said Elizabeth Canning, being so sworn, did then and there, upon the said last-mentioned trial, falsely, willingly, and corruptly, by her own proper act and consent, say, depose, swear, and give in evidence to the jurors of the said jury, according to the purport and effect following, (that is to say) As soon as I (again meaning herself the said Elizabeth Canning) was brought in (meaning into the said house,) Mary Squires (again meaning the said Mary Squires) took me (again meaning herself the said Elizabeth Canning) by the hand, and asked me (again meaning herself the said Elizabeth Canning) if I (again meaning herself the said Elizabeth Canning) chose to go their way, saying, if I (again meaning herself the said Elizabeth Canning) did, I (again meaning herself the said Elizabeth Canning) should have fine clothes; I (again meaning herself the said Elizabeth Canning) said, No. And that she the said Elizabeth Canning, being so sworn, did then and there, upon the said last mentioned trial, falsely, willingly, and corruptly, by her own proper act and consent, say, depose, swear, and give in evidence to the jurors of the said jury, according to the purport and effect following, (that is to say) Then she (again meaning the said Mary Squires) went and took a knife out of a dresser-drawer, and cut the lace of my (meaning her the said Elizabeth Canning's) stays, and took them from me (meaning herself the said Elizabeth Canning). And that she the said Elizabeth Canning, being so sworn, did then and there, upon the said last mentioned trial, falsely, willingly, and corruptly, by her own proper act and consent, say, depose, swear, and give in evidence to the jurors of the said jury,

according to the purport and effect following, (that is to say) She (meaning herself the said Mary Squires) pushed me (meaning herself the said Elizabeth Canning) up stairs, (meaning certain stairs leading out of the kitchen of the said house, up into a certain room adjoining and belonging to the said house) from out of the kitchen, (meaning the kitchen of the said house) where we (meaning herself the said Elizabeth Canning, and the said Mary Squires) were. And that she the said Elizabeth Canning, being then and there, upon the said trial, asked, and examined upon her said oath, concerning the name of the place she was put in; she the said Elizabeth Canning, being so sworn, did then and there further falsely, willingly, and corruptly, by her own proper act and consent, say, depose, answer, and give in evidence to the jurors of the said jury, according to the purport and effect following, (that is to say) They call it the hay-loft, (meaning a certain room belonging to the said house, into which the said stairs lead.) And she the said Elizabeth Canning being then and there, upon the said trial, asked and examined upon her oath, how long she continued in that room; she the said Elizabeth Canning, being so sworn, did then and there further falsely, willingly, and corruptly, by her own proper act and consent, say, depose, answer, and give in evidence to the jurors of the said jury, according to the purport and effect following, (that is to say) A month by the weeks, all but a few hours. And that she the said Elizabeth Canning, being so sworn, did then and there, upon the said last-mentioned trial, falsely, willingly, and corruptly, by her own proper act and consent, say, depose, swear, and give in evidence to the jurors of the said jury, according to the purport and effect following, (that is to say) I (again meaning herself the said Elizabeth Canning) got out (meaning out of the said room) about four o'clock in the afternoon, on a Monday (meaning Monday the 29th day of the said month of January,) after I (again meaning herself the said Elizabeth Canning) had been confined there (meaning in the said room) four weeks, all but a few hours. And that she the said Elizabeth Canning, being so sworn, did then and there, upon the said last-mentioned trial, falsely, willingly, and corruptly, by her own proper act and consent, say, depose, swear, and give in evidence to the jurors of the said jury, according to the purport and effect following, (that is to say) I (again meaning herself the said Elizabeth Canning) took an old sort of a bed-gown and a handkerchief, that were in the hay loft (meaning the said room,) and lay in a grate in the chimney (meaning the chimney of the said room.) Whereas, in truth and in fact, she the said Elizabeth Canning was not taken by two men to the said house of the said Susannah Wells, about four o'clock in the morning of the said 2d day of January, or at any other time of that day; and whereas, in truth and in fact, she the said Elizabeth Canning did not, at any time on the said 2d day of

January, see the said Mary Squires in the said house; and whereas, in truth and in fact, the said Mary Squires, on the said 2d day of January, was at Abbotsbury in the county of Dorset, and was not at any time on that day in the said house; and whereas, in truth and in fact, the said Mary Squires did not, on the said 2d day of January, take the said Elizabeth Canning by the hand in the said house, and ask her if she chose to go their way, saying, if she did, she should have fine clothes; and whereas, in truth and in fact, she the said Mary Squires did not, on the said 2d day of January, take the said Elizabeth Canning by the hand; and whereas, in truth and in fact, she the said Mary Squires did not take a knife out of any dresser-drawer, or any other drawer, and cut the lace of her the said Elizabeth Canning's stays, and take them from her; and whereas, in truth and in fact, the said Mary Squires did not cut the lace of her the said Elizabeth Canning's stays; and whereas, in truth and in fact, the said Mary Squires did not push the said Elizabeth Canning up any stairs belonging to the said house; and whereas, in truth and in fact, she the said Elizabeth Canning did not continue, or was in anywise confined in the said room belonging to the said house, into which the said stairs lead, for a month by the weeks, all but a few hours; and whereas the said Elizabeth Canning did not continue, or was any ways confined in the said room, or in any other room belonging to the said house, for a month by the weeks, all but a few hours, or for any other space of time; and whereas, in truth and in fact, she the said Elizabeth Canning did not get out of the said room about 4 o'clock in the afternoon of the said 29th day of January, or at any other time of that day; and whereas, in truth and in fact, she the said Elizabeth Canning did not take any bed-gown or handkerchief out of any grate in the chimney of the said room; and whereas, in truth and in fact, there was no grate in the chimney of the said room on the said 2d day of January, or on the 29th day of January, or at any other time between the 2d and 29th days of January, as she the said Elizabeth Canning by her false and corrupt testimony aforesaid, at and upon the said last-mentioned trial, did most falsely, voluntarily, and corruptly, by her own proper act and consent, upon her said oath, so taken as aforesaid, say, depose, swear, and give in evidence to the jurors of the said jury, in manner aforesaid. And so the jurors aforesaid, now here sworn, upon their oath aforesaid, do say, that she the said Elizabeth Canning, at and upon the said trial, upon the said 21st day of February, in the 26th year aforesaid, at London aforesaid, (that is to say) at the parish of St. Sepulchre, in the ward of Farringdon Without, in London aforesaid, before the said justices of our said lord the king last above-mentioned, and others their fellows aforesaid, by her own proper act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid,

did falsely, voluntarily, and corruptly, upon her said oath, so taken as aforesaid, commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our said lord the king and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.*

Mr. *Gascoyne*. May it please your lordship, and you gentlemen of the jury; I am counsel in this case for the king, against the prisoner at the bar, who stands before you indicted of wilful and corrupt perjury: and the indictment sets forth, that, at the general-session of the peace held for the county of Middlesex, on the 19th of February, in the 26th year of his present majesty's reign, an indictment was found against one Mary Squires, for having, on the 2d day of January, in the same year, with force and arms, assaulted the prisoner at the bar, and having put her in fear of her life, feloniously and with force took and stole from her person, and against her will, in the dwelling-house of one Susannah Wells, in the parish of Enfield, in the county of Middlesex, a pair of stays of the value of 10s. the property of the prisoner at the bar: and the indictment charges, that at the gaol-delivery of Newgate, on the 21st day of February, in the same year, which was the year 1753, Mary Squires was arraigned upon the indictment so found against her, and having pleaded Not Guilty, the prisoner at the bar appeared at the trial, and being duly sworn as a witness, did maliciously and deliberately, and in order to procure the said Mary Squires to be convicted of the felony and robbery charged on her, falsely and corruptly depose and give in evidence, that she the prisoner at the bar, on the 1st day of January 1753, had been at a place called Saltpetre-Bank, to see an uncle and aunt; that she stayed there till about nine at night; that her uncle and aunt came with her from thence as far as Aldgate, where they parted; that she the prisoner at the bar being then alone, and coming over Moorfields by Bedlam wall, two men laid hold of her, and took her by force from thence to the house of Susannah Wells at Enfield; and being there, that Mary Squires took her by the hand, and asked her if she would go their way, saying, that if she did, she should have fine clothes; that she refused; and that thereupon Mary Squires, with a case knife, cut the lace of her stays, and took them from her, gave her a slap on the face, and pushed her up stairs into another room, which they called the hay-loft; that as soon as she was there, the door of the room was shut upon her; and that she was threatened by Mary Squires, that if she heard her stir or move, she would cut her throat: and the indictment charges, that the prisoner at the bar being asked on the trial of Mary Squires, how long she had continued in that room, she falsely

and wilfully swore, that she was kept there a month, all but a few hours; and that upon the 29th of January she broke down a board that was nailed up at the inside of the window, and got out there: whereas in truth, as the indictment charges, the prisoner at the bar was never taken or carried to the house of Susannah Wells; and that, in truth and in fact, Mary Squires was at that time at Abbotsbury, in the county of Dorset: and the indictment charges, that in truth and in fact, Mary Squires did not cut the lace of the prisoner's stays, and take them from her, or slap her on the face, or push her up stairs into another room, or say, that if she heard her stir or move, she would cut her throat; and that in truth, the prisoner at the bar was not in any room or place belonging to the house of Susannah Wells; and therefore, that she was on the trial of the said Mary Squires guilty of wilful and corrupt perjury: all which is said to be done, to the great displeasure of Almighty God, in contempt of the laws of this land, and to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the king, his crown and dignity. To this, gentlemen, the prisoner has pleaded Not Guilty: we shall call our witnesses, and if we prove her guilty, you will find her so.

Mr. (afterwards Serjeant) *Dary*. May it please your lordship, and you gentlemen of the jury; I am counsel for the prosecution against the defendant at the bar, who now comes before you to be tried for wilful and corrupt perjury; attended with so many circumstances of aggravation, and calculated to produce such fatal effects, that it is to be lamented the law has not made it capital. For it was committed to support a groundless prosecution for felony, and, under colour of justice, to take away the life of an innocent person. Than which it is hard to conceive an offence more shocking to humanity, or more dreadful.

Gentlemen, the indictment sets forth, that the defendant, maliciously and deliberately intending to pervert the due course of law and justice, and to procure one Mary Squires untrue to be convicted of a robbery, did, upon the 21st of February 1753, in this court, give false testimony against her. It contains several particulars of the defendant's evidence upon that occasion, and avers, that in each particular she was guilty of perjury. What could tempt one so young to such accumulated wickedness, though the prosecution is not concerned to account for it, may be easily conceived upon recollecting what had happened. And, indeed, one would give way to any charitable suggestion, rather than suppose her heart so thoroughly polluted, as at first to design a sacrifice. To preserve her character, it became necessary to frame an excuse for her absence from her master's service during the space of a month, from the 1st to the 29th of January. To what such absence was really owing, I am not in-

* See 5 Term Rep. 511.

clined to suggest, lest I should wrong her. But her flight was sudden, unexpected, and alarming.

An ill-concerted story for this purpose, or the forgetting some material circumstances in one invented with a greater appearance of truth, was, in all likelihood, her first step to the crime she is now to answer for. And a too great forwardness in satisfying unexpected inquiries, the effects of distrust and curiosity, might lead her unwarily into a description of places and persons, unthought of before, from which, once fixed, she thought it dangerous to deviate. But an additional temptation fell in her way, a temptation too strong to be resisted in the situation to which she was reduced; and this was a scheme to raise money. For those, who were weak enough to believe all the absurdities to which their own credulity had given rise, were so affected with her unprecedented sufferings, that they proposed a general subscription, as well to punish the infamous wretches, who, it was said, had endeavoured to starve her out of her chastity, as to reward her purity. Here then she was under a necessity, either to renounce those golden hopes, by retracting what she had declared, and so to ruin her character, or to persist in it through perjury. And having by this time subdued all remains of virtue, she preferred the offer of money, though she must wade through innocent blood to attain it.

The project succeeded to the utmost of her wishes. For, by the help of prejudices most artfully, industriously, and (I may add) infamously inculcated, she made her way to the conviction of Mary Squires, and Susannah Wells, (the former for robbing her of her stays, and the other for being an accomplice in that robbery) and so she became the object of almost universal compassion. The unfair means made use of upon that occasion, by advertisements in the daily papers, and in printed bills, every where dispersed, with the names of six reputable tradesmen, attesting the truth of a story, of which they were not able to prove a single syllable; and all this for the sake of prejudging those unhappy women, who in consequence of it fell a sacrifice; would pass unnoticed in this trial, had not the same unjustifiable methods been continued to the present hour. An appeal to the public concerning matters triable by juries, has a direct tendency to shut up the avenues to conviction, and to enervate the arms of justice. But it is the happiness of this prosecution to be brought before a jury of citizens, whose characters give the greatest room to hope for an impartial trial, notwithstanding all the arts which have been practised to inflame their passions and corrupt their judgment. And if I am not greatly mis-instructed, the prejudices must be strong indeed, that can resist the proofs of this woman's guilt.

Gentlemen, before I open the evidence we have to offer, I must beg leave to trouble you with repeating what the defendant swore upon the trial of Mary Squires, and with remarking

some of the objections to which it stands exposed, without any other proofs to contradict it.

She swore, "That on the 1st of January, 1753, about nine at night, two men seized her in Moorfields; and without speaking, robbed her of half a guinea, and three shillings, and her gown, apron, and hat, which they folded up, and put into a great-coat pocket. That she screamed out, and then one of the men stopped her mouth with a handkerchief. That they then tied her hands behind her; after which one of them gave her a blow on the temple, which stunned her and threw her directly into a fit. That this transaction in Moorfields lasted half an hour; but nobody passed by in all that time. That she remained totally insensible for six hours after; when she found herself by a large road, with the two men who had robbed her. That they dragged her to the house of one Susannah Wells (who was at the same time tried as an accessory to Squires) at Enfield-Wash, (which is between eleven and twelve miles from Moorfields) where she arrived in half an hour after the recovery of her senses. And it was then about four o'clock in the morning. That she there saw Mary Squires, and two young women in the kitchen. And as soon as she was brought in, Squires took her by the hand, and asked her, If she chose to go their way, saying, if she did, she should have fine clothes. That upon answering, No, Squires cut off her stays, and took them from her. And immediately the two men went away. That Squires then called her 'bitch,' gave her a slap in the face, pushed her up stairs into a hay-loft, (a few steps from the kitchen) and shutting the door upon her, threatened to cut her throat if she heard her stir or move. That when day-light appeared, she saw about the room, in which there was a fire-place, and a grate in it, no bed or bedstead, nothing but hay to lie upon, a pitcher almost full of water, and about twenty-four pieces of bread, to the amount of a quartern loaf in the whole. That these pieces of bread, and this water, between three and four quarts, was all she had to subsist on, (except a penny mince-pye, which she had in her pocket) for the whole time she remained in that room; which was from Tuesday the 2d of January, at four in the morning, till Monday the 29th at four in the afternoon. And that she had no stool in all that time. That no one came to her, nor did she see a human creature, except once she saw somebody look through a crack of the door. That she had eat up all her bread on Friday the 26th, and had drank up all her water on Monday the 29th, at half an hour after three in the afternoon; and at four o'clock she made her escape, which she had never attempted (nor did it ever once come into her head to attempt) till that day. That the manner of her escape, was by breaking down a board which was nailed up at the inside of a window, about eight or ten feet from the ground; from which she jumped down, without the least hurt, it being soft clay ground. But before she left

the room, she took a bed-gown and a handkerchief, which she found in the chimney grate. That having never been on that road before, she enquired her way of people she met, and so walked on the great road to her mother's house, (about twelve miles) without seeking refuge in any of the houses on the road, for fear she should meet with somebody belonging to the house she had escaped from. That she arrived at her mother's in Aldermanbury, at a quarter past ten at night; and she told her friends that her confinement was somewhere in the Hertfordshire road, which she had discovered while she was under confinement, by seeing a coach go by, which she knew frequented that road. And being called upon by the Court to particularize the furniture of the room she was confined in, she mentioned a barrel, a saddle, a bason, and a tobacco-mould."

This, gentlemen, was her evidence. Now I would ask any reasonable, unprejudiced man in the world, whether he ever heard a story so intirely destitute of all human probability. Is it not a heap of monstrous absurdities, with falshood glaring in every circumstance? What could induce the two ruffians in Moorfields to behave in this extraordinary manner? Did they mean to rob, or kidnap her, or both? If only to rob, why did they kidnap her? If only to kidnap, why rob her? If both, why lose half an hour in stripping her in so public a place, when multitudes of people were continually passing by; since they might have done it securely at the end of their journey? Having robbed and stripped her, what temptations had they to take the pains and run the hazard of carrying her twelve miles, in a fit, (supposing it possible) through several turnpikes and villages, where it was a thousand to one, that they would be discovered and apprehended? The same difficulties occur at Enfield-Wash. While she was in the house, was any thing transacted, whereby one can trace the motive of her being brought or confined there? At first, indeed, she was asked, whether she would go their way; and if she would, she should have fine clothes.—Their meaning in this was left unexplained, and no further persuasions were used to tempt her! Advantage taken of a concise refusal,—she was instantly locked up for a month upon bread and water! Not the least inquiry in all that time, what effect this hard usage had upon her; or what was become of her! Whether she was dead, which might have been expected, if she remained in the room; or had escaped, which it was more reasonable to suppose. For, see how wonders multiply! The means of escape were left open to her every moment of the time, at the hazard of their lives! those means unemployed, and unthought of, for the preservation of her own!

Is it not amazing she should manage her allowance of bread and water scarce sufficient for a week's subsistence) with such providence, that the former lasted till within three days, and the latter, (which she could less en-

dure the want of) though less in proportion, till with half an hour of her coming away! And yet she had never received the least intimation, how long she was to remain in confinement, or whether she was to have any supplies! That she should survive all this treatment, too hard for the best constitution, and find strength to walk twelve miles immediately afterwards, without the least refreshment or rest!

These are not all, nor the fiftieth part of the objections, to which this unexampled tale is liable. It would be mis-spending time to enumerate them—they are obvious to every understanding. Does there need much evidence to contradict this? Does not common sense, and the observation of all mankind upon the course of nature, refute it in every instance? Yet such arts have been practised to engage men to believe it, that there are, at this day, thousands who embrace it as zealously, as an article of religious faith. Insisting upon the mere possibility of this romantic story, and having an implicit faith in the defendant's sincerity, because her character (they say) is clear of any other imputation, they have been drawn in to conclude upon the truth of all she has sworn. Such are incapable of conviction; upon whom neither argument nor evidence can have any effect.

Let me imagine a case, better authenticated than this before you, but in favour of which men have no prejudices; and see what reception it would meet with. Suppose a pretender to the art of flying (an art which some soaring geniuses of the last age thought practicable) should swear to have taken a month's tour round the extremity of the atmosphere, without breathing in all that time. Were no arts used to mislead men's understanding, were they left to judge for themselves, no one would believe this even upon the faith of fifty witnesses. For, however unlikely it is, that fifty disinterested men should concur in a falshood, it would be still more unlikely, that a man should be flying for a month without drawing breath.

But, gentlemen, this prosecution will not rest upon improbabilities. It was commenced upon the clear proof of facts; sufficient to convince every man, whose judgment is not captivated by prejudice.

The evidence to be produced against the defendant is of several kinds. First, To shew that Mary Squires was in another place, above 130 miles from Enfield-Wash, at the time of the supposed robbery there.—But lest the believers in wonders should think this insufficient, and insist upon the possibility of Squires being in two places at once; we shall, in the next place, under various heads of proof, attack the whole of the defendant's evidence, and shew that in every part of it she is forsworn.

Gentlemen, because there may be no uncertainty in that part of the case which relates to Squires, she will attend here in person, to be referred to by the witnesses. And you will ob-

serve, (to use her own language to the defendant, when she first charged her with the robbery,) that the Almighty has not created her likeness. So it is impossible, either for the witnesses, or the defendant, to mistake her for another. She is one of that tribe of people called gypsies, and strolls about the country as a hawker and pedlar. She is a widow, and has a son George, a young man, and two daughters, Lucy and Mary, both young women. It happened, that in the latter end of the year 1753, this gypsy, with her son and her daughter Lucy, travelled on foot into the west of England with smuggled goods, such as they meet with in sea-port towns, and sell again to people in the country. The material questions with respect to these people will be, where were they upon the 1st and 2nd of January 1753? And when did they arrive at Enfield Wash?

In order to give you the clearest satisfaction in this matter, it will be necessary to go a little farther back than the 1st of January, and trace them down to the time of their being apprehended on the first of February.

Gentlemen, it will be worth your observation, with what degree of certainty the witnesses swear, not only with regard to the identity of the three persons, (who will be all in court to be referred to) but also as to the precise times of seeing them. And, if it should appear to you, that they can be under no mistake, either as to persons or times; it will only remain for your consideration, what credit should be given to their oaths. They are forty in number; they are totally disinterested; and of unexceptionable characters.

Upon Friday the 29th of December 1752, in the evening, these three foot-travellers, Mary Squires George and Lucy Squires, came to lodge in a little inn at South-Parrot, in Dorsetshire; and went forwards towards Abbotsbury, the next morning. The landlady of the inn will tell you, she is certain as to the time, from an accident of some guests leaving a reckoning to pay, which she entered in her book that evening: a book, wherein she had seldom occasion to make entries; but whenever she did, it was her custom to ascertain the time by her almanack: and she remembers to have referred to the almanack, while they were in the house. You will find them the next morning, Saturday the 30th of December, between eight and nine o'clock, taking refreshment upon the road, at a place called Winyard's Gap, about a mile from South-Parrot. The person who proves this, saw them the evening before as they were going to South-Parrot, and was so struck with the old woman's hideous face, that she compared her to a picture then in her house of mother Shipton. The same day at two in the afternoon, they came to Litton, about nine miles from Winyard's Gap, and three from Abbotsbury. There they lay at an alehouse, and stayed till Monday afternoon the 1st of January. This will be proved by five witnesses, who will give you a particular account of them during all that time.

Monday the 1st of January, in the evening, they came to Abbotsbury, a sea-port town in Dorsetshire; where they were very well known by a great many people, having been often there before. There they stayed till Tuesday the 9th. This will be proved by no less than eleven witnesses: and as it is impossible these people should be under any mistake as to their persons, it will be material to observe, that it is equally impossible they should mistake as to the time. It happened, that the exciseman, stationed at Abbotsbury, was taken ill a few days before the coming of these people there; and another officer was placed in his stead, who lodged in the same house with them, at one Gibbons's, and came there on the very same day. You will find this, not only by the exciseman himself, and several of the witnesses who remember his and their coming; but we shall also produce the books from the Excise-office, by which the time of this man's coming to Abbotsbury will appear with absolute certainty. There are, besides, several other circumstances, which lead the witnesses to exactness of time, as well here, as at the other places before-mentioned.

Before we leave Abbotsbury, it will be proper to let you know that Lucy Squires, though the daughter of such a deformed woman, is very far from disagreeable, and had an acquaintance there, who was dear to her. This was one William Clarke, a shoe-maker of that place, who met them at Litton, and travelled on a day and a half's journey with them from Abbotsbury. The reason of my taking notice of this circumstance will appear hereafter, when you find them at Basingstoke. With this Clarke they left Abbotsbury on Tuesday the 9th of January, and went to Portersham, where they lay that night. Wednesday the 10th they went to Ridgway; where Clarke took an unwilling leave of his Lucy, after obtaining her promise to send him a letter soon; they lay at Ridgway that night; and, the next day, Thursday the 11th, you will find them crossing the waters by Dorchester, which were very high after great rains. They had received an account, that the other daughter Mary was ill, and so travelled faster from this time to Chettle. Friday the 12th they lay at Chettle. Saturday the 13th at Martin, in a farmer's barn. Sunday the 14th at Coombe: from whence they proceeded the next day in the road to London.

The next account you will receive of them will be Thursday the 18th at Basingstoke; which you will observe, according to their rate of travelling, to be four days' journey from Coombe. And here you will find a piece of evidence very material, and conclusive with regard both to persons and times, and which will confirm the rest of the evidence before it to the utmost degree of certainty. I mentioned before, that Lucy Squires had promised her sweetheart, William Clarke, to send him a letter on the road. It was at this place she performed her promise. But being an illiterate

girl, she was obliged to have recourse to the landlady of the inn to write for her. The letter is dated from Basingstoke, the 18th of January 1753. The landlady, Mrs. Morris, will tell you it was wrote by her at the time it bears date. It will appear with the Basingstoke post-mark upon it. There being no direct post from Basingstoke to Dorchester, the letter was put into the London bag; and therefore the London post-mark is also upon it, by which it will appear, that it came into the general post office on the 19th of January. It happens that this letter (which will be read to you in the course of the evidence) refers to the circumstance of Clarke's travelling with them from Abbotsbury.

Friday the 19th they went to Bagshot; and Saturday the 20th to Brentford; where George left his mother the Sunday morning, to go to his sister Mary, whom he found well enough recovered to go with him to Brentford the Monday to her mother. Tuesday the 23d they lay at a house called the Seven Sisters at Pagners by Tottenham. And the next day, Wednesday the 24th of January, they went to Enfield-Wash. Here they were strangers; and, inquiring for lodging, had the ill luck to be recommended to Susannah Wells, whom they had never seen before.

Happy for that woman, that these unfortunate strangers came to her house! In all likelihood she owes her life to that accident. For, had there been no old woman in her house, besides herself; nay, had she not (another accident for which she is indebted to Providence!) changed seats with the old gypsy at the fire-side, five minutes before the defendant's arrival there on the 1st of February—there is too much reason to believe, that Wells herself had been accused of this felony. Had it so happened, the same evidence, which was applied to Squires, would have served for her conviction. And she had no alibi to save her life. The defendant had then been prosperous in perjury; and the means of detecting her had been borne down by popular clamour.

Squires, her son and daughter, remained at Wells's, from the 24th of January till the 1st of February; when they were apprehended. What happened that day will fall under another head of evidence.

I have now done with that part of the prosecutor's case, so far as it relates to the innocence of Mary Squires. Upon which I shall only observe, that, if the evidence brought to support it is clear and convincing, it will be too late for the defendant to shelter herself under any pretence of a mistake. For whether she was robbed by Squires, or not, was the most material question upon that woman's trial, and her fate depended upon the defendant's positive testimony. And it is worthy observation, that there was not the least doubt suggested, when she was giving evidence against the most remarkable person in the world.

Gentlemen, the next head of evidence will be to shew, (what would of itself be sufficient

to convince all mankind) that the defendant could give no account of the room she pretended to have been confined in for a whole month together; and that the place she afterwards fixed upon, and positively swore to, was not in any respect answerable to her first description of it; and that her description of the room upon the trial of Squires, was in consequence of its being shewn to her some little time before. You will also find her evidence flatly contradicted, in a variety of material circumstances, by her own information upon oath at another time.

It has been urged in the defendant's behalf, with much shew of reason, that her giving an exact description of the place of her confinement is a strong proof of her having been there. But on the other hand, if her description of the place of her confinement was as unapplicable to the room she ventured afterwards to swear to, as it was to St. Paul's cathedral, is it not an unanswerable proof, that she was not there? For can it be imagined, she should be alone in a room for 28 days, without any obstruction of her senses, and at the end of that time as ignorant of it, as if she had never seen, or heard of such a place?

It was on Monday night the 29th of January, according to her account, that the defendant returned to her mother. On Wednesday the 31st she applied, with several of her friends, to Mr. Chitty, the sitting alderman, for a warrant against Wells, upon suspicion of having robbed her. For at that time she did not pretend to certainty. The alderman having heard her story, then declared his doubts, and called upon her to authenticate it by a particular description of the place she had been in. She swore it was a little, square, dark room, in which was an old stool or two, an old table, and an old picture over the chimney. And this was all the description she gave. No mention of any basin, saddle, tobacco-mould, or barrel; and so far from any pretence of hay, that she complained of having been forced to lie every night upon the bare floor. She also swore, that her modicum of bread was in five or six pieces, (not four-and-twenty) and that she left some of the water in the pitcher, when she came away: that she escaped by the help of a pent-house under the window, upon which she slid down, and from thence jumped upon a bank on the back-side of the house.

A warrant being obtained from the alderman, it was agreed upon by her friends, who had heard this, to go down to Wells's the next morning; and after securing all the people in the house, to inquire whether any room there was answerable to the account she gave; resolving, if they found she spoke truth, to support her to the utmost of their power; if otherwise, to drop her. The next morning they all set out for Enfield-Wash, and immediately secured all the people in Wells's house; there were Mrs. Wells, Mary Squires, her son and two daughters, Virtue Hall, and Fortune Natus, and his wife Judith Natus.

It will be proper here to describe this house, and the several rooms in it. At the entrance into the house there is a stair-case, the bottom of which is within two or three yards of the street-door; this stair-case leads to three rooms on the first floor, in one of which lay the old gypsy and her two daughters, in another George Squires, and in the third Mrs. Wells and her daughter, and Virtue Hall. Below stairs, on the left side of the little passage from the street-door, is a parlour, in which all the family were placed, as soon as they were seized. On the right hand of the passage is the kitchen, from which a door opens to a little flight of seven or eight steps, leading into a sort of lumber room or workshop, where Natus and his wife lay upon a bed of hay. These steps or stairs are inclosed in the rooms, there being no door but at the foot of the steps, which separates it from the kitchen. And this place, which some call a workshop, and others a hay-loft, (on account of some hay usually kept there) the defendant was pleased to fix upon as the place of her confinement.

The arrival of the defendant's friends was above an hour before her; but no room could be found like what she had represented. There were two persons, one called Adamson, the other Scarrat, who (for reasons best known to themselves) were extremely desirous of reconciling every difficulty; and they would have it, that this lumber-room must be the place of confinement. But some obstacles were to be removed. There was a quantity of hay, not less than half a load, in the room; and not a word of hay had been mentioned. These two gentlemen imagined she might have forgot it, and proposed that one of them should ride back to meet the defendant upon the road, in order to ask her about it. They cast lots, who should go upon this honest errand, and it fell to Mr. Adamson. In a little time Adamson returned brandishing his hat, and exulting, 'We are all right; she says, there is hay in the room!' She had never said so before; and, if she forgot to mention it, she also forgot the use of it, for the whole month while it was before her eyes. For she lay upon the bare boards!

But this was not the only difficulty which required the skill of Adamson and Scarrat to solve. The room is neither square, nor dark, nor little. It is thirty five feet three inches and a half long, by nine feet eight inches wide: it is extremely light, not only from the windows, (but one of which she pretended was boarded up) but also from the roof itself, which is of pantiles, raised above the walls, so as to let in a great deal of light from the top. There was no grate in the chimney, nor the least sign that a grate had been there. For, in the first place, there was no hearth to it; and besides, the whole chimney, from the bottom upwards to the mantle-piece, was full of cobwebs and nastiness. It is impossible therefore that a grate or any thing else could have been there within three days before, or indeed, as many months. There was a large chest of drawers

by the side of the wall, which she had said nothing of. Did she forget this too? Perhaps it had been put there since her escape the Monday before. Remove it, and see whether it has the marks of long standing. The experiment was made, and immediately fifty spiders ran out, to give testimony of a long, undisturbed possession. Instead of any pictures over the chimney, there was an old broken casement, which filled the whole place, and had the like vouchers for its long standing; the cobwebs uniting it to the wall. Where was the stool and table she spoke of? Nothing like either to be found. Where was the pent-house, or shed of boards under the window, by which she escaped? The wall on both sides perpendicular; the windows but eight feet from the ground on the outside; and there never was either pent-house, or shed, or any thing else by the wall. On the right-hand side coming into this nasty room, was some hay made in the form of a bed, with a little bag of wool by way of bolster. And Natus's wife was seized just rising from this bed. Near this bed's-head was a hole, through which a jack-line had formerly run from the kitchen. The hole was almost large enough to thrust her head through, and looked quite over the kitchen. This she never observed; for she saw nobody but once during the whole month, and then it was through a crack of the door. Over this hole were the pulleys of the jack-line, which she also forgot to mention.

In short, she forgot almost all the things that were there, and supplied her defect of memory, by naming several things which had never been in the room. By this time there was a great company of people in the house; some led by curiosity, some by justice, and some by motives which must be left to themselves to assign. At last the defendant arrived with her mother in a coach. She was immediately conducted to the kitchen, and set on the dresser. The door leading to the lumber-room was then open, on her left hand, and within three yards of her, so that she could then see all the stairs, and a considerable part of the room; yet she took no notice of it. Nor did she drop the least hint that the kitchen she was then in, was the place where her stays were cut off; though she remained in the kitchen five or six minutes. She was then placed on a chair, with the door of the lumber-room open on her right hand, where she could see up into other parts of the room. Still, not the least notice taken of it. It was then proposed to carry her into the parlour, where all the family were prisoners, in order for her to fix upon the person who cut off her stays.

In the mean while the prisoners were disposed in the room so, as she might have a distinct view of them all. Mother Wells was placed on the right side of the chimney, and the gypsy on the left. But, a few minutes before the defendant's coming into the parlour, the two old women had changed places, and the gypsy then sat on the right side of the

chimney, leaning over the fire, almost double, and smoking her pipe. In this situation were they, when the defendant entered the room; and in a moment, without seeing her face, pointing to the gypsy, she said, 'This is the woman who robbed me of my stays.' The poor old woman smoking her pipe, was inattentive to what was said. But one of her daughters exclaimed, 'Lord! mother, the young woman says you robbed her.'

Immediately the gypsy starting from her chair, and looking in astonishment full at her, exposed her hideous face, which till then was almost covered with a clout. 'I rob you! Take care what you say; if you have once seen my face, you cannot mistake it, for God never made such another!' And being told that this fact was committed on the 1st of January, the old woman immediately, without the least hesitation, declared she was then above one hundred miles off, in Dorsetshire. And George Squires then said, they were at Abbotsbury on the 1st of January, and for several days after. Protestations of innocence were to no purpose; the defendant remained positive, and Mary Squires must suffer for it.

The next thing to be done, was to fix upon the room. In the first place, the defendant suffered herself to be led up the great staircase from the street-door, and so into all the rooms forward. But neither of these was the room. Not the least notice taken that the place she was confined in was contiguous to the kitchen, and but a few steps from it; not at all like this stair-case. At last she was conducted to the lumber-room; and, after pausing for some time, she declared this was the place; but that there seemed to be more hay than she had observed during her confinement there. The witnesses, who had heard what she swore before Mr. Alderman Chitty, and had made their observations upon this room just before her coming down to Enfield-Wash, were astonished. She then recollected one of the three saddles, and the barrel, bason, and tobacco-mould; neither of which she had mentioned before. But she remembered nothing of the chest of drawers, the broken casement over the chimney, the hay-bed, the hole in the wall, nor the pulley. One asked her, 'Why she had not opened the window casement, and escaped that way, seeing she might have done it without the least difficulty?' Her answer was, she took it for granted it was nailed, but had never tried it.

The effect these observations had upon such of her friends, as did not go there with a resolution to assist her in all events, is easy to imagine. They were satisfied she was an impostress, and withdrew their assistance. Their names are Mr. Gawen Nash, Mr. — Hague, and Mr. — Aldridge, citizens of established reputation; who will give you a very faithful and circumstantial account of this whole transaction.

Though what has been already opened would be abundantly sufficient to maintain this in-

dictment, yet this is not all. For, instead of relying upon circumstances, however satisfactory, we shall go further, and shew by direct, positive evidence, that the defendant was not in this room in the month of January.

Natus, a poor labouring man, and his wife, will tell you, that this bed of hay was their only lodging during that whole month, and for five or six weeks before; and that they lay in this very room every night: and this will be confirmed by the evidence of several other witnesses. They will all tell you, that this room, being the repository of Mrs. Wells's hay, with which her horse was fed, and of pollard for the feeding her pig, was visited by some or other of them every day. That this black pitcher, which the defendant says was in the room for all the time she was there, was in constant use in the family, and filled with water from a neighbour's pump almost every day, during the time the defendant pretends to have been in the house. That none of them ever saw the defendant, or heard of her, till she came down on the 1st of February with Mr. Alderman Chitty's warrant.

Ezra Whiffin, who keeps an inn in the neighbourhood, will be produced a witness to prove, that he bought of Mrs. Wells a sign, which formerly hung at her door, when she kept a public-house; and on the 18th of January he took it out of this workshop, and Natus's wife was then lying there upon a hay-bed. He will fix the precise day by a very particular circumstance, in which he will be confirmed by another witness.

John Whiffin, his son, went with him to bring away the sign; and stayed below in the parlour, while his father went up into the room for it.

Three witnesses will be produced to prove their lopping trees by the side of Mrs. Wells's house on the 5th of January; and at that very time they had some conversation with two women, Virtue Hall, and Sarah Howit, another witness, then looking out at the window of this very room, where the defendant is supposed to have been confined. And the time of their lopping these trees will be fixed also by a fifth witness to this fact.

Such of these witnesses, as have been in the workshop, will give you the same account of it, as you will find by the other witnesses to the former head of evidence.

After proving the defendant perjured, not only with regard to the person whom she charged with having robbed her, but also as to the place in which she swore she was confined; we shall need an apology for proceeding further. But to cut off all pretence for excuse, we shall beg leave in another instance to shew the defendant's guilt, by her own testimony. In her evidence at the Old-Bailey, set forth in this indictment, she swore that she drank up all the water in the pitcher, about half an hour before the time of her escape. Before Mr. Alderman Chitty she swore that she did not drink it all, but some of it remained in the pitcher

when she came away. But in an information she made before Mr. Fielding, a justice of peace for Middlesex, (which we shall produce for this purpose) she swore that she had drunk up all the water on the Friday, and so had not a drop to drink from that time till the Monday, on which day she escaped. The pain of thirst has been felt by almost every one, at some time or other; and whoever has endured it for three days and nights, will be sure to remember it as long as he lives.

These self-contradictions therefore could not arise from mere mistake; except only it was forgetting at one time, what she had sworn at another. A liar, says the proverb, should have a good memory. But he who is resolved to speak truth, needs take no pains to recollect in what manner he had told his story before.

Gentlemen, to all this evidence we shall add two circumstances, which you may possibly think worth your attention. Soon after the defendant's supposed return to her mother, she was visited by a midwife, who was an old acquaintance; to whom the mother, in the daughter's presence, related the whole story. The midwife's curiosity took place of her pity, and she desired to see the shift which the defendant was supposed to have worn for a month. The observations made upon it will best become the witness herself to tell you. They lead to suspect strongly that it had not been worn so long as was pretended. On the contrary, it looked as clean, as if it had not been worn three days.

The other circumstance is a striking one. After the conviction of Squires, there was a re-examination of the case before the late lord-mayor, in order to pave the way to the throne for mercy, which proved effectual. The defendant was present at that inquiry, and the bed-gown which she pretended to have taken out of the workshop, as also the pitcher, were both produced. She was very desirous of taking them with her, which my lord-mayor objected to, and proposed that they should be deposited in some public place to be seen by any body, because they might possibly lead to a discovery. What induced the defendant to be so extremely anxious for the possession of this tattered bed-gown, and broken pitcher, is hard to say; but she was so much bent upon it, that she unwarily claimed a property in the bed-gown, and said, It was her mother's. If it was her mother's bed-gown, how did it get to Mrs. Wells's?

This, gentlemen, is the nature of the evidence we have to lay before you; upon the weight of which there can be no doubt but you will find the defendant guilty.

Mr. Willes.* I am counsel in this case for the crown; and though I cannot help feeling some concern for the unhappy situation of the prisoner at the bar, yet I own I rejoice, for the

sake of truth, and for the sake of the deluded multitude, that this matter is at length to receive the most solemn and impartial examination. For, in what light soever we consider the prisoner's history of herself, either as a gross imposition on the world, or, as others would have it, a wonderful and miraculous truth; most certainly it is a fact about which mankind have been much divided, which has been the cause of great uneasiness and distraction in this country, and concerning which the minds of the people ought to be quieted.

Nor can we wonder at these dissensions among the populace, when many able and great magistrates have engaged in this dispute; some of whom have with great warmth and eagerness declared themselves implicit believers of this amazing story, whilst others have looked upon Elizabeth Canning as the most vile and abandoned impostress.

I do not mention this with an intent to throw reflections on the patrons of either side of the question; the wisest of men have been deceived, nor will it be any imputation on their character, that they have been so; unless there is any reason for conjecturing, that either through partiality, prejudice, or other still worse motives, they have wilfully shut their eyes to the truth.

Far is it from me to insinuate that any thing of this sort has happened in the present instance: I verily believe that the fountain of justice in this kingdom has flowed, through all its channels, unstained, uncorrupted, and clear from all manner of pollution. I hope that those who have sat under his majesty's commission of the peace, have acted merely and singly in that capacity, and have not descended from the dignity of magistracy, to become advocates for either party. But be that as it will, it is not our duty, as counsel for the prosecution, to take notice of collateral circumstances or extrajudicial behaviour in any one; it is our business only to lay the particulars of the charge against the prisoner before you; and if the weight of evidence appears clearly to be on the side of the crown, I do not doubt but that the truth will be irresistible, and that we shall have your verdict for the conviction of the prisoner.

And, gentlemen, the prisoner stands indicted of one of the most heinous of crimes; an endeavour, by wilful and corrupt forswearing herself, to take away the life of a guiltless person; and without aggravation, in the black catalogue of offences, I know not one of a deeper dye. It is a perversion of the laws of her country to the worst of purposes; it is wreathing the sword out of the hands of justice to shed innocent blood.

Let us reflect a moment on the sad catastrophe which might have ensued. On her evidence Mary Squires was condemned to be executed, and had suffered the judgment of the law, but for the wisdom and clemency of his majesty, ever careful, ever tender of the lives even of the meanest of his subjects. During

* In 1766 Solicitor General; in 1767 a Judge of B. R.

the application that was made to the throne for mercy, did the prisoner abate aught of her resentment against the unhappy convict? No; her cruel heart never in the least relented. God forbid, that the measure she has meted another, should this day be measured to her again!

When I think of the age of the prisoner at the bar, scarcely yet above nineteen years old, I can hardly persuade myself that human nature could so early attain to such a pitch of wickedness: but when I attend to the very strong and convincing proofs we have to produce against her, I must give up my reason to my incredulity, if I any longer doubted, whether she was guilty or not.

And, gentlemen, the whole we have to lay before you in support of this heavy charge, will naturally arise under one or other of these considerations: the numberless inconsistencies, and even contradictions of herself in her own evidence, as taken at different times before different magistrates: the improbability of her story: the testimony of a multitude of witnesses of credit and character, who contradict her materially in almost every circumstance she has related.

And, gentlemen, in order to make you sensible how frequently Canning has varied in her own account of these facts, it will be necessary to inform you that she has been examined on oath four several times. On the 31st of January before alderman Chitty, when a warrant was granted, for the apprehending Mrs. Wells; on the 1st of February before justice Tashmaker, after she had been down at Enfield-Wash; on the 7th of February before justice Fielding; and on the 21st of February at the trial of Squires; on which last examination we have assigned the perjuries mentioned in the indictment.

In tracing her through these several examinations, we shall have an opportunity of discovering what variations from time to time there are in her story, what new circumstances, supplements, or embellishments were added to her first relation; and then we shall be able to judge impartially whether all these are reconcilable with truth.

Before alderman Chitty her evidence was simply this; that she was robbed by two men in Moorfields of her money, hat, gown, and cap: that there she received a blow on her head, which stunned her, but did not so far deprive her of her senses, but that she remembers her being afterwards carried through Bishopsgate-street: that she then was dragged to mother Wells's, and there stript of her stays, and because she would not go their way, (as it is termed) confined in a little, square, dark, or darkish room, which had nothing in it but an old grate, an old table, a stool or two, and some pictures over the chimney: that there were four or five pieces of bread and some water, on which she lived till she made her escape; and that she lay all the time on the bare boards: that she got out of the window on a small shed of boards or pent-house, down

which she slid, having clothed herself with an old bed-gown and handkerchief, which she took from the grate.

This is the short account she gave at first before the alderman, for her story had not then received half its decorations. The circumstance of her being subject to fits was not then mentioned: no hint of any gypsy's being concerned, much less any description of Mary Squires, the most remarkable woman in her person that ever perhaps existed: not a word of any hay being in the room; though it appeared, on her coming down to Enfield, that there was above half a load, which had been laid in the summer before. Let any one then believe, if they can, that, during her long confinement, she could overlook such a quantity of hay, and continue night after night to take up her hard lodging on the bare boards!

In her examination before justice Tashmaker, her story receives several new improvements. She had seen Mrs. Wells's little work-house, so now drops the unfortunate circumstance of its being a little square room: had she ever seen it before, she could not have so described it. She now recollects more particulars of what the gypsy said to her: that she promised her, if she would go their way, she should have fine clothes enough. This attack (if it deserve the name of an attack) on the poor innocent girl's virtue, was a proper subject to excite the compassion of the public, and a pretty use was made of it in the several advertisements, which were printed at that time, to raise subscriptions for her.

She now swears, that after she came to Mrs. Wells's, a man unknown to her took away her cap. This expressly contradicts her former evidence, in which she says she was robbed of her cap in Moorfields. She now introduced, for the first time, the circumstance of the famous broken-mouthed black pitcher, on the water in which, and some pieces of bread, she lived till the Wednesday before she made her escape, when the whole was consumed. No wonder she could now describe the pitcher, which was artfully conveyed into the work-shop by her friend Adamson before her arrival at Enfield-Wash.

As to the circumstance of her provision lasting her only till Wednesday, it neither agrees with what she afterwards swore before justice Fielding, nor with her evidence on the trial of Mary Squires. Truth is always consistent, but falshood and fiction must be judged by another criterion.

We are now come to her examination before justice Fielding: I know not through what medium they were conveyed, but she had certainly then received some new lights, and is infinitely more learned and artful in the manner of her telling her story. The men, she swears, in Moorfields feloniously and violently took from her a shaving hat &c. These words, 'feloniously and violently,' are not the expressions of a poor illiterate girl, perhaps they are the suggestion of her solicitor.

She now swears, that the blow in Moorfields threw her into a fit, which deprived her of her senses; and that she was used to have fits, which lasted six or seven hours. This was an useful and necessary embellishment of her story, as a fit accounted much more naturally for a six hours insensibility, than a blow which only stunned her could do. That on her recovery she found herself in a high road, but that she was so intimidated, she durst not call out. It was proper to give a reason for not doing what any body in her circumstances naturally would have done. I own I always admire and suspect an affidavit, which assigns a reason for every thing which is sworn in it.

She then swears she was shoved into a back room without any furniture at all in it. I will not dwell on this trivial mistake in her account; and yet surely, in the imagination of a girl who had had her education at an almshouse, stools, tables, and pictures, would be deemed furniture. But it is material to observe, she now says, that on Friday, and not Wednesday, she had consumed all her bread and water. This alteration of her evidence from Wednesday to Friday must have its design: weak and ill as she was, could she have been able to walk from Enfield to London in less than six hours, which is eleven miles, if she had received no sustenance for five days before? Whereas shortening the time of her being without any refreshment, took off a good deal from the improbability of this part of her story.

In her evidence on the trial of Mary Squires, she adds still some new circumstances. She says, on her recovery from her fit, she found herself in a great road, where there was water. This addition was not without some view, and I think there is no difficulty in finding out what it was. It supplied the world with a reason, why she and her friends at first directed their inquiries towards Enfield-Wash. A barrel, saddle, bason, and tobacco-mould, are now recollected to have been in the room: strange, we should never hear any thing of them before!

She now swears, she had not drank all the water till about a quarter of an hour before she escaped. This amendment of her evidence was with the same intention as the former alteration from Wednesday to Friday; that is, to lessen the improbability of her being able to walk from Enfield to town, without once stopping to take the least refreshment.

These are some of the most glaring contradictions in her own evidence, which must strike every body who reflects that these were particulars in which she could not err either through forgetfulness or mistake; I will not say more.

But to this we may add the improbability of her whole story, which is as it were *felo de se*; at least, it is such a tale as requires the strongest proof in the world to compel us to believe one tittle of it. The two ruffians to continue with her half an hour in so public a place as Moorfields, and though it was so early in the evening, (an holiday-evening too) yet when she

screamed out, for nobody to hear her! but why first rob her, and afterwards kidnap her? Was it their design to rob her only? or, to rob her, and afterwards carry her where (in the gypsy language) they hoped they should oblige her to go their way? If a robbery only was designed, would they have carried with them the strongest evidence of their guilt? If their purpose was only to add this poor girl to the herd of wicked wretches at mother Wells's, what reason was there to begin their seducement with a robbery? At these kind of houses a young woman may be easily stripped of her money, and yet no robbery committed: mother Wells might soon have made herself Canning's cash-keeper, without the aid of a blow to stun her, or the terrors of a case-knife. If her murder was intended, why not have done it on the road? Why not on her first arrival at Enfield-Wash? Why was she supplied with any bread and water at all?

Her fit likewise is of the unmarvellous kind; it continued on her near six hours; went away in an instant; and though she was used to have fits on any fright, yet she never had another during her long and terrifying confinement. How amazing this! What! a girl used to fits on frights not have a fit for a month together, when she might naturally expect, during all that time, every next minute would be her last!

But let us now follow this wonderful girl to Enfield; not forgetting one very extraordinary circumstance in her evidence before the alderman, that though she was stunned in Moorfields, yet she remembers afterwards her being carried through Bishopsgate-street. Is it credible, on her coming thither, that the gypsy, an artful procuress, hackneyed in the ways of women, should only slightly ask her to go their way, and, because she faintly said No, should give over all further attempts? Was this acting like the president or lady abbess of such a house as mother Wells's? Was this any proper trial of the prisoner's virtue? I hope, for the honour of the female sex, that there hardly ever was a young woman not above eighteen years of age, who did not say No, once at least, especially if solicited by an ugly, old decrepid hag. And yet this faint, this half-consenting, no refusal, is the only reason given for her long and barbarous confinement. Her confinement! To what purpose was it? What! starve a young woman out of her virtue? Rich food and strong liquors may do much; but bread and water, cold and hunger, are not apt to inflame the passions.

This bread and water; a broken pitcher of water, and just twenty-four pieces of bread, about equal to a quarter loaf; before alderman Chitty these twenty-four pieces were not above four or five. But be they more or less, when was the pitcher of water and these conveyed into the room? Was there any expectation of such a guest? No. Were they carried in after Canning came thither, and before she was shoved into the workshop? There was not

time enough to make such a particular provision. As to the supposition that they might be conveyed into the room after Canning was there, she herself expressly swears, that nobody came into the room from the time of her being shut up till she made her escape. Virtue Hall indeed in her information says, that the pitcher of water was conveyed in there afterwards; but I shall lay her evidence out of the case, especially as she is in this circumstance absolutely contradicted by the prisoner.

But having mentioned Virtue Hall's name, I cannot help taking notice of an argument I have heard in favour of the prisoner's innocence, which is this, That Canning and Virtue Hall were never together before Virtue Hall's examination, and yet they agree in almost every circumstance of the story, and therefore Canning's evidence must be true. But the answer to this is a very easy and obvious one. It does not at all appear, but that Canning and Virtue Hall were together before Virtue Hall's examination; at least, it is certain they might have found out some means of communicating their sentiments to each other, which would answer the same end. It is very remarkable, that Virtue Hall's confession was not taken at first (for what reason I know not) *visâ voce* before justice Fielding. She was sent out of the room to retire with her solicitor, who was also Canning's solicitor: her information was reduced into writing, and was two hours in preparing. After this, what mighty wonder is there, that when she came into the justice's presence again, she should repeat her lesson without the least hesitation?

But to pursue the train of improbabilities: was it not strange, that Canning should subsist so long on so small a quantity of bread and water; four weeks, wanting only a few hours? Stranger, that she should husband her store so well as to have some of her bread left, according to her first account, till the Wednesday; according to her last, till the Friday before she made her escape; and that she should save some of her miraculous pitcher till the last day? Was the twenty-fourth part of a six-penny loaf a-day sufficient to satisfy her hunger? If not, why should she defer the immediate gratification of her appetite, in order to make provision for a precarious uncertain futurity? Shall we suppose some revelation from above in favour of one of the faithful? Perhaps an angel from heaven appeared to this mirror of modern virtue, and informed her, if she eat above one piece of bread a day, her small pittance would not last her till the time she was to make her escape. Her mother, we know, is a very enthusiastical woman; a consulter of conjurors; a dreamer of dreams; perhaps the daughter dreamed also what was to happen, and so, in obedience to her vision, would not eat when she was hungry, nor drink when she was thirsty. However that was, I would risk the event of the prosecution on this single circumstance, that, without the interposition of some preternatural cause, this conduct of the pri-

soner's must appear to exceed all bounds of human probability.

That she should have no evacuations except by urine, is another strange circumstance, which decorates this romantic girl's story.

But another thing; how came she to make her escape so easily at last, and yet never before once attempt it? Were these dragons always on the watch? Surely, if they sat up all night, they must sleep in the day-time, and the prisoner tells you the house was then very quiet. Even the evening she made her escape, it must astonish us to find, that a girl, who had been kept so long without her proper nourishment, should stop no where on the road to take the least refreshment, though she passed by several houses, and met several persons.

But these wonders, if possible, will grow more and more wonderful, when we come next to examine the place of her supposed imprisonment. This room, what was it but a weak erection of lath and plaster? cracks and crannies innumerable in the sides of it, and the whole building so alight, that a boy of ten years old might in an hour's time have demolished any part of it. The window towards the east neither boarded nor fastened; but three feet from the floor, and but nine from the ground. The casement so large, that a very fat man might have got out of it; so little a way from the ground, that a child might have slipped down without hurting himself. And yet in this cage, with the door open, was this extraordinary girl confined for a month, without once trying to get out. The story indeed is all of a piece, it is all witchcraft and enchantment.

But, if she was afraid of breaking out, why should she not call out of the window for assistance? It was near at hand; the Hertfordshire road was not above sixty yards from the north window, and she frequently saw the coachman pass by, who used to drive her former mistress. Besides this, there is a little lane directly under that window, which was used every morning and night by the farmers and their servants, who went that way with their cattle to the marshes. There is likewise a pond not above seven or eight yards from the window, where the townsmen watered their horses, and in frosty weather it was a sliding-place for all the boys and girls in the village. Had she made the least alarm, there were many ready to have come to her assistance; but we hear of no endeavours of this kind: May be, the gypsey had put a spell upon her!

But perhaps I am talking of impossibilities to persons, whose credulity is great enough to believe whatever is artfully told them, how monstrous and absurd soever it may be in reality. I know the present age to be, in some respects, a very credulous one. Mr. Davy's story of a flying man might now, for aught I know, be credited; it is not long since the bottle hero* drew after him a numerous at-

* This alludes to a transaction which was

tendance; this heroine likewise has had her admirers and protectors; but, for my own part, I would as soon believe either of those stories, as hers, which is equally incredible.

But should these improbabilities, I might almost say impossibilities, find credit with you; yet surely, gentlemen, you cannot be totally inattentive to the testimony of several persons of credit and character, who contradict the prisoner in almost every circumstance of her narrative.

As to her description of the room, what say Mr. Nash, Hague, Aldridge, and Mr. White the sheriff's officer? They will give you such an account of it, as must amaze you. The three first were her friends, who went down to Enfield-Wash on the 1st of February, with her master Mr. Lyon, to assist in this notable discovery; they will give you the reasons why they have not continued to be her friends: that the room Canning fixed upon as the place of her confinement, was a long, light room, not a little dark, square one: that the dimensions of it were above thirty long, and only about nine

well known at the time when this trial occurred, and of which the following account was published in the *Gentleman's Magazine*, for January 1749:

"Monday 16.

"A person advertised that he would, this evening, at the Theatre in the Hay-market, play on a common walking-staff the music of every instrument now used, to surprising perfection; that he would, on the stage, get into a tavern quart bottle, without equivocation; and, while there, sing several songs, and suffer any spectator to handle the bottle; that, if any spectators should come masked, he would, if requested, declare who they were; that, in a private room, he would produce the representation of any person dead, with which the party requesting it should converse some minutes as if alive, &c. to begin half after 6.

"Accordingly a great company came, waited till 7 o'clock; then growing impatient and noisy, a person came before the curtain, and declared, that if the performer did not appear, the money should be returned; one in the pit then crying out, 'For double prices the conjurer will go into a pint bottle,' a tumult began, and a person in one of the boxes threw a lighted candle on the stage, the greatest part of the spectators hurried out, and the mob breaking in, they tore down the inside of the house, and burnt it in the street, making a flag of the curtain, which was placed on a pole in the middle of the bonfire. During this confusion the money, which was secured in a box according to contract with the owner of the house, was carried off. Several persons of high rank being present, the pick-pockets made a good booty, and a great general's rich sword was lost, for the recovery of which a reward of 30 guineas was advertised.

'Cur in theatrum (hor), Cato, severe veniunt?'

feet broad: that there was a large quantity of hay there, and an old rusty hay-bed: that there was no grate in the room, and the chimney so overspread with cobwebs, that it was impossible there should have been a grate there for some months before: no pictures ever the chimney, nor any marks that there ever had been any, but in their place an old casement joined to the wall by cobwebs: that there were in different parts of the room three old saddles, a nest of old fashioned drawers, and a tub of pollard: that, on removing the chest of drawers from the side of the wall, they found it so affixed to it by filth and nastiness, that they are certain it could not be lately brought there: that they observed, under the pulley of an old jack-line, a large hole in the wall, which had communication with the kitchen, and commanded a view of every thing that was done there. This hole likewise had escaped Canning's notice, though it will be proved to have been in the same condition for many years past. That, on the most careful examination, they could not find that there either was, or ever had been, any shed or pent-house under the north window, or any thing which could possibly be mistaken for it: that the room had a light casement in it, large enough for a person to get out; and that Canning being asked, why she did not make her escape this way, said, she believed it was fastened, but that she had never tried.

These were the circumstances that staggered their belief; nor could they account for the prisoner's remembering none of these things, though, during her long continuance there, she had leisure enough to have marked every cranny in the room, and to have counted every nail in the floor.

These witnesses and others will inform you, that on her coming down to Enfield, she was first carried into the kitchen, and set on the dresser; and though the door was open which led to the hay-loft, yet she never once intimated that this was the place where her stays were cut off, but suffered herself afterwards to be carried over the rest of the house in search of the place of her imprisonment. These witnesses, and particularly White, will speak to the busy officiousness of Scarrat and Adameon, in pulling down the boards of the north window, and in conveying the pitcher into this room before Canning came there; and that one of them was then dispatched to meet her on the road,—with what view one may easily guess.

But in order to give you more convincing proofs that Canning never was at mother Wells's in the month of January, *Fortune Teller* and *Judith* his wife will assure you, that they lay in this very room at the time the prisoner pretends she was there. This fact they both asserted on the 1st of February, and this they would have given in evidence on Squire's trial, if the furious temper of the times would have permitted them, without the hazard of their lives, to have come into court and given their testimony. I will not say what are the usual

attendants of fraud and imposture; but thus much is certain, truth wants not a party-mob to support it.

Another very remarkable piece of evidence to this purpose is the attestation of three honest day-labouring men, who on the 8th of January were lopping a tree just over-against the east window of this room, and saw Virtue Hall, and Sarah Howit looking out of the casement; they had a deal of chat with these girls, and in sport threw dirt at them: Sarah Howit will confirm this, who is one of mother Wells's daughters. The time will be fixed by John Cantril, a publican, who used at that season of the year to give his neighbours and customers a cold entertainment.

One Ezra Whiffin will tell you, he went into this workshop with mother Wells herself on the 17th of January, to fetch out the irons of a sign-arm he had bought of her, and that he then observed Fortune Natus's hay-bed, at the feet of which lay this sign-arm. His evidence will be supported likewise by his son's; and the time will be ascertained by a note of hand, which was just then become payable, and for the discharge of which he was going to Wormleigh to borrow some money. Ezra Whiffin will acquaint you how he came not to be examined at Mary Squires's trial. I am sorry he has so good a reason for his absence. If the avenues which lead to the seat of justice are to be surrounded and guarded by an inflamed mob, what security is there for our lives and properties; where is all our boasted liberty?

Robert White, a poor labouring man, will prove, that in the month of January he was at mother Wells's almost every night in the week, and that he frequently saw the people of the family go in and out of this room; though 'tis true he was never in it himself.

John Howit, and indeed all the people who were at the house, will affirm that mother Wells kept hay in this room for her horse, and pollard for her poultry, and that some one or other of them went in there every day. If all this last set of witnesses are not forsworn, if but one of them speaks the truth, what must we think of Canning's assertion, that there was nobody in the room during the whole time she was kept there?

As to the taking of the bed-gown out of the grate, two gentlemen of figure and reputation will acquaint you, that the prisoner, on her examination at the Mansion-house, insisted upon taking away the bed-gown with her, and said, It was her mother's. If her mother's, how could it be found at Mrs. Wells's, or taken out of the grate, when there was no grate in the chimney?

Old Mrs. Canning's midwife will inform you, that the daughter's shift, which she pretended she had worn a month in that nasty place, was not dirty enough to have been worn by a cleanly person a week; that it was not draggled in the least, nor had any spots of dirt on it. Some other particulars you will hear from her own mouth, which perhaps may lead you to guess

VOL. XIX.

what was the prisoner's employment during this long recess from the world and her friends.

But if to all these circumstances we add this incontestable proof we have to produce of Mary Squires and her son George and daughter Lucy being at Abbotsbury on the 1st of January, what opinion ought we to have of the prisoner's veracity? Let it be remembered likewise, that this is no new-invented story; for at Enfield-Wash, as soon as the gypsey was charged by Canning with having cut off her stays on the first of January, she immediately answered, That can't be, for I was at that time above a hundred miles off, at Abbotsbury. This fact of the gypsey's being then at Abbotsbury will be attested by above thirty witnesses. The unexceptionableness of their characters, the amazing consistency of their evidence, their remoteness of habitation, and ignorance of each other, as well as their having no inducement to swear falsely, will, I am certain, not escape your particular observation.

These witnesses speak not only as to the person of Mary Squires, but also to the persons of the son and daughter, who travelled with her; they conversed with them; and several of them have known the old woman for many years last past, which removes all possibility of imagining they are mistaken.

These witnesses take up the gypsies at South-Parrot, on the 29th of December, about eight or ten miles beyond Abbotsbury; and from thence from place to place, step by step, bring them to Enfield-Wash, but not till the 24th of January.

At Abbotsbury they stayed from the 1st of January till the 9th, appeared publicly, and were present at several dancing-matches: Lucy had a sweetheart there, who accompanied her part of her journey, and was an evidence for the old woman on her trial. The time will be fixed to a degree of demonstration by the excise-books, to which Gibbons, who keeps the Ship ale-house there, referred himself on his former examination. The young man who officiated for the exciseman lay in the same room with George Squires, and is now attending to be examined. A number of little circumstances will confirm their testimony, and leave the truth of it incontestable. A piece of nankeen left at one place, a dead horse seen at another, a letter wrote by Lucy's direction at Basingstoke, and which will be produced with the post-mark on it, are some of those unerring tokens, by which truth is always to be distinguished from falshood.

If the gypsey was at Abbotsbury on the 1st of January, God (I hope) will forgive the prisoner, for she has sworn that both the mother and daughter were then at Enfield-Wash.

After all these contradictions, absurdities, and glaring falshoods, need I remark that the prisoner (conscious of her guilt) did not surrender herself till she was in danger of an outlawry? The *fugam fecit* is by our law considered always as a strong proof of guilt, and

Y

is allowed as evidence in all criminal prosecutions. And now a question may be asked, What could be the prisoner's inducement to all this? Mr. Davy has suggested gain; and doubtless she and her associates have had a plentiful harvest. Perhaps this was only a secondary motive; the primary one might be the concealment of some things from the world, which would have placed her conduct in no very advantageous light. But another question may be asked, where was she all this time? Certainly it will appear she was not at mother Wells's, which is all that is necessary for us to shew in order for the conviction of the prisoner.

It was agreed upon by the counsel on both sides, that the witnesses should be examined apart, and, when examined, not to return to the others. And they gave each other a list of their witnesses' names.

William Chetham. (He produced the copy of the record of the conviction of Mary Squires.) This I examined at the office at Hicks's-hall; it is a true copy.

Cross-examined by Mr. Williams.

Mr. Williams. How did you examine it?—*Chetham.* I examined it with the clerk of the peace. I read this, and the other was read to me.

Did you read the record?—I looked upon it when the copy was read over, and saw that it was right.

[The copy read in court. The purport of which was, that Mary Squires had a bill of indictment found against her at Hicks's-hall before the grand jury for the county of Middlesex, for putting Elizabeth Canning, spinster, in bodily fear, in the house of Susannah Wells, widow, at Enfield-Wash, and stealing a pair of stays, value ten shillings, on the 2nd of January, 1752. And that she was tried for the same at the Old-Bailey, in the February sessions 1753, and found guilty of the indictment.]

When he was asked, if he saw Elizabeth Canning sworn upon that trial, Mr. Davy answered, That was admitted.

Thomas Gurney sworn.

Mr. Davy. You are the short-hand writer, I believe, that took the evidence here at the Old-Bailey, upon the trial of Mary Squires for the robbery of Elizabeth Canning?—*Gurney.* Yes.

I suppose you have got the minutes you took at that time?—I have.

Please to mention the evidence she gave.—The contents are in the sessions-paper.

You are to give an account of all the evidence she gave at that time; you may refresh your memory by looking on your minutes.—She said, she had been at Salt-Petre Bank to see her uncle and aunt there; her uncle's name was Thomas Colley. She went from home about eleven o'clock, and stayed there till about nine at night, on the 1st of January;

then came homewards; her uncle and aunt came with her as far as Aldgate, there they parted with her; and she had nobody in company with her; she came down Houndsditch, over Moorfields by Bedlam wall; two men came to her by Bedlam gate, better than a quarter after nine o'clock; they took hold on her, and said nothing. Then she was asked, what sort of men they were? She said, they were lusty men. She was asked, if she lost any thing? She said, half a guinea in a little box, and three shillings. She said, the man that stood on the right hand took it, and took her gown, apron, and hat, folded them up, and put them into a great-coat pocket; she screamed out; then one of them put a handkerchief, or some such thing in her mouth; it was the man who took her gown that did that, and that she saw no other persons by at that time; they then tied her hands behind her; after that one gave her a blow on the temple, and said, Damn you, you bitch, we will do for you by and bye. Then she was asked about her having fits; she said, she had been troubled with fits four years, that they were convulsive fits. She gave an account, that the blow stunned her, and flung her into a fit. She was asked, whether those fits were attended with struggling? She said, she could not tell. The next account she gave was, she found herself by a large road where there was some water, and the two men that robbed her were with her: She said, they lugged her along, and said, You bitch, why don't you walk faster? that one held her by one arm, and the other by the other, while they pulled her along, and took her to the house of Susannah Wells, which was about four o'clock in the morning. When she was asked, if she could form any judgment of the manner in which she was carried to the place? she said they dragged her along by the petticoats, she thought, they being so dirty; that when she came there, it was not day-light; that it was day-light about three hours after; that she believed it was then about four o'clock, and that she then saw the gypsy-woman. She was then asked the woman's name; and she said Mary Squires.

Was Mary Squires then at the bar?—She was. She then went on and said, there were two young women there, but she did not see the prisoner Wells then; that the young women were standing up, and the gypsy-woman was sitting in a chair: that when she was brought in, she took her by the hand, and said, if she chose to go their way, she should have fine clothes; that she said, No. She was then asked, if she explained the words, Go their way? she said, she did not: that then the gypsy took a knife out of the dresser-drawer, and cut the lacing of her stays, and took them from her. She was then asked, if she was under apprehensions of danger at that time? she said, she thought they were going to cut her throat. She was asked, if she saw Wells there? she said, No; and that Mary Squires looked at her petticoat, and said, Here,

you bitch, take that, or I will give you that, and gave her a slap on the face. She was asked, if she had the petticoat in her hand? she said, No, it was on me: afterwards, she said, she pushed her up stairs. She was asked to describe the kitchen; she said, it was on the right hand going in, and the stairs by the fire-side. She was asked, what they called the place where she was? she said, the bay-loft, and that it was not then day-light. She gave an account that the room door was shut, but she did not know whether it was fast or no; that the door was at the bottom of the steps in the kitchen. She said, that if she (the gypsy-woman) heard her stir or move, or words to that purpose, she said she would cut her throat. She was asked, if she saw any thing brought up to eat or drink? she said, No: that when day-light appeared she could see about the room. She was asked, what sort of a room it was? she said, a long room, with a fire-place and a grate; that there was no bed or bedstead only hay to lie upon; that she saw a black pitcher, which was produced in court; then she said, this is the pitcher, it was full up to near the neck with water, and about twenty-four pieces of bread. She was then asked, how great a quantity of bread there was? She said, about a quartern loaf; and that she had a penny mince-pie in her pocket, that she bought to carry home to her brother. Then she gave an account that she was confined there a month by the weeks, all but a few hours; and that she saw nobody in the room all that time, only she once saw a person look through the crack of the door, but did not know who it was. Then she was asked, if she had made any attempt to get out before? She said, No. Then she was asked, what time she got out? she said, about four o'clock in the afternoon on a Monday. Then she was asked again, how long she had been confined there? she said, four weeks, all but a few hours; she said, she broke down a board from the window, and got out. She was then asked, how high that window was from the ground? she then pointed to a place in the court, which was about eight or ten feet high: she gave an account, that she first put her head out, and got fast hold on the wall, then got her body out, and then jumped into a little narrow place by a lane. She was asked, if she did not hurt herself? she said, there was some soft clay: then she gave an account that it was day-light. She was asked, what she had for clothing? she said, she took a bed-gown and handkerchief, which lay in the grate in the chimney. Then she was asked, if she saw any body when she got out? she said, she did not. Then she went up the back of the house, crossed a little brook over two fields, as she thought, and there got into the road-way, then she went straight up the road to London. She gives an account, that she did not know the way, therefore asked her way to London. Then she was asked, if she called by the way? she said, she did not call at any house; but coming over Moorfields,

the clock struck ten. She was asked, if she acquainted any body with it? she said, No, she got to her mother's in Aldermanbury a quarter after ten o'clock; the first person she met with was the apprentice, then she saw her mother and the children; her mother, she says, went into fits directly.

As far as you have mentioned, are you able to say, upon your oath, that that was the evidence that the girl, upon her oath, then gave in court?—The substance of it is the evidence she gave in court.

Cross-examined by Mr. Morton.

Mr. Morton. What day did she say she was robbed?—I have it in my minutes that it was the 1st of January, which was the day she went to see her uncle.

By Mr. Davy.

Now describe what she observed in the bay-loft.—Gurney. There was a barrel, a saddle, a bason, and a tobacco-mould, in the room where she was. She was asked, what she meant by a tobacco-mould? she said, what people do up papers of tobacco in.

Now please to go on where you left off.—She was then asked, if she had given the account to any body at that time? she said, Yes, to Mrs. Woodward, who came to see her; she told her she had lived upon bread and water.

Did she say Mrs. Woodward was so frightened she could not ask her any questions?—She said, she did not ask her any more questions then. Then she says, Mr. Wintlebury came in, with whom she had lived servant: he took her by the hand, and asked, where she had been? she said, on the Hertfordshire road: he said, Bet, how do you know that? she said, Because I have seen my mistress's coachman go by, knowing them to go to Hertfordshire; she said, she knew it, for she used to carry things to the coach, and fetch them back again. Then she was asked, if she was asked any questions that night about the room or jug? she said, she had told them there was a jug not quite full: that they asked her, how much? she said, better than a gallon. She was asked, how she got out of the window? then gave an account how she tore her ear in getting out. Upon her cross-examination, she gave an account, that the two men were with her about half an hour in Moorfields, and that nobody else was by, and there was a box taken out of her pocket: then she gave an account, that she had a handkerchief which she did not lose. She was asked, if there was any light near the place where she was first attacked? she said, there was a lamp. She was asked, how long it was before she came to herself? she could not be sure, but she came to herself half an hour before she came to the house of Wells. She was then asked, if she had any degree of sense? she said as before, she had none, only about half an hour before she got to Mrs. Wells's house: then she was asked the question again, to which she answered as before. Then she

was asked, if she had sense enough of any sort to know by what means she was conducted there? she said, she thought they dragged her along by the petticoats, for they were dirty. Then she gave an account, that she was in a great surprize and all of a tremble, and the terror made her sensible. Then she gave an account, that the two men stayed there no longer than till they saw her stays cut off; then they went away, before she was put in the hay-loft. She said, she did not attempt to get out of the hay-loft, till Monday: she was asked, why she did not? she said, she thought they might let her out, and that it never came into her head till that morning. Then she was asked, where she was sitting, when she saw somebody peeping through the door? she said, she was walking along the room: she said, there were four or five steps up, and that she did not in all the time perceive where she was, till about a week after she was there, and that was by looking out of the window and seeing the coach. She was asked, if she was not extremely weak? she said, she was; her words were, I was pretty weak. Then she was asked, whether she was that way before? she said, she was not. She gives an account of passing by many houses, and asking the way of the people on the road. Then she was asked, why she did not go into any house? she said, she thought she might meet somebody belonging to that house, that might know her, and take her back again. Then she was asked, over again, the first time of her making the discovery: she said, it was in her mother's house; and then she gave an account where her mother's house is, the corner of Aldermanbury. Then she gives an account to questions asked before, whether she saw Mrs. Wells at the time she was there? she then said, she saw her afterwards when she went down to the house. She was asked again about it, whether she is certain to the prisoner Squires? and she says, she is sure she is the person who cut her stays off, and she was sitting in a gown and a white handkerchief about her head. She was asked, during her whole confinement, whether she tried to see if the door was fast? she said, she had pushed against it, and found it fast. She was asked, whether she heard any noise in the kitchen? she said, she heard people blowing the fire, and passing in and out; and there was another room she heard a noise in of nights, but that it was very quiet of days, being a house of entertainment in the night. She said, that she eat all her bread on the Friday before she got out. Then she was asked, how she eat it? she said it was quite hard, that she was forced to soak it in the water, and that she drank all her water about half an hour before she got out. Then she was asked where she did her occasions? she said, she had never a stool during the time she was there, only made water.

Was the apprentice, she says she saw first, named as a witness on that trial?—No.

[Cross-examined.]

Mr. Morton. Were Mr. Nash, Mr. Hague, and Mr. Aldridge, examined as witnesses?—Gurney. They were not.

Esther Hopkins sworn.

Hopkins. I live in Dorsetshire, at South-Parrot.

Mr. Willes. How far is that from Abbotsbury?—*Hopkins*. I don't know, it is the lowest part of Dorsetshire; it is about a mile from Winyard's Gap. I keep a house of entertainment for travellers of all sorts.

Look at that old woman sitting there; do you know her?—I really believe in my conscience, this is the old woman that was at my house on the 20th of December 1752, with her son. I remember the son particularly well: they lodged there one night, and went away the next morning.

Do you remember what day of the week it was?—I cannot say that I can.

How do you remember the day of the month?—Because there were several gentlemen there in company at that time, and two of them left the reckoning to pay, and I put down the day of the month, and I keep my book by the almanack.

Do you remember any thing of her daughter being there?—I don't remember whether it was the daughter or not; I remember the old woman; I think I never saw a woman more particular in my life; she told me the young woman was her daughter, and the other was her son.

Did they tell you where they were going next morning?—No, they did not.

Look at the young man and young woman behind her; do you know them, or either of them?—That is the man (pointing to George Squires) to the best of my knowledge.

Cross-examined by Mr. Morton.

Mr. Morton. I think you did not seem to speak positively to the old woman?—*E. Hopkins*. I never saw a woman more like her in all the days of my life, and I really believe she is the woman.

Have you not many passengers lie at your house?—Some or other lie at my house every night.

What was her business? did she sell any thing?—I asked them what they sold? they told me, hard-ware.

Did they sell any thing in your house?—No.

Did you see any thing they had to sell?—The man carried a bundle or bag, not very large, under his arm.

Had they a horse?—I suppose they had not.

Had you ever seen the old woman before?—No, I had not.

Alice Farnham sworn.

Farnham. I live at Winyard's Gap; it is a mile south from South-Parrot, in the lower

part of Dorsetshire, and about ten from Abbotshbury; it lies between them.

Mr. Gascyne. How far is it from Litton?—A. Farnham. I do not justly know, I believe it is about ten or eleven miles.

Look at that old woman; do you know her?—I remember I saw her once on a Saturday morning, between eight and nine o'clock, a little after New Christmas 1752: she came in at my house for refreshment: I keep a public house: I took particular notice of her, and compared her to a picture that I had in the room of old mother Shipton; there was a young man and woman with her.

Look at that man.—I see him; I know him perfectly well; it is her son.

Look at the young woman near him.—I think, to my knowledge, she is the same person; they stayed with me almost an hour that morning; I never saw them before or since; they had one quart of beer and some bread and cheese, and told me they would come to see me again in Old Christmas holidays; they asked me how far it was to Litton, and went up the road all three of them together towards it; I am certain I know the old woman and her son.

How far is Litton from your house?—It is ten or eleven miles.

Had you seen them before they came to your house?—I was coming out of South-Parrot on the Friday night, and met them as they were going in, and the next morning they came to my house; I told my mother, as we were laughing and talking, that I had met three gypsies; and she asked me, if I was not affrighted.

How do you know that this was before Old Christmas?—My mother was a-brewing, and I went and asked her, if she would let me go to Crookherne market, which is on a Saturday: she told me, she could not spare me, and said it would be rare enough to go on Monday to buy some things against Old Christmas; and this was just as those people went out at the door.

Cross-examined by Mr. Nares.

Mr. Nares. When was the first time you saw them?—A. Farnham. It was on the Friday night.

Do you know where they lay that night?—No, I cannot tell; when they came into my house, they asked me, how far it was from South-Parrot, and I said, one mile.

What sign is yours, you keep?—I keep the sign of the Three Horse-shoes; it is a public-house.

What made you think they were gypsies?—Because they were all three together; one had a little bag in his hand, not a large one nor a small one; it was about as much as I could carry under my arm; it was a little fardle.

Which had that?—To the best of my knowledge, the man had the bag.

How was this old woman dressed?—She had a sort of a drab-coloured cloak on, and a sort of a serge-gown.

Was it whole or ragged?—It was not rags.

How was the daughter dressed?—She had a white gown on and a red cloak; it was a sort of a holland gown, very clean and neat.

Then she did not look like a traveller or gypsy by her dress?—No, she did not.

Did you inquire of them what business they were of?—No, I did not enquire that; they asked me for one mug of beer, and I drew it them; they stayed almost an hour.

Were you with them all the time they stayed?—Yes, I was.

Look at them, and tell us from the dress they are in now, and the dress they were in then, whether you are certain they are the same persons?—To the best of my knowledge, they are the same persons.

Mr. Morton. I think it is opened that the young man and young woman (meaning George and Lucy Squires) are to be examined; if so, they ought not to be in court to hear the other witnesses examined.

Mr. Davy. Then I'll either call them next, or not at all, which you chuse.

Mr. Morton. Then call them next.

Mr. Nares. Did they make the same appearance they do now, or a different one?—A. Farnham. They were very well dressed, as they are now; they were clean and fitty.

Did the old woman appear to be as weak as she is now?—She was very unhealthy, seemingly, coming up against the bill.

Could she walk without assistance?—She did not hold by them, they walked before her.

Can you take upon you to swear to the identity of her person?—I do think she is; I took a true observation of her; she had a great nose and lips.

Did you take observation of her daughter;—I did; she seemed to be a very clean sort of a body, and of a black complexion.

What did you think them to be?—I took them to be travellers; I did not know whether they sold any thing for a livelihood; they offered me nothing, and I asked them for nothing; they paid for what they had.

Mr. Davy. Lucy must go out while George is examined. (She goes out of the court.)*

* See vol. 13, p. 348.

In Scotland, "Our custom" says Mr. Hume, (Commentaries respecting Trial for Crimes, chap. 13, vol. 2, p. 189) "is not content with reprobating all instructions given a witness how he himself shall depone, but deprives him even as far as possible of all opportunity of learning what the other witnesses have sworn, and aims at obliging him to give his evidence according to his own understanding of matters, and to so much only of the fact as he knows of his own proper knowledge. And herein our purpose is not only to obviate the risk of any combination among the witnesses to wrong the pannel by concerting a story with each other, but to prevent even that impression, which the account given by one witness may naturally make on the mind of another.

George Squires sworn.

Mr. Dwy. What relation is that old woman to you?—*G. Squires.* My own mother, and the young woman that is turned out is my sister Lucy.

Where were you on the Christmas before your mother was taken up?—Really I cannot tell you.

Were you ever in Devonshire?—I am not acquainted there; I was in Somersetshire in Queen-Cammeal.

Were you ever in South-Parrot?—I was.

Can you remember the time?—I came there on a Friday night.

What day of the month was it?—It was on

With this view, before proceeding to take the proof, all the witnesses on either part are shut up in an apartment by themselves, whence they are successively and separately called into court, to be examined; so that it is a good objection to any one, if he has been left at large, and has heard the testimony or part of the testimony of another, by which he may shape his own. This is our rule, not only as to the several witnesses considered in relation to their fellows on the same side, but to those on the other side also; since those for the pannel, having learned the state of the evidence against him, with its weak and strong parts, might otherwise be instructed how best to oppose and countermince it. Nay, which is a great deal stronger, and liable indeed to objections of no little weight, more especially, as it is of late years only that this degree of strictness has been introduced, witnesses have in more than one instance been set aside, because they had been precognosed even in presence of each other.

In the trial of John Lindsay, [January 31st, 1791,] thirteen exculpatory witnesses were rejected (for if the doctrine is good, it applies equally on either side,) because they had assembled at the desire of the agent for the pannel, and had the declarations taken down, and read over in presence of the whole of them. But I must observe, that here there was something more than mere accidental presence: it was the unauthorised and deliberate act of a party, calculated to bias and prepare his witnesses. In the trial, however, of Brown and Murray [July 13, 1791] for deforcement, the objection was sustained to John M^rFarlane, that he had been present at the taking of the precognition; which being the situation also of all the other witnesses, the prosecutor declined to call them, and, in consequence, the pannels were acquitted. This rule, supposing it to be fixed in such a manner as not to be altered, must, however, be received in a reasonable sense, and such as is consistent with the necessary course of business in taking precognitions. It does not therefore apply to the magistrate, who is officially present in taking the several examinations; and so it was settled in the trial of John Ker [Jan. 21, 1792] for fire-raising, where such an objection was stated to Thomas Chris-

the 20th of December; my mother and sister Lucy were there with me.

What makes you certain as to the time?—It was after New Christmas, that made me take an account of it.

At whose house were you?—I put up at the sign of the Red Lion, to the best of my knowledge; her name is Hopkins; I have been there since, we stayed there but one night.

From whence did you come to that place?—We came from it by Yeovil.

What was the last village you came from, when you came to South-Parrot?—I cannot recollect it.

Where did you lie the night before you came to South-Parrot?—I cannot tell the place's name.

tie, and James Hogg, the bailies of Dunbar. Those witnesses too, who are only called to authenticate the pannel's declaration, which is quite a separate proceeding, and posterior to the main fact related in the libel, seem not to be within the rule of this prohibition. To say the truth, there seems to be some reason for reconsidering this whole matter, before it is too late. Because it is a thing which naturally, and without any purpose of doing wrong, must so often happen, that in the first and most material steps of a precognition, such as the production of stolen goods, the identifying of a robber or the like, the persons who have recovered the goods, or seized the robber, or so forth, go before the nearest magistrate at one time, and tell their story to him together. And in this there seems to be nothing more dangerous, than in the circumstance of the witnesses conversing with each other on the subject of the future trial, a thing which always happens, and cannot be prevented. Besides in hearing each others declarations, they are not masters of each others testimonies on oath in the trial, which, as all who are versant in that sort of business know, are often materially different from the other. Moreover it seems to be unfit that it should be in the power of every ignorant justice of the peace, nay even of a designing witness, or a crafty agent, thus to sacrifice the public interest, and hinder the course of justice. At all events, even with respect to the evidence upon oath, the judge will not suffer the scrupulousness of our practice to be made a handle of, for the indulgence of spleen or ill humour on either part. In the trial of Fullerton [August 12, 1768] for assault and battery, a motion having been made to have all the witnesses removed, it was requested for the prosecutor, that John Spence his agent, should be allowed to remain, whom the pannel had cited, purely to deprive the prosecutor of his assistance: Spence not having been present on the occasion, and knowing nothing of the matter but by information from others; which upon enquiry, appearing to be true, an exception was made in his behalf."

See also chap. 2 of the same work; as to taking in precognitions the declaration of each witness separately.

How long had your mother, sister, and you been travelling together?—I came from home at Newington-Butts in Southwark, and I went from thence, as near as I can guess, about seven or eight weeks before Michaelmas.

Can't you recollect the place you lay at before you came to South-Parrot?—It was a pretty large village.

How many miles had you travelled that day?—We had travelled about seven or eight miles.

Where did you go the next day, that is the Saturday?—I went to Litton.

Is not there a town between South-Parrot and Litton?—There is Winyard's Gap.

How far is South-Parrot from Litton?—It is ten or twelve miles, to the best of my knowledge; I lay at Litton on the Saturday, and left my sister and mother there on the Sunday morning, and went to Abbotsbury.

What day of the month was the Sunday?—It was the 31st day of the month; my mother stayed there one night after me; Mr. Clarke had then a good regard for my sister Lucy; he was a sweetheart of her's, and she of his; I went to him at Abbotsbury, and lay at Gibbons's house one night; then in the morning, which was on a Monday the 1st of January, Clarke and I went to Litton; there we dined upon two fowls, which I bought: my mother was surprised at my staying all night at Abbotsbury, and she went in pretence to see what was the matter with me, thinking I was sick; there she heard I was gone with Clarke to Litton, and she came back again to Litton before we had dined.

How far is Litton from Abbotsbury?—It is three or four miles.

Who walked with your mother to Abbotsbury?—Nobody, that I know of; after dinner, my mother, sister, Clarke, and I walked to Abbotsbury, and we danced there that night in Mr. Gibbons's parlour; he keeps the sign of the Ship.

What company had you there?—There were a great many of my acquaintance; I can't call them all to mind; there was Mr. Wallace a shop-keeper, and Mr. Bond a school-master, he got fuddled that night; Mr. Wallace generally drinks cyder, he came in for a penny pot of cyder.

Who was your partner?—I danced with Gibbons's sister, and Mr. Clarke with my sister Lucy; I can't mention all the company, it is impossible; we danced country dances till about eleven or twelve at night; we danced several nights there after the first night.

Had you ever been at Abbotsbury before?—Yes, I had several times; and know several people in the town.

How long did you continue at Abbotsbury?—We came there on the 1st of January, and went away on the 9th.

Did your mother stay with you there all the time?—She did; and when we went away, Mr. Clarke went with us to a little village they called Portersham, about a mile or a

mile and a half from thence; this was on a Tuesday.

Do you remember one Andrew Wake, an exciseman, at Abbotsbury?—I do; he borrowed a great coat of me one day, in order to survey in it, being a very wet day.

What day was that?—I cannot take upon me to say that; it was one day while we were there.

What house did you go to at Portersham?—To the best of my knowledge, it was the Chequer, an alehouse; it is on the left hand going down the village; we lay there, Mr. Clarke lay with me, and we all went the next day to Ridgway, which was Wednesday the 10th, which is about five or six miles from Abbotsbury; we breakfasted there the next morning, and, to the best of my knowledge, went from thence about eight or nine o'clock.

At what house did you lie at Ridgway?—At the house of Mr. Bewley, the sign of the Ship; his son, and he, and a maid-servant, keep the house.

Did any thing happen remarkable at Ridgway while you was there?—There was a dead horse, and a man skinning him as we came by; and I left a piece of nankeen, about three yards and a quarter, for my reckoning with my landlord. I was afraid that silver would fall short; so I went to his bedside, and told him I was afraid money would fall short before I came home, and desired he would take that till I fetched it. My mother, sister, and I went from Ridgway to Dorchester on Thursday the 11th, which is about three miles distance; we did not lie there, but went forward almost all night; for we had received a letter from my sister Mary, who was at London, that she was extremely ill, and desired us to come home as soon as possible; there was a very great water out at Dorchester, and the miller's man carried my sister Lucy over it on horseback, behind him; for which I told him I'd give him a pint of beer; and I took my mother, and carried her on my back through the water; there is a mill just by the place; my sister stayed till we came to her, then we all three walked on together.

Where did you stop?—The next day we got to a place called Tawney-Down, and we went into a little ale-house on the road, and had some bread and cheese, and a pint of beer. We lay at a place called Chettle that night, which was the Friday.

How many miles is Chettle from Dorchester?—I cannot tell, because we went through Blandford.

What time did you get to Chettle on the Friday?—We got there in the evening; my mother was very weary, and I asked a shepherd on the Downs for an ale-house, and he said there was never a one to Chettle: on the Saturday we went from thence to Martin; there I asked at an ale-house for lodging, and could get none; so a gentleman let us lie in his barn.

Do you know his name?—I do not recollect it.

Was it farmer Thanes?—It was; we lay there; my mother and sister were with me, we never were a minute from each other all the time to London.

Where did you go when you went from Martin?—We went from thence to Coombe on the Sunday night, to the house of widow Greville; her son Thomas Greville is dead of the small-pox.

When did you leave Coombe?—We left that on the Monday, but I can't recollect where we lay.

Where did you lie on the 15th?—I cannot tell.—I went to Basingstoke on the Tuesday, I think.

Recollect again.—I cannot recollect it.

How many places did you lie at, or how many days were you in going from Coombe to Basingstoke?—I cannot tell.

What day of the week did you get to Basingstoke?—I cannot tell: we travelled about ten miles a day.

Where did you put up at Basingstoke?—At the Spread-Eagle; a widow woman keeps it; she wrote a letter for my sister Lucy to Mr. Clarke; Mr. Clarke and we had parted a long time, and he desired Lucy to send a letter to him.

Where did Clarke and you part?—We parted at Ridgway.

What is the landlady's name who wrote this letter?—I don't know her name; the letter was sent to the post-office at Dorchester, directed to Mr. William Clarke at Abbotsbury; we did not lie at the Spread-Eagle, we could not have lodging there; but she directed us about a mile or mile and half farther on our way to London.

What is the name of the place you lay at?—It is called Old Basing, it is a little out of the way.

Where did you go the next day?—We went, I believe, to Bagshot, and lay at the Greyhound there; and on the Saturday we went to Brentford, to the house of Mrs. Edwards; I lay there one night, and on Sunday I went to London to look after sister Mary; I stayed there one night, and the next day, which was on a Monday, I brought my sister Mary to Lucy and my mother at Brentford; we all stayed there till Tuesday.

What sign does Mrs. Edwards keep?—She keeps no sign, but there is the sign of the Drum just by it; there we were all four together; and to the best of my knowledge, we all left Brentford on the Tuesday, and went to the Seven Sisters by Tottenham, to the sign of the Two Brewers.

Is not there another name to that place?—I do not know; there is a green; they call it by some name, but I don't know it.

What day of the week was this?—It was on a Tuesday.

Where did you go the next day?—Then we went to Mrs. Wells's house; this was on a Wednesday.

How came you to go there?—I was recom-

mended to her house for lodging; they said she was a very civil woman: I never saw her in my life before this time, if I was to be racked to death. There is an acquaintance of mine that owed me seven pounds fifteen shillings in London, and I went there to stay till I could receive it, to Mrs. Wells's house: we went to a woman's house who sells pease-soup at Edmonton; we would have lodged there; but my mother wanted to wash, and the woman said that was not customary, so she recommended us farther, to a place called Cheshunt; upon that we went to Mrs. Wells's house, being recommended there by Mrs. Long's daughter; I left my mother and two sisters at Mrs. Wells's house, and went to London to receive my money about two or three days after we got there; I lay in London one night, and came back the next day, and we all remained there till we were taken up.

Describe particularly the rooms you lay in at Mrs. Wells's house.—The room my mother and two sisters lay in, is as you go by the kitchen door up a pair of stairs, and turn short on the right hand; it is a large room, with one bed in it, in which they all three lay; it is the handsomest room they have in the house.

What room was under that?—There is a parlour under it; I lay in a little room facing the stair-head.

Where did mother Wells lie?—She lay in a room on the left hand of mine, as you go up stairs.

Who lay in that room with her?—There was a daughter of hers, and Virtue Hall.

Do you remember any body else that lay in the house?—There was Fortune Natus and his wife lay in a place where there is a vast deal of hay.

What do you call that room?—It was a shuffle-board room, as they say; you go up two or three steps to it out of the kitchen; they had a bed made of hay on the right hand going up.

At the time you were at Enfield-Wash, how did you supply yourselves with provision?—I bought my own victuals myself; there is a little chandler's-shop over the way; the man's name is Larney; he is a bricklayer; they sell butter, tea and coffee, soap and candles; I went there several times for tea.

Where did you buy your butchers meat?—It was in herring time; we lived on fish, and did not buy meat there; there was an old man came to the door, Mrs. Wells bought fish of him, and so did I.

Did you see this young woman at the bar when you were there?—No, I did not; I never saw her before we were taken up in my life, if I was to be racked to death; I'll stand with a sword put to my heart, if ever I saw her till she came in the chaise; we came there on a Wednesday, and at the end of a week and a day my mother was taken up.

Cross-examined by Mr. Morton.

Mr. Morton. At setting out on your exami-

nation, you said you could not tell where you were at Christmas.—*G. Squires.* Not the new Christmas.

You said you were not at London before.—I mean, not before six or seven weeks before Michaelmas.

From what place did you set out?—I went down into Hampshire.

When did you set out on your journey, and where is your home?—We sat out from Newington to Somersetshire and Dorsetshire.

Where did you leave your sister Mary, when you set out?—She was with a particular acquaintance, with Mrs. Squires's brother-in-law; I left her in Kent; Mrs. Squires in the Borough has a brother, and his wife was very ill, and I left my sister Mary with her, in order to do what was in her power for her; they sell goods in the country, and travel about as we do.

At what house, or in what town did you leave her?—I had not a thought of being called to such questions as these.

I shall ask you a great many questions you have not heard yet: can you give me any answer, at what house, or what town you left your sister Mary?—It was in Kent.

Were your mother and sister with you when you parted with her?—We were all three together; I don't know at what town, or whose house; when I left my lodgings, I went into Kent, and happened to meet with them. I went into the wild of Kent.

Did you come back again then to Newington?—I went from Kent into Sussex.

Name a town there.—Lewes, Battel.

Did you go through either of them?—No, I did not.

Name the first great town that you went through in Kent.—I don't know which I went through first; I went through Lewes; I made the best of my way into the west.

After you left Lewes, what is the first town you came to that you did know?—Really I do not know; it is so long ago, I can't tell you.

You, without an almanack, have given a long and seeming fair account of a long journey, pray trace yourself down into Dorsetshire; I don't ask you the first town from Lewes, but the first town you do remember after you left Lewes.—[No answer.]

It was not South-Parrot, was it?—No, it is not possible I can tell you; I went from thence into Hampshire and Wiltshire; I went through Salisbury.

Is that the first town you can remember, after you left Lewes, you came at?—No, I went through several, but don't remember their names; I must have went through some: I hope you will excuse me, I hope you will not ask me any more.

Can you tell the name of any town you went through between Lewes and Salisbury?—No, I cannot.

Where did you go when you went from Salisbury?—I went to Hindon.

What county is that in?—That is in Wiltshire.

VOL. XIX.

Where did you go when you went from Hindon?—I went partly by Mear.

What was the next town when you left Mear?—Really, Sir, I hope you will excuse me, be pleased to excuse me; I cannot tell indeed; please to excuse me.

You gave so clear an evidence on that part of your return, that if you do not go on, it must be left to my lord who tries you: tell me where you went when you left Mear?—From Mear we went towards Shaftsbury.

Did you go to it?—I went partly by it.

Tell me some town you lay at.—[No answer.]

Did you lie at Lewes?—I did; I cannot tell the house; it was an ale-house, but I don't know the sign.

Tell us another town you lay at.—I know Mear very well; I lay there, but had never lain at that house before.

Where did you use to lie there?—[No answer.]

Did you lie at Shaftsbury?—I cannot tell whether I did or not.

Where were you going to in the west?—I sell goods.

What goods?—I had white waistcoats, and worked gowns, and hollands, and such things; and where my business led me, there I went.

What quantity of goods might you have when you went out of Kent?—I had not dealt largely, I believe I had then about twenty pounds worth of goods, consisting in aprons, worked gowns, nankeens, and such things.

How long were you before you came to South-Parrot?—I cannot tell: I never was at South-Parrot before the 29th of December; I went down with a gentleman once since.

Is Yeovil farther from London than South-Parrot?—No, Sir.

Did you go through that?—No, I came partly by it: but they said they had got the small-pox in the town, and I had never had it, so I did not come through it.

Were you at Crookberne?—No, I was not there at all.

Tell me a great town after you left Shaftsbury?—I went away from Shaftsbury to Abbebury.

Tell me the name of one town you lay at in Somersetshire?—I did not go very far in Somersetshire.

Name one town betwixt Yeovil and South-Parrot that you lay at.—I don't know a town betwixt them; there are several villages, but I can't tell the name of one.

Tell me the sign of an inn where you lay at beyond Shaftsbury, whether it was a fox, a goose, a dog, or a pair of compasses?—I don't know the sign of any place where I lay at, because it is so long ago.

You remember the other places very well?—That is because I have been there since.

Then you remember it by the last journey you took?—Yes, Sir, and by the other too.

Then you can't remember either a town, an alehouse, or a sign where you lay at, after you left Shaftsbury?—No, I cannot.

Z

Now we shall be a little better acquainted : we bring you now to South-Parrot ; you say you had travelled seven or eight weeks before Michaelmas, till the 29th of December?—But I did not travel all that time, I came home to my house at Newington before that.

Did you return home after you set out for Kent, and so into the west, before you got to South-Parrot?—Before the time of my coming home, I could not.

Let me understand you : did you return back to Newington before Christmas?—No, Sir, not till after Christmas.

Then from the time you set out, seven or eight weeks before Michaelmas, you were travelling about the country with your goods?—Yes, Sir.

Can you tell the exact time you set out from Newington-Butts?—It was harvest-time, or near it ; I can't tell whether it was in July or August.

Well, we are come to South-Parrot ; you say you came there the 29th of December ; you say you met with Mr. Clarke on a Sunday at Abbotsbury, and lay there that night, and set out with him on the Monday, and went to Litton, and your mother went after you to Abbotsbury : now I'll ask you this question, when your mother went after you there, did you meet her on the road?—No, I did not.

Then did your sister come with your mother there on the Monday morning?—No, she stayed in the house at Litton.

Then your mother walked on the Monday morning, December the 31st, from Litton to Abbotsbury by herself, and back again, and dined on two fowls, then went with you to Abbotsbury again?—Yes, Sir.

What time did she come back to Litton?—Betwixt two and three o'clock, and dined with us, and walked with us to Abbotsbury that night.

What time did you all set out from Litton to go to Abbotsbury?—We set out between three and four o'clock in the afternoon.

Was it dark?—It was quite dark.

Where did you buy the two fowls?—I bought them of one Mrs. Turner ; I made a cludation for the feathers, she said she would have the feathers.

You lived well ; I should think two fowls a very remarkable dinner for three gypsies.—Fowls are bought there for sixpence a-piece, it is cheaper than beef or mutton ; that I have very often.

I hope you always buy them?—I do.

Were they boiled or roasted?—They were both boiled ; I was not at home to see them boiled, but I eat part of them.

What day was it you lent the exciseman your coat?—I don't know the day.

How many of your goods might you have disposed of at that time?—I had disposed of them all, except a piece of check and two waistcoats.

Then you had taken a little money?—I had, and owed some, and returned it to London.

To whom?—To an acquaintance of mine, Mr. Norman ; he is since dead : he was a tide-waiter.

From what place did you return the money?—I cannot name the place.

Mr. Davy. I beg leave to ask one question I forgot ; what happened at Ridgway when you were there?—G. Squires. A young man that lives at Abbotsbury, who sells turnips, had two horses, and Mr. Clarke, after he had dined with us, designed to return home ; he knowing the man, desired him to come in ; we had got some beef-steaks ; this man dined with us, and Mr. Clarke rode on one of his horses home ; he is here.

Mr. Morton. Tell me his name.—G. Squires. I don't know his name.

Is that the house you left a piece of nankeen at?—Yes, Sir.

Do you call nankeen 'check'?—No, Sir.

When you left this piece of nankeen in pawn, because you were afraid you should want money, pray how much money had you then?—I had borrowed some of Mr. Clarke, and had some of my own.

Tell us this one thing, that as Mr. Clarke was so much your friend, and your sister's friend, why did he not pay your reckoning, and save your nankeen, that you might make your money of it?—He offered it, but I was so kind I would not let him.

What money did you borrow of Clarke?—I borrowed 6s. of him.

Have you had your nankeen since?—No, he has got it in custody since.

What was your reckoning?—It was about 3s. 6d.

What is nankeen worth a yard?—It is worth, or I generally sell it for, 2s. a yard.

Where did you receive the news of your sister Mary's illness?—It was in the country, I can't tell the town where.

How did you receive the account of it?—It came by the post ; sure it must.

Upon your oath, did you leave any directions with her to write to you in the country?—Yes, and I had a letter she was ill ; I had it first by a letter.

Can your sister Mary write?—No, she cannot.

Was the letter directed to you or your mother? Was it after you left Abbotsbury you received the letter?—I cannot say that.

Then, if you received it before you came there, or at the place, it is strange you should stay dancing there!—I will not swear I received it before we came there, or not.

You say, at Dorchester the miller carried your sister over the water on horseback, how did you and your mother get over?—I asked him to carry my mother over ; he said he could not stay.

Did he come back again by you, or go on?—No, he went another way.

How far, after you set out from Ridgway, where the dead horse was, might you walk

with that old woman, that day and night after you had received an account of your sister Mary's illness?—She got no farther than Chettle.

How far is Ridgway from Dorchester?—It is about three or four miles.

How far is it from Chettle to Blandford?—I can't tell how many miles.

What did you lie upon in that barn you mentioned?—We all three lay upon straw; we don't carry sheets or blankets with us; we all sat up in our clothes.

Whereabouts does Chettle lie?—It is on the left hand, and Martin on the right.

Which were you at first?—At Chettle, and then to Martin, and from thence to Coombe.

Is not Martin in the direct road from Chettle to London?—No, it is not; it is the bottom way; we came there because it was night.

How long did you stay at that house where the letter was wrote?—About an hour and half; we came there about three o'clock, to the best of my knowledge.

Where did you go to find your sister Mary?—To a relation's of mine, who belongs to the customs, named Samuel Squires; he lives down in White Hart-yard.

Did she ask you whether you had received a letter from her or not?—I told her I had.

Did you tell her where you received it?—No.

Which way did you go from Brentford to Tottenham-High-Cross?—I went through the city, along by Covent-Garden.

Did you go to your house at Newington?—No.

Nor your sister nor mother?—No.

On which side the park-wall did you come from Kensington?—Through Knightsbridge, and all along the great road.

Do you know this town of London?—I can find my way in any part of the city, but I am not acquainted with the streets names.

Did you go through the city?—I went clear quite through the city.

Which way did you go out of town to Tottenham?—By Shoreditch.

Had you, or had you not, a lodging at Newington at that time?—Yes, I had; and my household goods were there at the time.

Then how came you to go through London, and not to your lodgings?—Because I owed a sum of money, and was afraid of being arrested, and wanted to see Mr. Squires, who lived in the neighbourhood, to make it up for me.

What day of the week did you pass through London?—I left Mrs. Edwards's house of a Wednesday, and the same day I came through London.

Where did you meet the person that recommended you to this house of Wells's?—Before I came to Enfield; the woman's name is Long.

How many beds are there in the room at Wells's where your mother lay?—There is but one bed.

If you ever did go this journey, be positive with yourself, whether it was in the year 1752.

—Yes, Sir; I am sure it was then, and not at any other time.

Did your mother and sister help you in your trading?—My mother buys old clothes and silver lace.

Who bought these goods of yours?—I did myself.

Did your mother and sister know of your trading?—They did.

Did they know what quantity of goods you had?—I don't know whether they did or not.

Mr. *Davy*. We will not call Lucy the sister; she is rather more stupid than her brother, and has not been on that road since their coming to Enfield-Wash; and so can give but a very imperfect account either of times or places. But we will call Mr. Willis, who went with George Squires about the country since the commencement of this prosecution, in order to ascertain the particular places where Mary Squires and her family have travelled through; and Mr. Willis will assign the reason of this man's remembering the times and places of their return from the west with such exactness, when he can recollect so little of the journey of going down.

Robert Willis sworn.

Willis. I set out some time in last June from Dorchester.

Mr. *Nares*. Whether this gentleman is called to prove any thing else than what Squires has related to him? and what he has heard from others since the fact? I object to his evidence.

Mr. *Gascoyne*. Mr. Willis went into the country with George Squires, in order to ascertain the places, he being a person of reputation, at houses where these three people lodged, and has found them to be facts.

Mr. *Morton*. You have shewn there was a person with them in court, (that is Lucy) and you refuse calling her, and now call this man to give an evidence of hearsay only, after a person has been examined an hour and half, and told you of a person within your lordship's power to call, who he says has been with him all the journey: will your lordship suffer a third person, that can only tell what this or that man told him upon his making enquiry? We are willing to risk the issue of this trial singly upon the evidence of George and Lucy, examined separately.

Mr. *Baron Legge*. If they don't call the sister, you'll make what observations you please upon it. That evidence has said upon his oath, that his sister went this whole journey with him; and in order to confirm that what he said was truth, they will not call her, but this attorney.

Mr. *Just. Clive*. This is but hearsay evidence, and that is not evidence; but if you go to discredit this man, surely they may produce evidence to shew the conformity of his evidence, that he was always in one story.

Mr. *Nares*. This must be proved by a person that was present at the fact; if the case was otherwise, I could call a hundred witnesses in order to confirm my own evidence.

Mr. Baron *Leggo*. The several people, that lived at the houses where he says he called, are the evidences to call to prove that.

Mr. *Morton*. Here is a man goes and tells his case to his attorney, and he comes here as a witness. (Refused.)

George and Lucy Squires were again placed by their mother in the court.

John Fry sworn.

Fry. I live at a place called Litton, in Dorsetshire; I am a tiler and plaisterer; I came to town on Wednesday last.

Mr. *Willis*. Do you know the old woman that sits there? (meaning Mary Squires.)—I have seen the old gypsy several times; I remember seeing her on the 30th of December 1752, at Litton: it was on a Saturday, at the house of James Hawkins; I was at work there at the same time.

Pray how can you remember the particular time?—Because it was in the new Christmas time, and the Monday following was the New-year's day; this is the very old woman.

Look at the man and woman with her.—They are the two persons that were with her on that Saturday evening.

Were you in company with them?—I was not at all, but I saw them by the kitchen fire.

How can you be certain these are the people?—I have known the old woman thirty years; she has been in that part many times; I have seen her face often before.

[Cross-examined.]

Mr. *Nares*. Is this Mr. Hawkins living?—

Fry. He is, and is now here.

Francis Gladman sworn.

Mr. *Gascoyne*. Do you know Mary Squires?—*Gladman*. Yes, Sir; that is the woman. (Pointing to her.)

Do you know these two people that stand by her?—I do, they are her son and daughter; I keep a house at Litton, and am a gardener; I remember seeing these people there on Monday the 1st of January 1753, in the house of James Hawkins; there is no sign, it used to be the Three Horse-shoes; I slaved George the Sunday, being the day before, at my house.

Had you ever seen the old woman before?—To the best of my knowledge, I never did; but I am positive sure to them.

What is the reason you know it to be the 1st of January?—The reason is, we generally ring-in the new year; I went to ring a peal, and the people of the parish gave us some liquor, that is, some ale and some cyder, to drink; we concluded to go to the ale house with our jug of cyder, that was given us, to have something put into it; we went to Hawkins's; the old woman sat there; I sat down close by her, and asked her, if she could tell fortunes? she said, No, she was no fortune-teller: I asked her, if she could talk Spanish? and said, I thought I had seen her abroad somewhere or

other; she said, she could not: I asked her, if she could talk Portuguese? she said, No: I said, Nor French? she said, No: Nor Dutch? No: she said she knew what I said, but could not answer me. Upon this an old gentleman said, You must cant to her, talk gypsey to her, and she'll answer you. Then I said, You are one of the family of the scamps; she said, No, I am no scamp; and a young man in the room said her name was Squires.

[Cross-examined.]

Mr. *Williams*. Did she sell any thing?—

Gladman. She did not appear to me to sell any thing.

James Angel sworn.

Mr. *Davy*. Did you ever see that old woman before?—*Angel*. I have seen her a great many times.

Did you ever see her at Litton?—I saw her there on the last day of the year 1752, at James Hawkins's apartment, a public house; and I believe there was Miss Lucy with her.

Did you ever see the young man?—No, I did not see him there.

By what circumstance do you remember the particular time?—Because it is a usual thing for us to ring-in the new year; we rang a peal, and in the morning concluded to go to a public house to drink together; there we saw the old woman sitting smoking her pipe; I was there two hours, and then I was called away to go a fox-hunting.

Did you ever see her before that time?—No, but I have several times since, and am well satisfied it is the same woman.

What is your business?—I am a stay-maker.

Cross-examined by Mr. *Morton*.

What time of the last of December did you see her?—It was after the evening prayer on a Sunday; she was not in the kitchen, but in a new apartment, which was not made a public house of then, but is now.

What time did you ring-in the morning?—It was just about day-break.

How long might you stay at Hawkins's?—I believe near two hours; she was there all the time, and I left her there when I went away.

What time was it you went to go a-hunting?—I believe betwixt nine and ten o'clock, I am not certain to the very time.

How long did you stay a fox-hunting?—Till almost night; I believe it might be three o'clock.

Did you go to Hawkins's in the evening?—I did, but then they were not there.

Do you know Clarke? Did you see him there that evening?—I know him, but I did not see him there.

Do you imagine, that betwixt ten and two, or half an hour after, the old woman could walk from Litton to Abbotsbury and back again, and after that walk again to Abbotsbury?—I think she might; she must make very good speed.

How many miles are they from each other?
---It is three little miles we call it.

James Hawkins sworn.

Hawkins. I keep an ale-house at Litton.

Mr. Willes. Do you know that old woman there?—*Hawkins.* Yes, she passes by the name of Mary Squires; I remember seeing her at our house on the 30th of December 1752, being on a Saturday.

Do you know that young man and woman?—Yes, they are George and Lucy, her son and daughter; they were all three of them at my house at that time together; it was just at the turning of the date; they lay there on the Saturday and Sunday nights, and went away on the Monday about two in the afternoon.

What time did they get to your house on the Saturday?—About two in the afternoon; George went to Abbotsbury on the Monday, the 1st of January, and one Clarke came with him.

Where was the old woman that Monday morning?—She was at our house; she eat a fowl in a little new chamber.

Did she not leave your house before they all went away?—I don't remember she did; they were by themselves; that chamber is not in the house; they eat fowls for their dinner.

Who were the fowls bought of?—They were bought of one Dance Turner, in our parish.

Were they boiled or roasted?—They were boiled, I believe; we don't eat roast meat in the country but very little.

What time did they leave your house?—They went away, I believe, about two in the afternoon.

Were George Squires and Clarke at dinner with the others?—I am certain they were; in my opinion the old woman went to look for George out into the fields, somewhere or another; she did not tarry long.

How long?—About an hour; but I went but seldom into the room where they were.

Do you remember Angel's being at your house at the time?—I do; they had been a-ringing; and the minister's kinsman went a fox hunting that day, and gave the people some money.

How do you know it was the 31st of December?—By reason I made a fire in that little chamber on the Monday morning, when the people were ringing, where no fire had been made before.

Cross-examined by Mr. Nares.

Was Angel in the new room or the common kitchen?—In both of them.

Did Mary Squires smoke in the kitchen or the other room?—I believe she might smoke in both rooms.

Where did she smoke on Monday morning?—I believe it was in the old house.

Mr. Dary. If you design to impeach these people's characters, here is the minister we can call to confirm them.

Mr. Morton. We have nothing to say against their characters.

William Clarke sworn.*

Clarke. I live at Abbotsbury, and know the old woman, Lucy and Polly; I remember George coming to my house at Abbotsbury the day before New Year's day, in the forenoon, last December was twelve months; he and I went to Litton together on the Monday morning; I was a sweetheart of Lucy's; we got there some time in the afternoon, and met with Lucy about three or four o'clock; I know it was some time before it was dark.

Mr. Gascoyne. Was the old woman there?—*Clarke.* She was not when we came there, for she had come to make enquiry where George was, because he did not return on the Sunday night; the old woman came there about half an hour after us, and George, she, Lucy and I went to Abbotsbury that night, and we danced at Gibbons's house.

Do you remember any thing of a couple of fowls?—We eat something there; I took part of a fowl.

Was it roast or boiled?—It was boiled fowl, to the best of my remembrance.

Then if you stayed to dine, what time did you set out for Abbotsbury?—We set out late, after dark.

Who was your partner?—Lucy was my partner.

Can you tell who was George Squires's partner?—I cannot tell you indeed; Melchisedech Arnold played on the music, that I am sure of.

How many days did they stay at Abbotsbury?—They stopped there from the 1st to the 9th, all three of them.

Did you see them often in that time?—I was in their company every day the time they were there, and saw Lucy some part of her journey; I went as far as Portersham.

At whose house did you lodge at Portersham?—We lodged at Sias Frampton's house, that is a mile from Abbotsbury; I saw her three miles farther, and parted with them at Ridgway-Foot; I supped with them there at Francis Bewley's, and then returned to my own house.

Did any body borrow money of you at Ridgway?—Yes, George borrowed 6s. of me.

What had you for supper there?—We had beef-steaks.

Upon what terms did Lucy and you part, upon good terms?—We were upon civil terms; I never saw any thing by her but civil terms; she is as honest a girl as any in the world for what I know.

When she and you parted, did you give her directions to write to you?—I did.

Did she give any directions to you?—She did.

* See Proceedings against him for Perjury upon the Trial of Squires and Wells, ante, p. 275.

Did you give directions only, or desire her to write to you?—I desired her to write to me as soon as possible; after that I received a letter from Bristol at Esham in the Vale.

How long after your parting with them was it you received this letter from Bristol?—It was not half a year after; I had it brought to Abbotsbury; it was directed to me, but who wrote it I cannot tell.

Cross-examined by Mr. Williams.

What countryman are you?—I was bred and born at Abbotsbury.

How long have you been acquainted with these people?—Four years last March; the first time that ever I saw them was at the Old Ship at Gibbons's; the second time I saw them was the last of December 1752, when George came from Litton to me, and I went there back with him.

What time of the day was it when you came to Litton?—Some time in the afternoon; I can't say to an hour or two; it might be three o'clock.

How long were you walking from Litton to Abbotsbury?—We were two hours walking it; it is three miles.

What time did Mary Squires come in after you were at Litton?—She might come in in half an hour, and that might be between three and four o'clock; we took part of a fowl there.

What, amongst you all?—Yes, amongst us all.

Was it boiled or roasted?—To the best of my remembrance, it was boiled.

Who paid the reckoning?—I don't know indeed, I did not pay a farthing.

Is it but three miles from Litton to Abbotsbury?—It is three computed miles, but it is four post miles.

Can you walk as fast as Mary Squires?—I can, and a great deal faster.

Could she do it in less than four hours?—No, I don't think she could, because she is an elderly woman; that is, walking thither and back again.

When you parted at Ridgway-Foot, did George Squires tell you whether he had money, or no money?—He did not tell me whether he had or not.

Who paid all the money from the 1st to the 9th, where you drank?—George paid it, I believe; I don't know but he did; whether he paid it or not, he had six shillings of me.

Did he sell any goods do you know to any body?—Yes, he sold an apron to the landlady at the Old Ship, and another to the servant.

Did he ask you to lend him any thing?—Yes, he did.

Did you know of his pledging that piece of goods at Ridgway for the reckoning?—I did not till afterwards.

Did you offer to pay half there?—No, I did not; George would not let me.

Did you lend him this money before or after he pawned the nankeen?—It was before.

How came he to pawn it?—I cannot tell that.

How long were you at Ridgway?—I might be there two hours.

What time did you set out for Abbotsbury?—I set out about four o'clock in the afternoon, and lodged at Portersham going back.

Mr. Davy. When you came to Litton, had Lucy and Mary Squires sat down to dinner?—

Clarke. No, Sir.

Did you see the dish when first served up?—I eat part of what was meddled with.

Had they been eating before you came there?—I don't know whether they had eat any thing or not.

Did you lie with George Squires at Ridgway?—No.

Do you know any thing of the circumstance of the piece of nankeen?—No, Sir.

Do you know any thing about a dead horse?—There was a dead horse lay in the highway at Ridgway as I went by.

John Gibbons* sworn.

Gibbons. I keep the Old Ship at Abbotsbury; I know Mary Squires, and the young man and woman; they are son and daughter to the good woman.

Mr. Willes. When did you see them at your house?—Gibbons. They were at my house on Monday the 1st of January 1753; they came there in the darkish of the evening.

Had you any merriment at your house that night?—Yes, Sir, dancing; George danced with a sister of mine named Mary Gibbons, and Lucy danced with William Clarke; the old woman was in the house at the time.

How long did they stay at your house?—They stayed from the 1st to the 9th, then they went away.

Did they stay in your house all that time?—The old woman did, I saw her every day there, and so I did George and Lucy; I am sure of this, upon my oath; I knew Mary Squires almost three years before, and knew her when she came into my house.

When they went away, where did they tell you they were going?—They told me they were going to Portersham; Clarke went with them.

Do you remember an exciseman coming to your house to officiate for another that was sick?—I do, his name is Andrew Wake; he lay in the same room with George Squires, and they were very familiar together.

Do you remember the exciseman borrowing George's great coat?—I believe he did one night as he was walking his rounds.

Was it as he was walking his rounds, or to walk his rounds?—It was to walk his rounds.

How do you know that?—I heard him tell it.

* See Proceedings against him for Perjury upon the Trial of Squires and Wells ante, p. 375.

Cross-examination by Mr. Morton.

You were examined when Mary Squires was tried at this bar?—I was.

I will only ask you, whether you gave an account of seeing them dance, as you have now?—I don't know that it was asked me.

Was it not material to say, we had music, and they danced at our house at that time? Did you swear that then?—I can't say whether I might or not.

When did you first recollect it?—On the 1st of February.

Then why did you not swear it then, and give my lord and the jury an account of it?—I don't know, I was not asked it then.

Did you give an account of the exciseman lying in the same room with George?—No; but I then told the Court the exciseman was there at my house.

Was the exciseman here then?—No.

Andrew Wake sworn.

Wake. I was an exciseman about nine months ago, and am now in the foot guards; I was ordered to Abbotsbury to officiate for one Mr. Ward, who was ill, by order of the supervisor, from Dorchester; on the 31st of December 1752, I got there, I went to the Ship at Gibbons's; [He takes a Book in his hand, and looks in it] this is my writing, these are our entries, it is the journal.

Mr. Gascoyne. Look at the old woman sitting there, do you know her?—*Wake.* I do, it is Mary Squires; I saw her at Abbotsbury, at Gibbons's house, at that time, the 31st of December 1752.

Do you know that young man?—I do; he passed for George Squires; he lay in the same room with me.

Do you know that young woman by him?—I do, it is Lucy; they both went for son and daughter of Mary Squires; I saw George first there; he was sitting by the kitchen fire, and one Clarke, a shoemaker of that place, with him; this was on Sunday night: I am not positive to the first day I saw Mary Squires, because I was obliged to be out early in the mornings; but I think I first saw her on the Wednesday, and Lucy with her, by the kitchen fire.

How long did you remain in that town?—From the 31st of December to the 14th of January; Gibbons's house was my house all that time; I remember they went away two or three days before I did.

Can you remember the day they went away?—Upon my word I do not.

Do you know this by your memory, or by your books?—By my memory.

Did George Squires lie in the same room you did every night?—I don't remember but he did: the mother and Lucy lay in a room where there were two beds, which we went through to go to bed; it was up one pair of stairs; I saw them in bed.

Do you remember any dancing there?—I do; I was in the room with them one evening;

George danced with a young woman of Abbotsbury, Clarke danced there, and Lucy danced there.

What sort of weather was it while you were there?—There was a good deal of snow: I remember I borrowed a great coat of George Squires to go my rounds in, because I had been out in my own, and it was wet.

Who played the music?—A blacksmith, named Melchisedech Arnold, played on a fiddle; he sold cyder; I surveyed his house; I remember I had been taken ill coming my rounds, and was sitting by the fire-side, and the old gentlewoman prescribed something to cure me, she got me something hot; the next morning, or the morning after, she made me a buttered toast before I went out.

You had a book in your hand; is every day's gauge in that?—I believe they are; we return these books to the Excise-office; this book was sent for out of the country on purpose when I was examined; I had left them with John Ward at Abbotsbury, when I went from thence to Dorchester again.

What time was it you heard of this affair about the trial of the old woman?—I saw it in a news-paper, that one Mary Squires, a gypsy-woman, was taken up for a robbery.

Did it mention the time?—I cannot remember whether it did or not; but I believe I told my mother, that that could not be the woman, because I saw her at Abbotsbury when I was officiating for Mr. Ward; I was sent to Lewes in Sussex, and had an order by my supervisor, from the commissioners, to come up and attend my lord-mayor; but I did not know upon what account; I came up and gave the same evidence before his lordship, as I do now, after he had sent me to Newgate to see Mary Squires, whom I knew very well by many circumstances, and she knew me.

How came you to be out of the excise?—I was discharged, and so went into the guards.

For what were you discharged?—For stamping.

How could you see the people in bed when you went through the room?—Because there were no curtains to their beds.

Cross-examined by Mr. Williams.

Tell us what year this was.—This is the book we had from the office at that time; they are marked at the excise-office before they come.

Look in it, and shew me the first entry you made there.—It was on the first of January; it is my hand-writing from that to the 14th of January.

Was it in the year 1752 or 1753?—There is no year to it, only the days of the month.

What year was this 1st of January in?—I believe it was the year 53; the mark 52 is done by the supervisor on the 1st page, before we have them.

Had you ever seen Mary Squires before that time?—No, Sir, nor since, till I saw her in Newgate.

Did you dance there?—No, I did not at all.
Can you tell whom Clarke danced with?—Clarke danced with Lucy, to the best of my knowledge.

Did Mary Squires recollect you, or you her first, before you told her upon what account you came to see her?—I said nothing at all to her, only asked her if she knew me; she said, Yes, that I was the young man belonging to the excise-office; and said she remembered me very well, that I borrowed her son's great coat.

Did she seem to be under any hesitation at that time?—No, she seemed rather over-joyed; she knew me through the grate as she was in the press-yard.

Had you the same clothes on then, as you wore in Dorsetshire, when you saw her there?—Yes, I had the same coat on, a sort of a pepper-and-salt coat; I went there before I went to my lord-mayor.

Had you sent her any notice you were coming there?—No, I had not.

Explain what you mean by stamping.—That is neglect of duty, writing at home instead of going abroad.

Did not you say my lord-mayor sent you to see her in Newgate?—My lord asked me, if I had seen her? I said, I had: he asked me, if I was positive to the woman? I said, I was: he said, If you are not, go again; so I went and talked with her again.

Mr. Davy. Were you not positive, made you go again?—Wake. I was positive then.

Mr. Williams. Did my lord-mayor examine you before he had the excise-books?—Wake. I don't know that.

Francis Aldborough sworn.

Aldborough. I am assistant to the general examiner at the excise-office; these books are called the 5th and 6th round for the year 1752, ending at Midsummer 1753; they are sent from the office once in a quarter of a year, by order of the board; these are for Abbotsbury division: they are returned to the office by the supervisor; these contain an account of what was done in Abbotsbury from the 21st of December 1752, to the 15th of March following, 1753; there is an order of board for every officer that officiates in the place of one that is sick.

Mr. Gascayne. Look in the book: do you know whose hand-writing it is?

Aldborough. I don't know Wake's hand-writing; here is noted in this book January 1 to 13, Andrew Wake officiated for the proper officer, he being indisposed; the book says John Ward is the proper officer.

[Cross-examined.]

Mr. Marton. At what time are these books returned to the office?—*Aldborough.* There is no certain time for that; there is an order for them to be sent in six weeks after they are done with; some may be kept three months, some more, some less; but we look upon him to be

the more industrious officer that sends them up in proper time: I was informed these came up according to express, and they were put in my possession.

George Clements sworn.

Clements. I live at Abbotsbury.

Mr. Davy. Do you know that old woman there? look at her face.—*Clements.* I have looked at her face many years ago.

Do you remember her daughter?—What, Lucy? Yes, Sir, and her brother too; he is my name-sake.

When did you see them in your country?—I saw them all three on the 1st of January; I went into the public house the Old Ship; there the old woman's son and daughter danced with our Abbotsbury people; it was about nine at night.

Who was Lucy's partner?—William Clarke.

Did they stay at Abbotsbury?—They did; they lodged at Gibbons's; I drank with them the first and second mornings, and dined with them the Sunday following; I saw them on the Monday, and on the Tuesday, the day they set out from thence.

Who set out with them?—William Clarke; he and Lucy went together.

I hope they are married by this time.—The Lord knows, I don't know that.

Cross-examined by Mr. Nares.

How often have you seen this old acquaintance of yours, Mary Squires?—About fifteen or sixteen times in that place, but justly I cannot tell.

How often have you seen George?—I cannot tell; I have seen him more than once, Twice?—More.

Three times?—Three times.

Four times?—I cannot tell.

Then you will not say you have seen him more than three times?—It may be more, I will not say.

When George was not with the old woman, who came with her?—Her daughters, Polly and Lucy.

How often have you seen Polly and Lucy?—I cannot tell.

Have you seen them oftener than you have George?—I cannot tell.

How long is it since you saw the old woman at Abbotsbury, before this time you are speaking of?—I believe it is four years since.

Was George with her that time?—Yes, Sir.

Melchisedech Arnold sworn.

Arnold. I am a blacksmith, and live at Abbotsbury; I know the old woman perfectly well, and the girl on the left hand, and the man behind her; they are her son and daughter; the last time I saw them all three, was in January last was twelve-month; I saw them on an evening at the Old Ship at Abbotsbury.

Mr. Willes. Do you mean Old Style or New?—*Arnold.* I mean this present calculated

time; I remember it was on the 1st of January at night; the young man and young woman danced, and I played on the violin.

Do you know who was Lucy's partner?—Her partner was William Clarke, and George Squires's partner was Mary Gibbons; they might give over dancing at eleven or twelve at night.

Did you see them afterwards?—I be not positive I saw them the next day, but I saw them several times that week there; I saw them on the Saturday night in particular, that week, they were dancing again, and the old woman sat in the dancing-room; she was in the kitchen on the Monday night, sitting by the fire-side; I also saw them the next Monday, being the 8th; they were then in Gibbons's house; I heard they went away the Tuesday, being the next day.

Cross-examined by Mr. Williams.

Had you any knowledge of them before this time you talk of?—I don't remember any perfect knowledge I had of them; but I have heard say they were there three years before, but I don't remember I ever saw them before.

What business do they follow?—I don't know that, for I never dealt with them.

Where did you see them these times you mention?—They were at the Ship, and I don't know that I saw them at any other house.

John Ford sworn.

Ford. I live at Abbotsbury, I am a carpenter.

Mr. Davy. Did you ever see that old woman before? (Pointing to Mary Squires.)—

Ford. I have seen her many times before at Abbotsbury; I saw her a matter of four years ago, and I saw her on the 1st of January, a twelvemonth ago last January, being of a Monday; I shook hands with her, drank with her son, and kissed her daughter; the daughter, son, and she came all together to the excise-office in our town (there they lodged); John Gibbons keeps the house; he is a nephew of mine; I drank with George, or else I am not here now.

Did you see them often?—I saw them at Gibbons's house from the 1st to the 9th every day; they bought the bread they eat of me; I am as sure I saw them there, as I am that I am here this minute.

Who bought the bread?—Mary Squires did, or her son, or daughter.

How came you, that are a carpenter, to sell bread?—I keep a shop, and sell bread and several other things.

Have you any particular reason for remembering the day?—I have, it being the 1st of January; and Mr. Bond, a school-master in our town, gives his scholars a holiday at New-year's time; he was there on the Sunday evening, and gave them liberty; I was with him, and Mr. Wallace, and George Squires.

VOL. XIX.

Cross-examined by Mr. Morton.

Where did they come from then?—They came from a place called Litton.

How early on the Monday did you see them there?—It was some time about one, two, or three o'clock; I am sure it was some time in the afternoon; I know it was not night, because I was looking over the hatch, and saw George coming down the street, and spoke to him.

How far might you see George, before he came to speak to you?—I saw him, perhaps, fifty yards; I could see a hundred, and I believe I could see a thousand yards.

What hour do you take it to be?—I am sure it was not come to three o'clock; upon my life I kissed Lucy before three o'clock.

You have given a very particular reason for knowing it to be the 1st of January, that is, that Mr. Bond had given his scholars a play-day; then does he only give them a play-day on the 1st of January?—No, not in particular.

Does not he let them break up at Christmas?—No, he does not let them break up all the Christmas; they had several days at this time, that is the reason I know the day.

Mr. Davy. You say the first time you saw them was on Monday the 1st of January; pray what time of the day was it?—Ford. I went to the ale-house between one and two o'clock for a mug of beer.

Mr. Davy. How many pots of beer have you drunk to-day? Do you take upon you to say you saw them on the Monday about two or three in the afternoon?—Ford. I did.

Mr. Davy. You are drunk now, and ought to be ashamed of yourself.

Daniel Wallace sworn.

Wallace. I live at Abbotsbury, and am a mercer: I have seen these three people before, and remember them all very well: I saw them there the 7th of January, which was on a Sunday.

Mr. Willes. Had you seen the son and daughter before?—Wallace. I had several times before.

When did you see the son and daughter first?—It was three or four years before; I saw them that time almost every day.

Had you seen either of them that week, before Sunday the 7th, at Abbotsbury?—I saw George almost every day; he bought sugar of me; and I saw Lucy twice that week, but did not see the mother till the 7th, and did not see them after that day.

Had you ever seen the mother before, so as to be certain of knowing her?—I had, and that is the real woman.

Cross-examined by Mr. Williams.

When did you first see them that week?—I saw George the day he came to town; I believe he came into town the Sunday before.

What day of the month was it when you first

saw George?—I saw him on the first day he came into town, about six in the evening.

Did you see him on the Monday the 1st of January?—I saw none of them on the Monday; I believe I saw George on Tuesday, Wednesday, Thursday, and Friday; I have seen the old woman several years ago, and have conversed with her a great many times.

What did they come there for?—That I don't know; they have at different times sold things.

Mr. Recorder. What do you know the particular day by, on which you saw the old woman?

Wallace. I had bought a new jack, and had a shoulder of mutton roasted for dinner on the Sunday; and the old woman was peeling potatoes, and asked me to dine with her; and I said, I had something particular to dine on.

Hugh Bond sworn.

Bond. I am a school-master at Abbotsbury; I saw this old woman there on the 8th and 9th of January 1753, and George and Lucy along with her; this was on a Monday and Tuesday, at the sign of the Old Ship: I had been down in Devonshire, and came home about six or seven at night: I lodged at the Old Ship, and had never seen the old woman before; they went away on the morning of the 9th about nine o'clock; this old woman is the very same person; whoever sees her once, can never mistake her again: I saw George again the same night; then Clarke and he came back again from Portersham.

Mr. Gascoyne. Had you any conversation with her?

Bond. No; but I had with George, and one Mr. Wake, an exciseman, that officiated in the room of Mr. Ward, who was then sick; for when I came home, my landlady begged I would not be offended at her putting somebody in my bed; that was this exciseman; there are two beds in the room, and in the other George Squires lay.

When did you go down into Devonshire?—I went on the 31st of December, and came back on Monday the 8th of January.

As you are a school-master, you must know the time of your going out?—My wife was in Devonshire; I went to see her; she was sick, and is since dead.

Cross-examined by Mr. Morton.

What time did you see this old woman on the 8th?—It was after candles were lighted; after I had shifted myself, I came and sat down by the fire, with George Squires and Mr. Wake; I had never seen George before; I asked my landlady, who he was? she said, his name was Squires, and that his mother and sister were in another room; after which the old woman came out to call her son to go to bed.

What time did they go away the next day?—I don't know what time; but when the girl came to call me from the school to breakfast, they were then in the kitchen.

How far is Portersham from Abbotsbury?—It is about a mile distance.

Are you sure you saw George, after he came back again from Portersham?—I am; he came back again in the evening, and drank a mug of beer at my door, after school-time, with William Clarke, in the street.

What might it be o'clock?—It might be five o'clock; I saw no more of him; George said he would not stay any longer, for he must go to Portersham; I did not go out, but went to bed afterwards.

John Bailey sworn.

Bailey. I live at Abbotsbury, and am a carpenter.

Mr. Dary. Look at that old woman; do you know her?—Bailey. I do; the man and woman behind her are George and Lucy: I saw them at Abbotsbury on the 1st of January 1753, at the Old Ship, the excise office; and I saw them all three there the Monday and Tuesday, which was a week after. My yard joins to the Old Ship; I saw them most days of that time; I shaved George twice, the time he was there, on the Wednesday and Monday after; I practise the trade of a barber as well as a carpenter.

How long have you known the old woman?—I have known her ten or fifteen years, and am sure I am not mistaken.

How long have you known the son and daughter?—Not so long; I have known them above three years; that is, from the last time they came there before this 1st of January I mentioned.

By what circumstance do you recollect it to be the 1st of January?—I had a brother that used the sea, and he went away that very day for Bristol; I am certain that was the very day: he left something of a will for me to enjoy, if he died; and he has since returned, and taken the paper from me.

[Cross-examined.]

Mr. Morton. What time did you see them at Abbotsbury on the 1st of January?

Bailey. It was in the evening, betwixt eight and nine o'clock, by the kitchen fire.

Mr. Dury. Do you remember the dancing there?

Bailey. I cannot say I do, for I went home to bed.

Thomas Anson sworn.

Anson. I live at Abbotsbury, and am a labouring man; I know that old woman very well, and her son and daughter, as she calls them.

Mr. Willes. Did you ever see them at Abbotsbury, and when?—Anson. I saw them on old Christmas-Day there, being on a Friday, the 5th, at John Gibbons's house; they were all three together; I had seen them a day or two before that.

Had you seen them before this time of coming there?—I had seen her about four years ago, and her son and two daughters with her.

Do you know one William Clarke?—I do;

he was with them at the same time ; they were intimate together ; that is, Lucy and he, as sweethearts ; it was reported so then.

Cross-examined by Mr. Nares.

Do you know their reasons for coming there?—No, I do not.

How long have you lived at Abbotsbury?—About five years.

How far is that from the sea?—It is about a mile from it.

John Hawkins sworn.

Hawkins. I live at Abbotsbury, and am a weaver.

Mr. Gascoyne. Look at that old woman that sits there, and her son and daughter.—*Hawkins.* I do ; I know them : I saw them at Gibbons's at Abbotsbury, on the 1st of January, about eight at night.

What January?—I am no scholar ; it was not last January, but January was a twelvemonth ; the son and daughter were dancing then.

Who played on the violin that time?—Melchisedech Arnold.

Where was the old woman?—She was sitting in the other house by the fire-side in the kitchen.

Why do you call it the kitchen belonging to the other house?—That is the lower house, joining to the same house.

Did you see the old woman more than once?—I saw her every day till the day she went away, which was on a Tuesday, being the 9th day of the month.

Had you ever seen the old woman before that January?—Yes, Sir, I had, it may be a year, two, or three before, at George Clements's.

By what do you remember the particular time of your seeing her?—Because it was on New-Year's day, and being holiday time we got to dancing.

Were you acquainted with them before this?—No, I was not.

Did you dance with them?—Yes, I did, on the Monday night.

Can you tell how they were coupled?—I cannot tell who my neighbours danced with.

Whom did Clarke dance with?—I cannot tell.

Whom did you dance with?—I cannot tell now.

Cross-examined by Mr. Morton.

This was a very merry dance : what had you been at all day? Had you kept holiday the whole day? Cannot you remember your partner?—I do not remember my partner.

Nor who danced with Lucy?—No, I cannot ; there was a very great company of us.

Whom did George dance with?—I do not know.

Do you remember the place?—Yes, I do ; it was in Gibbons's parlour ; it was a common dance, any body might come as would.

What was Clements's house, where she came

before?—A private house ; she used to lie at that house.

What is his trade?—He is no trade, but a fisherman.

Does he never catch such a thing as a handkerchief, such as is round your neck, at sea?—No, not as I know of.

What had the old woman used to deal in?—I never saw her deal in any thing ; I have heard people talk she sold things.

Was it hardware?—I do not know what ware it was.

Did you ever talk with her?—Yes, once at Clements's.

What was your conversation then?—It was about telling of fortunes ; we asked her questions, and she told us she was no fortune-teller.

Did she tell you what her trade was?—No ; we went about our business ; there were two young men with me.

Mr. Davy. Now we leave Abbotsbury, and come to Portersham.

William Haines sworn.

W. Haines. I live at Portersham.

Mr. Davy. Look at that old woman ; do you know her?—*W. Haines.* I know her very well, her name is Mary Squires ; I have known her thirty years and upwards.

Where did you see her last?—I remember seeing her at Portersham on the 9th of January 1753.

Do you know that young man and woman that are by her?—I do ; they are George and Lucy : they were all three of them at my door with William Clarke from Abbotsbury ; they were going to their quarters, the sign of the Chequer, Joshua Frampton's house ; Clarke called at my house, to know if I had done his clothes (I am a tailor.) I asked the old gentlewoman and the rest to come into my house, but they did not, and went on to the Chequer : after that I went down to the Chequer ; there was one Richard Chipman ; we drank a pot of beer : Mrs. Squires sat in one corner, and George in the other, and Lucy and Clarke before the fire in the kitchen.

What sort of weather was it that night?—It was terrible bad weather the next day ; I left them that night there.

What makes you remember it to be the 9th of January?—I rent a shop at Abbotsbury, and was going there on New year's day ; and because of the old Christmas, I never went till Monday the 8th. Although I have known the old woman so long, yet I never had any knowledge of the young ones, till William Clarke courted Lucy : as for George, he might pass by, but I never had any knowledge of him till then. I lived two years at Abbotsbury : I was once at work at George Clements's, and the old woman happened to be there all the time I was there, which was seven or eight days.

Cross-examination by Mr. Nares.

What time in the afternoon did you see them at your door on the 9th of January?—It was about ten or eleven o'clock in the fore part of the day.

Did you go after them to the Chequer?—I did.

In how long time after?—About an hour or two after them.

How long did you stay with them?—I only drank a pot or two of beer.

Did you see George Squires there?—No, I did not see him there any time after that afternoon; after I went away, I went to Abbotsbury, and I met him in the fields that come from Abbotsbury.

John Haines sworn.

J. Haines. I am son to William Haines of Portersham; I live there with my father.

Mr. Willes. Look at that old woman; do you know her?—*J. Haines.* I have seen her before, at Portersham on the 9th of January.

Do you know her son and daughter?—Yes, I saw them there the same time.

What day of the week was the 9th of January?—It was on a Tuesday; they lay at the Chequer; William Clarke came with them; they came there about nine, ten, or eleven o'clock; William Clarke lay there, so did they; they went away about nine or ten the next day; it was a very bad, rainy day.

Cross-examination by Mr. Williams.

Did you ever see this old woman before that time?—I saw her at Abbotsbury on the 6th of January, and never before.

Did you see them in the evening?—I do not remember I saw them in the evening; I saw them the next morning.

Did you see an exciseman there?—No, I did not.

How came you to be so particular, as to the day?—The reason is, because I saw them at Abbotsbury the 6th of January, the Epiphany day; I was at Abbotsbury then.

How long have you lived with your father?—Ever since I was born.

Mr. Dary. Upon your oath, is this the very woman?—*J. Haines.* It is; I cannot be mistaken.

Francis Bealey sworn.

F. Bealey. I live at Ridgway, and keep a small public house, the sign of the Sloop a-ground.

Mr. Dary. How many miles is that from Portersham?—*F. Bealey.* It is four or five.

Look upon that old woman there, and tell us whether you have seen her before?—I have several times at my house.

Did you see her at any time about a year ago at your house?—I did on Wednesday the 10th of January.

Were the son and daughter with her at that, and Clarke of Abbotsbury?—They were.

What time might they come to you?—I believe, betwixt nine and eleven in the morning.

Did they come in all together?—I don't know whether they came all together, but they were there all together in a short time.

What had they to eat or drink?—At first they had some roll and cheese; I carried it myself; and they had some beef-steaks for dinner, at about one or two o'clock, or after; it was not much off of that.

Do you remember the circumstance of any body having a dead horse?—Yes, Sir; a woman going from Siron market to Weymouth market, the horse was taken sick upon the road, and she hired my horse to ride to Weymouth market: she bid me take care of this horse, and get a blacksmith to do something to him, and the horse died on the Wednesday morning, at almost day: I got a man to lend me a horse to draw him out of my stable to a place behind my house, under a hedge: when the woman came back, she desired me to give somebody six-pence to skin him, and the horse was a-skinning as they came along into the yard.

Did Clarke stay at your house that night?—No, he did not: a man was selling turnips, with two horses about the parish; and Clarke had spoke to him, as far as I heard, to come to he to carry him home on one of those horses: it was a terrible wet day as ever I knewed.

Where did the gypsey-woman, her son and daughter lie?—They lay at my house that night.

Before you were up in the morning, did any body come to your bedside?—Yes, George Squires did, with his mother: he told me he had a pattern of a waistcoat, [He produces a remnant of nankeen] this is the stuff.

What did he say to you?—The first he said was, he asked me if I wanted a waistcoat, and said he had been to Abbotsbury, and money was short, and I should have it cheap. I said, I did not understand it, and I never had such a waistcoat in my life, and I did not want it: with that his mother came in, and said, they were short of money, and desired to leave it in my hand, and desired I'd take it for the reckoning, which I did, and have had it ever since. They told me they would either send the money, or bring it.

Had you ever, before this time, seen the gypsey-woman and her daughter?—I can't say justly to the old woman; I once saw the son and daughter dancing at our house, when they lodged at Broadway once.

Mr. Dary to George Squires. Look at this piece [he takes the nankeen in his hand.]

Squires. I can't swear this is the same that I left with him, but it is very much like it; it is the same sort of stuff.

Bealey. I wrote my name upon it, before I let it go out of my custody to any body; my name is now on it [Shewn to the jury, and appeared with his name on it.]

Mr. Davy. How do you remember the time particularly?—*Bewley*. I am sure it was that time, by reason it was such weather, and the Blandford sessions were sitting at court; it was a flood, and the dying of the horse, and several circumstances.

How far is Blandford from Ridgway?—It is fifteen computed miles. We know that sessions is always kept the 8th or 10th of January: many of my neighbours were at the sessions, and told me, when they came home, what a flood there was in going.

Cross-examined by Mr. Moreton.

Are you sure this was January 1753?—It was January was twelve-month.

Are you sure you have seen George and his sister a-dancing before this?—Yes, Sir, I have, three or four years back; but I can't say I had seen the old woman; they lodged at Broadway then.

What trade did they carry on?—Upon my word, I cannot tell.

Did not you know of their dealing in nankeens?—I never knewed they did; they brought this to me; I never saw them have a bit in my life before.

How far is Ridgway from the sea?—It is about two miles.

Were you up here when Mary Squires was tried?—No, I was not.

Were you not applied to by George or Lucy to come up to that trial?—No, I was not. I read in the news of a Mary Squires tried for a robbery, but I did not know that it was this Mary Squires; I said there were others of that name.

Mr. Davy. Did you ever know a Mary Squires with such a face as this?—*Bewley*. No, Sir.

Thomas Mockeridge sworn.

Mr. Davy. Inform the Court who you are, and whether you have ever seen those three persons, and when and where?—*Mockeridge*. I live at Abbotsbury now; I had been at Ridgway and Upway selling turnips (it was very bad weather) on the 10th of January, by the present stile; it was the Wednesday after old Christmas-day. I found the old woman, her son George, and her daughter Lucy, and William Clarke, at Mr. Bewley's house, at the sign of the Ship; I had made an end of selling my turnips before I came there; I came in, I believe, between twelve and one at noon, and think I stopped there till between two and three.

Had you seen the old woman Mary Squires before?—I had several times. I remember seeing her at George Clements's house, going down towards the sea, (we call it Gracechurch-street) about three years ago before that.

Are you sure those are the people you saw there that day?—I am upon my oath, and will not come here to speak a false word for the world.

Do you know of any accident that happened to a horse on this day?—No, I do not,

[Cross-examined.]

Mr. Nares. Where did you go back to afterwards?—*Mockeridge*. To Abbotsbury: I had two horses; I rode one, and William Clarke the other; he went to Portersham, where he lodged, and I went home with my horses; he took leave of those people at Ridgway.

John Taylor sworn.

Taylor. I live at Fordlington, at the sign of the Coach and Horses.

Mr. Davy. Whereabouts is that?—*Taylor*. It is joining Dorchester; it is not a stone's-cast apart; many do mistake it for part of the town.

Do you remember this unhappy old woman?—I know her perfectly well; I have seen her above once or twice.

Do you know that girl and the young man there?—I do, and have known them some years; they are her son and daughter; I saw them at Fordlington on Thursday the 11th of January; they were not in my house, they were in my stable on the 10th; there was such a rain, they could not pass along the road; the waters were so high, they went through a neighbour's house and my stable the back way.

Are you a miller?—No, but there is a mill lies close by my door.

How did they get through the water?—The old woman took up her coats and went along through it, and the young woman was carried over by the miller's boy on horseback.

Did you see the old woman cross on foot?—Yes, Sir, to be sure, I saw it as plain as I see you.

When was this?—It was on Thursday the 11th of January 1753, in the forenoon, betwixt the hours of eight and eleven.

Did you see her walk all the way through the water?—I saw her go along part of it, I did not see it all, because it is two or three rivers; I saw her go over two of the rivers.

Did you see any body carry her over?—Nobody carried her, she went on foot.

Did you see the old woman cross all the rivers?—She went over the bridges, as far as I know of it; she forded the water at my stable-door, or as near it as it is cross the court-yard; I did not see her walk through all the water; I had no business to watch her; George had told me they lodged at Mr. Bewley's, at Ridgway-Foot, the night before.

Did they tell you whither they were going?—I can't tell where they were going; they were in the Blandford-road.

Cross-examined by Mr. Williams.

You say you saw the miller's boy carry over the daughter?—He carried her over all of it: the place where he took her up she waded through, and after that there be bridges; one is stone, and the rest are wooden ones.

How far is it from your house to Chettle?—I cannot tell; I believe it seventeen or eighteen miles; but I don't know where it is.

Thomas Hunt sworn.

Hunt. I live at Chettle, I am a thresher.

Mr. Willes. Look at that old woman, her son and daughter: have you seen them before?

—*Hunt.* I have at Chettle, on Friday the 12th of January 1753, about four in the afternoon: the old woman came into our back-side, to the barn-door to me, and begged lodging of me; there was no public-house in the place; I let her lie in an out-house on some clean oat-straw; it belongs to Mr. Watts of Cranborne: I asked her, if she had any body belonged to her? she told me she had none but a couple of children, and immediately called, Why don't you come along? and immediately there came a man and woman.

Look at that man and woman near her; do you know them?—The man I can swear to safely; the woman I do not so much, because she was covered over: I know the man full well, as I know my right hand from my left; I let them in at night, and there I found them in the morning; and the morning being very wet, they remained there till ten or eleven o'clock, or it may be something more.

Had you ever seen the old woman before?—I had not; but I am very sure it is the woman, before God and the world.

How can you fix upon the time?—It was a very remarkable day, the old new year's-day, which proved, by altering the stile, to be the 12th of January.

Cross-examined by Mr. Morton.

Did you ever see them before?—No, never before that Friday.

Have you seen them since?—I have, in the city, about a month before Michaelmas.

Do you know where they came from, that day you saw them at Chettle?—No, Sir, I don't.

How far is Ridgway-Foot from Chettle?—I don't know.

How far is Chettle from Dorchester?—They count it twenty miles; but I never was there in my life.

John Elderton sworn.

Elderton. I am a servant-man; a carter to one farmer Thane, at Martin; I have seen that old woman, and the young woman, and the young fellow.

• *Mr. Gascoyne.* Where?—*Elderton.* At Martin, on Saturday seven-night after Old Christmas-day, in the year 1753, in the afternoon, about four o'clock; they all three lay in an out-house where I live; the old woman came first, and asked my master leave to lie there.

Did you hear her?—I did.

Was there straw or hay?—I saw them all in the out-house about four in the evening, and on the morning before they went away.

What time did you see them in the morning?—I saw them about eight o'clock; they were getting up; I am sensible they are the three people.

Had you ever seen the old woman before?—No, I had not.

Is your master farmer Thane here?—No; he was coming up, but was taken sick on the road; he came to Salisbury in company with us, and there we left him; he came to give evidence in this trial.

Cross-examined by Mr. Nares.

What time did they come to your master's?—About four o'clock.

Did they all come together?—The old woman came a little before the others: when master had granted lodging, she went and called them; then they came.

What is getting up out of a barn?—It is dressing themselves; putting on their clothes, or tackling themselves up.

Did you see any sheets they had?—No, I did not see any.

Did you see any of their clothes off?—No, I did not; they were tying their clothes up.

Did you see their gowns off, or caps off, or petticoats off?—No, Sir.

Mr. Davy. Did the straw appear as if they had laid on it?

Elderton. It did; there were marks where they had laid.

William Hort sworn.

Hort. I live at Martin.

Mr. Davy. Look at that old woman; did you ever see that face before?—*Hort.* Yes, Sir, I have, at Martin.

Do you know that girl behind her, and that man near her?—Yes, Sir, I do; they are the woman's daughter and son, for what I know.

When did you see them before?—I saw them all three at Martin, on Saturday seven-night after old Christmas-day; they lay in an out-house at farmer Thane's.

What do you mean by an out-house?—By that I mean a barn, or place where was straw.

How did they lie?—I don't know; I did not see them lie in bed: I am farmer Thane's servant; they asked leave of master to lie there.

What did they lie upon?—I cannot say what they lay upon, there was straw.

Do you take upon you to say these are the same three persons?—I do, by my life; that I say in the presence of God.

Look upon them again.—I do, I am sure they are the same.

Cross-examined by Mr. Williams.

How long did they stay?—They came in the evening, and went away the next morning.

Did you see them at any other time?—I saw the old woman in master's house by the fire, and her daughter was joining china for them.

John Blandford sworn.

J. Blandford. I live with farmer Thane, at Martin.

Mr. Willes. What are you?—*Blandford.* I am a blacksmith.

Look at that old woman.—I saw her there on the Saturday evening, seven nights after old Christmas, about four o'clock, or something after, which is the 13th of January.

Did you see only the old woman?—No, I only saw her, because she came in before them.

Had you ever seen her before that time?—No, I don't know that ever I did.

Did she lie at farmer Thane's?—She did somewhere, but I cannot tell where; I did not see her afterwards then.

Cross examined by Mr. Merton.

How long might you see her?—It might be half a quarter of an hour, or something less.

Have you seen her since that time?—I have.

When?—Last Wednesday.

Yet you can swear to her after a year and half?—Yes, Sir, if it was 20 years I could.

Joseph Hayter sworn.

J. Hayter. I live at Coombe, and am a malster.

Mr. Gascoyne. Do you know that old woman, and young man and woman?—I do all three: I saw them between Martin and Coombe the Sunday seven-night after Old Christmas: I met them on the road as they were coming for Coombe, about eleven in the morning.

What year do you mean?—I mean in the year 1753; the young man was a little before them, and the old woman had hold on the daughter's hand: the young man asked me how far it was from Coombe? I said, I thought he knew as well as I did (as I had seen him before); the old gentlewoman was half a dozen lugs behind him; she asked me, and I told her it was two miles and a half.

Had you seen them both before?—I had, but I can't say I had seen the young woman before.

What is the reason you know that particular day?—By reason my wife was gone over to keep Christmas, and I was going to fetch her home from Martin: and I saw them again the same day at Coombe; I came back to Coombe again the same night: I saw them on the Monday morning at 7 o'clock; I saw them at Mrs. Greville's, the sign of the Lamb; Thomas Greville is dead; I went down to ask him if he had a load of furze, I wanted a load; there this old gentlewoman sat in the corner, and George stood up in the middle of the house, and Lucy stood by him; I never spoke a word to them then.

Cross-examined by Mr. Nares.

How long before this was it that you had seen this old woman before?—I cannot say, it may be two years.

What did you take them to be?—I took them to be what we call gypsey people.

Where had you seen George before?—I had seen him often at Coombe.

Without his mother?—Yes, and with his mother some years back; but she might be there at that time and I not see her.

Is Coombe a market town?—No, it is a village; I heard of her being indicted for robbing a girl, and I was applied to to come up.

Were you here when Greville was indicted?—No, I was not here time enough.

Did you come up to the old woman's trial?—I was not applied-to to come up; I told it, as soon as ever I heard Greville went, that I met her in such a place.

Why did you not appear to give evidence before?—I was not subpoenaed, is the cause I did not come.

Mary Greville sworn.

M. Greville. I live at Coombe.

Mr. Davy. What relation are you to Thomas Greville, who was indicted for perjury here?—M. Greville. I am sister to him; he is dead.

Look at that old woman, and the girl in a capuchin, and the man behind her.—I know these three persons.

Where did you see them?—I saw them on the 14th of January, on a Sunday, at my mother's house, the sign of the Lamb at Coombe; I live in the same house; they went away on the Monday morning.

Do you speak with absolute certainty that these are the very persons you saw, and no other?—These be the very persons indeed.

May you not be mistaken?—It is impossible I should; I am very well satisfied I am not mistaken in them.

Had you ever seen them before?—I don't remember I ever did.

Did you notice the old woman?—Yes, I did.

I speak of her features, not her profession.

—That is what I mean; and that is the very son and daughter indeed.

Cross-examined by Mr. Williams.

Who waited upon them?—My mother did; they were by the kitchen fire.

What time did they come in?—They came in between two and three in the afternoon.

When did they go away?—They went away between seven and eight in the morning.

How far is Coombe from Martin?—It is four miles.

George Towil sworn.

G. Towil. I live at Coombe; I have seen that old woman and her two children before.

Mr. Willes. When did you see them before?—Towil. I saw them on the Sunday was seven-night after Old Christmas day, which was the 14th of January.

Are you certain of it?—I am very certain, Where did you see them?—At Mary Greville's, at the sign of the Lamb.

Were you in company with them?—No, I was not; nobody but the landlady and I drank together; we were passing our accounts.

How long were you there?—I believe I was there from two o'clock to four.

* See the Proceedings against him, ante, p. 375.

Had you ever seen the gypsy-woman before?—I don't know that ever I did: there was another man in company with them; I believe he was a carpenter; he had a leather apron on: he asked me, if I was a carpenter; I said, I was a well-wisher to it.

Cross-examined by Mr. Morton.

When were you called?—The first time I was subpoenaed was in May.

Have you been to see the old woman since?—I have, and am sure it is the same woman.

Are you sure to them all?—I am.

Richard Aimer sworn.

R. Aimer. I live at Coombe, and am servant to farmer John Harris.

Mr. Gascoyne. Look at that old woman: who is she?—*R. Aimer.* Mary Squires; and she in the capuchin is her daughter Lucy; and the other person by her is her son George.

Where have you seen them before?—I saw them at Coombe on Sunday the 14th of January 1753, just after one o'clock; they were travelling upon the road.

Did you speak to them?—Her son asked me, how far it was to Sutton? I said, I could not tell, for I was never there.

What conversation had you with the old woman?—It was in the way of bantering and telling of fortunes.

Did you speak to the young woman?—I never said a word to her; I saw the old woman afterwards; she came to our master's door.

Do you know what for?—No, I don't; and I saw her son on the Monday morning at the widow Greville's, at Coombe, but I never spoke a word to him there, or he to me.

Did you see the old woman or daughter on the Monday?—No, Sir, I did not.

Cross-examined by Mr. Nares.

When they spoke to you between Sutton and Coombe, did you know them?—No, Sir.

Then how do you know that this is George and Lucy?—I know that only as they told me since, for I never saw them before in my life.

Did the old lady tell you your fortune?—Yes.

All is come true, I hope?—I did not think any thing was true when it was done.

What did you give her for telling you your fortune?—Two-pence.

Were her daughter and son by?—They went on while we talked together.

What time did you see her at Coombe?—Upon my return there in the evening I saw her.

Have you seen her since?—I never saw her since, till I saw her in Newgate.

Robert Merchant sworn.

R. Merchant. I live at Coombe, I am a chaffer.

Mr. Davy. Do you know that old woman?

—*R. Merchant.* I do, very well.

Do you know her son and daughter?—

They were gone on, when I saw the old women.

Where did you see the old woman?—At Coombe, the 14th of January.

Do you know the day of the week?—No, Sir.

How do you know it to be the 14th of January?—By my master's account and the farrier's; I asked master that day, what day of the month it was?

Cross-examined by Mr. Williams.

When did your master tell you it was the 14th of January?—We had a horse bad that very day the woman was there; and master and the farrier disputed it to the best of their knowledge, that that was the day that I saw her.

What is your master's name?—My master is farmer John Harris.

When had you this dispute?—We had no dispute at all.

When did you hear your master say it was the 14th of January?—The same day the woman was there.

How came you to be talking of the day of the month?—Being the horse was bad, Sir; and because the horse was bad, they set down the day of the month.

What, were they settling their accounts?—They were, so far as I know: master was to pay the farrier money for curing the horse.

Was there any talk then about the gypsy?—No, Sir, I heard no talk about the gypsy.

Martha Waters sworn.

Waters. I live at Coombe.

Mr. Willes. Did you ever see that old woman before?—*Waters.* Yes, I have at Coombe, on the 14th of January.

Were her son and daughter with her?—No, Sir; I saw her at a farmer's house where I live.

How came she to come there?—She came and asked for some small-beer.

Had you ever seen her before?—No, I never did; but I am sure she is the woman.

Cross-examined by Mr. Morton.

How long did she stay there?—She stayed there about the value of a quarter of an hour.

Did she tell thee thy fortune?—No, she did not; I did not want it.

Mr. Davy. Your lordship may remember, that George Squires could give no account of places between Coombe and Basingstoke, therefore we could not collect any evidence between these towns; so the next witness comes from Basingstoke, which you will find to be forty miles from Coombe, and that is four days journey according to their rate of travelling: they were at Coombe on the 14th of January, and you will find them at Basingstoke on the 18th.

Mary Morris sworn.

Morris. I live at Basingstoke, at the Spread-Eagle.

Mr. Davy. Look at that old woman.

Morris. That old gentlewoman is Mary Squires, and the young woman is Lucy Squires, and the young man is George Squires. I wrote a letter for the young woman on the 18th of January.

What day of the week was it?—Really I will not be positive; it was on a Thursday or Friday; it was for one Clarke at Abbotsbury.

Look at this letter; is this your writing?—(She takes it in her hand)—Sir, it is my hand-writing, directions and all; my little boy carried it to the post-office, and Mr. Squires gave him a half-penny because he did not stay.

The Letter read, directed "To the post-house in Dorchester, to be directed to Abbotsbury for Mr. William Clarke, cordwainer. This with care."

"Basingstoke, Jan. 18, 175*.

"Sir; this with my kind love and service to you, and all your family, hoping you are all in good health, as I be at present. This is to acquaint you that I am very uneasy for your troublesome journey, hoping you received no illness after your journey; so no more at present from your most obedient and humble servant,
LUCY SQUIRES."

"I desire to hear from you as soon as possible. Direct for Lucy Squires at Brentford, near London. George and mother give their compliments to you, and all your family."

Mr. Davy. You are sure this is your hand-writing?—**Morris.** This is my own hand-writing, which I wrote at Basingstoke, at the request of Lucy Squires.

Were the old woman and son there then?—They were in the house all the time; they would have lodged at my house, but I had not lodgings; they had a pint or two of beer, and eat a bit of bread, and went on to Old Basing.

How far is Old Basing from Basingstoke?—It is about two miles.

Is it not possible you may mistake these people for any other gypsies?—I am positive that these are the very people I saw at my house.

Cross-examined by Mr. Nares.

Had the old woman ever been at your house before?—She had lain at my house about a year and three quarters before.

None but the old woman?—No; I never saw the son and daughter before.

Are you sure this letter was wrote the day it bears date?—I am positive sure it was.

Mr. Willis sworn.

Mr. Willes. How far is Coombs from Basingstoke?—**Willis.** It is about forty miles.

Where had you this letter?—When I came to the post-office at Dorchester, which is the nearest post-office to Abbotsbury, the direc-

* The other figure being in the corner was supposed to be torn off.

VOL. XIX.

tions being very blind, the post-master had sent it under mistake to one Clarke as I understood, at Charlster, who sent his wife with it immediately.

The Court look upon the back of the letter, and discover two post-marks upon it.

Thomas Ravenhill sworn.

Ravenhill. I belong to the post-office; I am assistant-clerk to the western road.

Mr. Davy. Look at the post-mark upon that letter, and tell us where the letter was marked.

Ravenhill. This is a mark of the General Post-office in London.

What day of the month does it appear to be stamped?—The stamp is very imperfect; I cannot take upon me to speak with certainty.

Of whose hand-writing is the post-charge?—This is mine, that is the charge, which is seven-pence; the original place where it came from to London is three-pence; that is three-pence up, and four-pence down: it is directed to be left at the post-house in Dorchester, that is four-pence.

See what part of the printed mark do you find plain?—The stamp is so very imperfect, that I cannot with any degree of certainty tell; the 9 is very plain; whether it is 19 or 29 I cannot say: it is not the 9th, for if it was, that figure would have been in the centre.

Look at the letters at the bottom of the circle.—The second letter seems to be an A.

I think your stamps are marked MR for March?—They are.

Then there can be the name of no month, the second letter of which is A, but January and May.—I do not recollect that the second letter of any stamp is A, but that of January and May.

Can you get the stamps from the Post-office, that the Court may see them?—Yes. (He goes, and returns with several impressions on paper, as Jan. 9, Jan. 19, Jan. 29, and May 1, March 26.) These are all the stamps where A is the second letter; all the inland stamps have the figure on the top of the letter, and the foreign stamps have it at the bottom; the figure 9 is placed not in the centre, but just over the second letter.

Look at this letter; do you believe that stamp to be January?—I cannot form an opinion of it, more than any stranger to it; I believe it to be the 19th or 29th, rather than the 9th.

Cross-examined by Mr. Morton.

What are those stamps made of?—They are made of box.

Do you stamp a letter for 1752 with the same stamp of 1751?—No, we do not; we use every day one, and they last no longer; sometimes, at the latter end of the day, it is so defaced and clogged, that it will hardly last a day; and after they have been used, they are thrown into a drawer, where they remain five or six months, and then we burn them.

2 B

Are you sure this mark of the charge is your mark?—I am very sure it is.

Mr. Davy. Has Basingstoke a stamp to it?—*Ravenhill*. I can't say whether it has or no. Is there a post-master there?—There is.

Have not all post-masters stamps?—I can't say whether they have or not.

Look at this, and see if there is a post-mark upon it.—I see very plainly there is a mark; but it is so blind, I can't distinguish what it is.

Is it a mark of two lines?—I believe it may be a post-mark of two lines.

Why have some two lines, and some but one?—Those of two lines are generally where the town's name is a long one.

Elizabeth Edwards sworn.

Edwards. I live at Brentford.

Mr. Willes. Look at that old woman, and these two people with her.—*Edwards*. I see her, and her daughter and son; they came all three into my house; I don't know the day, but we had a neighbour's child christened at the time they were there; [She produces the copy of the register] This is a true copy of the register of the child when it was christened; Mr. Gascoyne went himself and took it out of the book.

Can you tell by any other circumstance?—No, I cannot.

What day was it the child was christened?—By this it was the 22d day of January, and the old woman went away on the 23d, being on a Tuesday; but they came to my house on the Saturday before.

Do you keep a public-house?—No, I do not; I keep a shop: they lodged at my house: George went out on the Sunday, and brought his other sister to our house on the Monday, and they went all away together on the Tuesday morning betimes towards London.

What did they call the other sister's name?—I have forgot what he called her, but one of them he called Lucy.

Was that she that he brought on the Monday?—No, it was not.

Are you sure they were at your house at that time?—I am positive they were.

Susannah Burwill sworn.

S. Burwill. I live at Brentford; the last witness is my mother; she has had two husbands, which is the reason our names differ.

Mr. Gascoyne. Do you know that old woman there?—*S. Burwill*. I do: I never saw her before she came to my mother's. I know them all three; they all came together on a Saturday night, the 20th of January; they asked for lodgings, and said they were recommended by a friend of my mother's, and my mother let them lie there: on the Sunday the old gentlewoman and her daughter stayed there, and the son went to London, and did not come home till the Monday, and then he brought a sister (as he called her) with him.

What time did he return?—I can't tell the time directly; it was some time of the day.

Did they lie there on Monday night?—They did, Sir, and went all four of them away on the Tuesday morning.

Did they say where they were going?—They said they were going to Epping in Essex.

Can you tell what time they went away?—I really cannot; they went away some time in the morning.

[Cross-examined.]

Mr. Nares. Had you ever seen them before?—*S. Burwill*. No, I never had to my knowledge.

William Tredget sworn.

Tredget. I live at Tottenham, at the Seven Sisters, the sign of the Two Brewers.

Mr. Davy. How far is that from London?—

Tredget. It is four miles.

How many miles is it from Enfield-Wash?—I cannot justly tell: I know the place.

Look at those three people,—that old woman, and the daughter and son.—I remember the old woman very well, and the daughter and son too.

Where did you see them?—I saw them at Tottenham on the 23d of January, which was on a Tuesday: I am sure to the day and the people.

Where did they say they came from?—They said they came from Brentford.

Did they lie at your house?—No; they did not; I told them I had no lodging, and directed them over the way to a farm-house, one Mr. Philips's; but cannot say whether they lay there or not.

What time of the day did they call at your house?—It might be about four; it was a little before candle-lighting.

Had you ever seen them before?—I cannot say I ever did, unless it was the old gentlewoman; I believe I had seen her about three years before; I had taken notice of her face, that she was a woman not common to be seen, the last time.

Had you taken notice of her face before that time?—No.

When you saw her upon the 23d of January, did you recollect that you had seen her before?—No; but when they came to ask me to come and see her in Newgate, then I recollected that it was the face I had seen three years before.

Do you now say, upon your oath, that these are the very people whom you saw upon the 23d of January?—It is the very same woman; I saw her then at Page-Green; then her son and daughter were with her, but not when I saw her before, as I know of.

[Cross-examined.]

Mr. Williams. How many people did you see at Page-Green, that asked for lodging on the 23d of January?—*W. Tredget*. I saw none but the old woman, George, and Lucy.

Mary Tredget sworn.

M. Tredget. I am wife to the last witness; we live at Page-Green; I saw the old gypsey at my house on Tuesday the 23d of January; she asked us for lodgings; I did not let them have any, but recommended them to a farmhouse over the way.

Mr. Willes. What is the farmer's name?—

M. Tredget. His name is Philips.

Mr. Davy. My lord, we have now gone through the proof of the *alibi* of Mary Squires, and brought her to Page-Green, within two or three miles of Enfield-Wash: we will leave her there for the present, and proceed to another part of our case, which goes in contradiction to the whole of the defendant's evidence: we shall therefore call witnesses to prove, that her information before Mr. Alderman Chitty, on the 31st of January, differed in many instances from what she swore afterwards; and that she at first gave a false description of the place she pretends to have been confined in, and varied in her story after she had been carried to Wells's house at Enfield-Wash, on the 1st of February: we will also give your lordship and the jury a true description of this supposed prison, and of what happened there on the 1st of February. We beg leave first to examine Mr. Alderman Chitty; but I must let the gentlemen concerned for the defendant know the names of the witnesses we intend to call to this part of our case, that they may also be examined separately; Mr. Chitty, Mr. Nash, Mr. Hague, Mr. Aldridge, and William White.

WEDNESDAY, May 1.

Alderman Chitty sworn.

Mr. Gascoyne. Be pleased, Sir, to give an account of what passed before you on the 31st of January 1753, relating to Elizabeth Canning.—*Alderman Chitty.* I was the sitting alderman at that time; Elizabeth Canning was brought before me, but as it is about a year and half ago, I cannot give a distinct account of it. I remember it was on the 31st of January, about half an hour after twelve, or one o'clock. Mr. Lyon and another person (I believe it was Mr. Nash) came to me. There were a few notes taken for my own memorandum, which I believe are in court, which are the substance of what passed.

Were they signed by her?—No; I took it on paper, as I generally do; but not thinking it would have been the subject of so much inquiry, I did not take it so distinct as I could wish. (He produces a paper.)

Is this your hand-writing?—It is; this is not what I had taken at that time, but what I took since from that paper I took then of her's, and other persons that were brought before me. Then is this the substance of that account of her's you took?—It is.

Mr. Gascoyne. You may refresh your me-

mory by looking on it, and give the Court an account of it; you may read it.

He reads: 'A Copy of the Minutes taken by Thomas Chitty, upon the Examination of Elizabeth Canning, at Justice-room, Guild-hall, January 31, 1753.

'Elizabeth Canning swore, that on last New-year's day, as she was returning from her uncle's, about Saltpetre-Bank, as she came along by the dead wall against Bedlam, in Moorfields, about or near ten o'clock at night, she was met by two men, who stripped her, and robbed her of half-a-guinea, three shillings, and a halfpenny.'

Mr. Davy. Are you sure she said a halfpenny?

Alderman Chitty. I am sure she did; also her gown from her back. (Now I would observe, here I asked her, What else? she said, a hat; she said it was a straw or chip hat; I did not put that down, but I as well remember it as if it was but yesterday.) She said, 'A hat from her head; she struggled and made a noise; one stopped her mouth with something like a handkerchief; and swore, if she made any noise or resistance, they would kill her, and then hit her a blow over the head, and stunned her, and forced her along Bishopsgate-street, each holding her up under her arms; but did not remember any thing more that passed, and did not come to herself till about half an hour before she came to Enfield-Wash, as she had learned since, to Wells's house there, and there were several persons in the room; they said, she must do as they did, and if so, she should have fine clothes, &c. She said, she would not, but would go home, and refused compliance; and then a woman forced her up stairs into a room, and, with a case-knife she had in her hand, cut the lace of her stays, and took her stays away, and told her there was bread and water in the said room, and if she made any noise, she would come in immediately and cut her throat; then went out, and locked the door; and never saw her nor any one of them since, till after her escape; which bread was in quantity about a quarter of a peck loaf in pieces, and three quarters of a gallon of water, or a little more, in a pitcher, as she supposed; on which only she subsisted, and one penny mince-pye she had in her pocket, till she got away, which was on the 29th of January, about half an hour after three o'clock or four in the afternoon, and then made the best of her way to town to her mother's, at the bottom of Aldermanbury. She farther said, on inquiry, she had no stool all that time, only made a little water; and said, there was an old stool or two, an old table, and an old picture over the chimney, two windows in the room, one fastened up with boards, the other, part ditto and part glass, in which latter she made a hole by removing a pane, and forced part open, and got out on a small shed of boards or pent-house, and so slid down and

'jumped on the side of a bank on the backside of the house, and so got into the road, and proceeded to her mother's that night, which was about ten o'clock. Her mother said she was faint, so she got her some wine and water, but it would not go down, the passages being swelled, therefore sent to the apothecary for advice. Mr. Lyon, her master, gave her an exceeding good character, and so did her late master, Mr. Wintlebury.' There were a great many questions asked her, which are not down here. There was an examination for I believe near an hour; and after I had examined her, I sent for Alderman Flodder; but he did not chuse to examine her, and put her over to the sitting alderman, which happened to be my turn.

Mr. Gascoyne. During the time of this examination, did she mention any hay?—Ald. Chitty. She said, there was nothing in the room but those things she had mentioned; not one tittle of hay, neither do I remember what she said she lay upon.

Did she describe any gypsey, or any remarkable woman?—I asked her, whether she should know the woman again? she said, she believed she should; but she did not make mention of any extraordinary woman doing this.

Did she say when she drank all her water?—She said, a little water was left when she made her escape. I asked her, whether she knew what the quantity of a quatern loaf was? she said, she did, for her former master kept a public-house; I asked her, what sort of bread this was? she said, there were four or five pieces, to the quantity of a quatern loaf.

Are you sure she said four or five pieces?—I am sure she said four or five, or five or six pieces.

Mr. Davy. Did she mention any such thing as a tobacco-mould, a bason, a saddle, hay, or a barrel?—Ald. Chitty. I heard of no such things: she said, there was nothing in the room but what things she had mentioned: she apprehended then, it might be the woman of the house that had served her thus; but it appears, as it comes out, she had no notion who that woman was. I asked her, whether or no she had seen any body in all that time? She said, she had not but once; she looked through the key-hole, and saw some one person pass below.

Mr. Gascoyne. Please to look at this paper.—Ald. Chitty. This is my hand-writing; it is my warrant for the apprehending the people that she charged.

Did she mention the name of Wells, or whose house she had been at?—I was a little unwilling, at this extraordinary account, to grant a warrant: I said to her, Be sure what you say; say nothing but what you can swear to: and as she swore all to be true, upon this information I granted her a warrant, but told her I could not believe the story she had told me.

Do you recollect whether, in the time she was in confinement, she heard any thing by which she could discover the names of any of

the people?—The name of Wells was not mentioned at all by her.

How came you to grant a warrant in particular against Wells?—Because they had learned the name since of the keeper of the house, and that they supposed to be this Wells.

Were there any particular features described of the person?—No.

Who mentioned the name of Wells, as Canning never mentioned that name?—I cannot remember that: it was mentioned, mother Wells was the occupier of this house.

Was one Scarrat there?—There were above fifty people there; I did not know them.

During this examination, did she mention any fit she had?—I don't remember she did, but the mother did; she said, she had been subject to fits from her infancy.

Did she say she went down Bishopsgate-street?—She did, between two men, one held under one arm, and the other under the other; but said, how she came there, she could not tell; that she was not so far stunned, but that she knew a little, as she went along that part; but how she went afterwards, she did not know: she said, she might have been put in some house, for what she knew, but she could not tell that.

Mr. Gascoyne. Previous to this examination, had you seen any advertisement in the papers of the 6th of January, which gave an account of a young woman taken out of a hackney coach?

Mr. Morton. That is not a proper question.

The Warrant read.

'To all constables and other peace-officers.

'London, to wit. These are in his majesty's name to command you, and every one of you, upon sight hereof, to take and bring before me, or some other of his majesty's justices of the peace, the body of a person that goes by the name of mother Wells, at Enfield-Wash, in the county of Middlesex,—

[A Juryman. Who put that name in the warrant, or who gave the name?

Ald. Chitty. I cannot recollect who mentioned the name Wells: I apprehend they had got that name before they came to the justice-room: I asked the girl, whether that was the mistress of the house or no? she said, she could tell nothing of the woman's name.

The Conclusion of the Warrant.]

'of whom you shall have notice, to answer to such things that shall be alledged against her by Elizabeth Canning, for violently assaulting her, and robbing her of a pair of stays, and confining her in a room in the said house, and keeping her on bread and water for upwards of three weeks, as oath has been made before me,

THOMAS CHITTY.'

'Jan. 31, 1753.'

Gawen Nash sworn.

Nash. I belong to Goldsmiths'-Hall, and keep a coffee-house in Gutter-lane. On the

31st of January 1753, I went to Mr. Lyon's house in Aldermanbury; he is a particular acquaintance of mine, and has been some years; there was he and his wife. I asked them, whether that paragraph in the paper, about their servant's coming home in such a condition, was true? he told me it was.

Mr. Davy. Were you present in the justice-room, when the defendant was there before Mr. Alderman Chitty?—Nash. I was, as a friend to this girl; the city-marshal's man was there: I was there a little before the others; I asked leave to let the room be cleared, there being many people in the room: I had never seen the girl till that day; but had compassion for her from the account I had heard of her hard usage.

Was Mr. Adamson there?—I think he was.

Was Mr. Scarrat there?—I do not know whether he was or not. The girl gave an account of the place where she had been in: Mr. Alderman Chitty asked her, (how it might slip his memory, I cannot tell) what sort of a room she had been confined in? her answer was, that it was a little, square, darkish or dark room, with boards nailed up before the windows.

Are you sure the words 'little' and 'square' were mentioned?—I am sure of it, I remember it very well.

Did she say windows in the plural number?—She did; she said, through the cracks of the boards she could see the Hertfordshire coach pass by upon the road, that had used to carry her mistress. Upon being asked what was in the room? she said, there was an old broken stool or a chair, and in the chimney an old iron grate, and a few old pictures hung over the chimney.

Mr. Moreton. Did you take this in writing?—Nash. No, I never did: upon being asked what she lay upon, I remember very well she said, she lay on the boards; which melted my heart indeed: I felt an inward affection for the girl, upon recollecting it was cold weather at that time; for I think we had a good deal of frost at that time.

Mr. Davy. Have you heard what the alderman said in his evidence?—Nash. I have.

What did she say about bread in the room, and how many pieces were there?—She said, there was about the value of a quatern loaf thrown about the room in crusts, which were blue and mouldy; the number of pieces I do not remember she said.

Do you remember she said she slid down a pent-house?—I do not; she said, she pulled down one of the boards of the window, after she had strove at it many times; and in getting out at the window, she tore her ear by a nail by the side of the window in turning herself about; and her mother standing by, said, her ear was then bloody; her ear then seemed to be very sore. There was a warrant granted upon this against one Wells. The alderman does not remember what it was that induced him to grant it against her in particular: I recollect it, because it was in a paragraph in

the news-paper, that she had been at the house of mother Wells at Enfield-Wash.

What charge was there before the alderman against mother Wells? for he could not grant a warrant by information from the news-paper.—I recollect she was asked where she had been, and that she, or somebody else, said she had been at the house of mother Wells, at Enfield-Wash.

Recollect, if you can, whether it was she, or another person, who said so.—Upon my word, I cannot positively tell which; but it was repeated aloud, that she had been at the house of mother Wells (that is a notorious bad woman); she being asked how she came to know she had been at mother Wells's, she said, she had heard her called so while she was under confinement in the room.

Did she describe any person she saw in the house?—There were no particular descriptions given by her of any one person in the house.

Was the name of Virtue Hall mentioned then?—I never heard it indeed before the alderman.

Do you remember any other particulars of the description of the room, or any other circumstances?—I do not recollect any other description than I have hitherto told: upon this a warrant was granted.

Did you, upon that, go down with any persons to Enfield-Wash, and when, in order to apprehend the people, or see the house?—I really can't recollect whether Mr. Lyon took the warrant out of the clerk's hand or I, but we went on cheek-by-jowl to the Hall-yard; I know Mr. Lyon paid the shilling for the warrant: when we were in the yard, we were consulting what to do in this affair; fearing it should gather wind in the country, and the people all get away before we got down there. Upon this, Mr. Lyon and I being very intimate, went home to my house; my wife was very unwilling I should lie out of town that night, otherwise we had gone down immediately, to have apprehended the people that night. We agreed to go the next morning in a coach, and he asked me to take a friend or two, which I did; they were Mr. Edward Aldridge and Mr. John Hague. We went (this was on the 1st of February) at our own expence, and took coach in Chiswell-street, and desired the coachman to proceed as fast as he could, fearing we should miss what we aimed at. When we came to about Hounds-field, somewhere by Ponder's-End, we had several people met us, riding as hard as they could, to give us intelligence that they had seized all the people in the house.

As you had heard the defendant give a description of the room, did you mention that to Mr. Hague and Mr. Aldridge?—I told them what I had heard.

At the time you were going down with them, did you declare any intention you had to take a survey of the place, and see whether it answered her description?—I can't tell whether

I said so, but it was my intention so to do, and to see the warrant executed.

What time did you arrive there?—I guess it was about eleven o'clock, which was about an hour before Elizabeth Canning came there: the coachman drove us up to the Sun and Punch-Bowl, almost opposite to mother Wells's house; there were people, some on horseback, and some on foot, all in an uproar. Mr. Hague, Mr. Lyon, and Mr. Aldridge went into the house. I pushed over to the house, in order to find if the description of the room answered: I saw some people in the room on my left hand, which they call the parlour; then I went up the stair-case leading from the great door that comes into the street, and, to my great surprise, I looked about the three rooms, and found nothing there like it; there were beds in them, which seemed to have been laid in that night; then I came down again, and went into the kitchen, and saw a man with a broom-stick in his hand; I said to him, Friend, do you know any thing of this house? he said, there is a room here: he unbuttoned a button, and opened the door; I saw a door on each side, one opened to a cellar full of water, another opened to a place like an oven, and the other led me to a place where were a few steps or stairs, which led up into this hay-loft, a nasty room: I have since told the steps; I think there were eight of them; I am sure there was nothing like her description there at that time. I cannot say I observed the key-hole, but I was thereabout afterwards, and believe there has not been a lock upon that door for many years; there were no signs where a lock could have been placed; I saw no marks of a lock fastened thereon; I am sure there had been no lock there; neither was there any bolt; there was a large bar that secured the three doors.

Are the steps without or within side the door?—They are on the inside the door; the stairs are part of the room.

Can you mention the exact length and breadth of the room?—I never measured it; it is a very long room; you may as well call this table a square [meaning a long table in the sessions-house;] that man and I went up into it by ourselves.

Did you take any particular notice of what things were in the room?—At that time I cannot say I did, because I had not found out the room according to the girl's description. I came down, and saw Mr. White, one of my lord-mayor's marshal-men, who went down to execute the warrant: I said to him, for God's sake, what do you think of this affair? he said, he believed we were got into the wrong box, and he believed the girl had never been there: then I went over to my companions that came down along with me; this was before Canning came. We went over to the house again; we went up into this room: some persons, I cannot tell who, said, this must be the room; Mr. Lyon stood near me; said I, this cannot be the room according to her de-

scription, for she said it was an empty, dark room; Mr. Lyon said, these things may have been put here since: there were numbers of things then in it.

Mention the things you saw there?—There was to the quantity of half a load of hay; an old nest of drawers, about four feet long, and three high; there was a high tub with pail-lard in it: two side-saddles, and an old man's saddle: on my right hand coming up stairs, there seemed to be a place as if some poor people had laid upon it; it was some part hay that was taken from the heap, and some wool put into a sack for a bolster, made up in the form of a bed: over this nasty bed (if I may so call it) were some pulleys and a line belonging to a jack; and at the head of this bed was a hole, through which, it seems, formerly the line did run, that had some hay stuffed in it to keep out the wind; I took it out; it was a long square, about six by eight inches; there is a jack in the kitchen, to which the line had been fastened; the hole looks directly into the kitchen; it is a very thin partition; it is lath and plaister: through that hole might be seen every thing in the kitchen, except just under it; and there was a window in the kitchen, which looks out into the road, and from that hay-loft a person might see through that window cross the road.

Could you, when standing in the kitchen, see through into that room?—You might see the window that fronts the kitchen, through the hole.

How high is the hole from the floor of the kitchen?—I believe it might be about seven or eight feet, to look through from the kitchen; a person might elevate himself, or look upwards; and when in the room, the hole is about five or six inches above the pillow of this hay-bed, which was made on the floor. In this room was a chimney, which I apprehended was for the warming a glue-pot; and over this place was a little ledge, upon which stood an old iron casement all dusty; the chimney stands in the corner of the room; as near as I can think, it is to the south; there was cobwebs and nastiness upon the things; it is impossible they should have been newly put there.

Were there any cobwebs on the casement?—There were; they seemed to fix the casement to the chimney-ledge; it had such an appearance to me, I did not move it; it was all over cobwebs, and seemed to be soldered to the wall with them; I did not move it.

Was there any grate in the chimney?—No, there was not; it appeared to me as if there never had been any.

Was there a hearth to the chimney?—I think there was not.

Was the hearth-place, I mean the floor of the chimney, covered with dust?—At that time I did not particularly observe whether it was or no.

Was there any appearance to you of any

pictures having been over the chimney?—I believe there never was a picture hung up in that room in this world.

Did you observe the window at the north end of the room?—I did; that window was nailed up with boards, and the muntam was betwixt; there were two windows in the room, one at the end, and the other almost facing the stairs, going up out of the kitchen; the window at the end seemed to have had a light; the casement was whole, with the boards nailed up upon the top, and boards nailed to the muntams, and the glass casement shut.

What do you mean by a muntam?—It is the upright that divides the window in halves: the western side was boarded up, and the eastern side was glass; the which casement commanded the Hertford road, with a pond at the end of the house, that came within eight or ten feet of it; a person standing at that window might see all the people that pass upon the road. The other window was not then boarded up, nor, I believe, ever had been; that was only a casement. I made particular observations on it, to see if there ever had been any nails on either side, and could see no appearance of any; that is, large enough for me to get out at; I have since shook hands with my wife out at it, she standing on the ground without, and I in the room; it was easily opened, only by turning a long hook; this looks out to a little narrow lane or ditch, and over the hedge is a large common field.

Was the room light or dark?—It is what you may call a light room, rather than dark, by means of these two windows, and the tiles never were pointed; the light came in from the roof; it could never be a dark room.

What sort of tiles were they?—They were pan-tiles.

How far was that window from the ground?—I believe, was I to hang out at the window by my hands, I should not be above three feet from the ground. The ground is higher at that window than it is at the north window a good deal.

Did you observe an old sign in the room?—I don't recollect there was.

Were there any trees in that hedge near the east window?—There were, so near the window, that was I within-side with a hunting whip, I could reach the boughs.

Did you observe the boughs, whether they had been lopped lately?—I did not.

Were there any cobwebs on the drawers, so as to fix them, as it were, to the wall?—I did not observe that.

Was Canning come at this time, while you were observing the room?—No, she was not.

Was Adamson there?—He was in the room long before she came; there were a great number of people there.

Whether any thing remarkable happened from Adamson's conduct?—Whether it was from his zeal I know not, but he took hold on the boards, and pulled them down from the north window: I said, Gentlemen, this cannot

be the room, for the girl gave no account of any hay being in the room.

What part of the room did the hay lie in?—It lay towards the east, on the same side the window was on, betwixt the north and east window; and the bed was on the right side the stairs, under the jack-line hole, in the south-west part; we agreed by and bye to go over the way again.

Did you see the pitcher while you were in the house?—I can't say I saw one, or looked for one; it might be there, and I overlook it.

Where were the people of the house then?—We had left them in custody in the parlour, which is the left-hand room coming into the house: when we were over the way, I saw Mr. Adamson, and another man whom I did not know, toss up to know who should go to meet Canning; and Adamson went to meet her, and came back before her.

For what purpose did they want to go to meet her?—I conjectured it was to see if they had not gone to a wrong house: we were all impatient to see her; for if I had had a horse, I would have gone myself: when I and abundance of other people were returned to mother Wells's house, Adamson came riding up, seemingly with a good deal of pleasure, waving his hat with his left hand, and said, We are all right yet, for she says there is a little hay in the room. Presently after the chaise appeared, in which the girl was: when she came, some were for carrying her over to the public-house; others were for bringing her to the house of mother Wells, which they did; she was brought, and set on a dresser in the kitchen, on the left hand of the door, fronting the fire-place; and the door where she afterwards said she had been confined was on the left hand, and the door at that time open; if she had turned her head that way, she might have seen the stairs; but whether she did turn her head that way, or whether she might have seen up into the room, I cannot say; I believe she might have seen part of it. Then there was a proposal to send for a bottle of wine to refresh those people that had been in the landau with her in the cold. She remained on the dresser about four or five minutes; then she was removed to the middle of the kitchen, on a broken stool, with her back towards the fire-place, with the door of the hay-loft on her right hand, looking towards the dresser; the door of the room was then remaining open, and she might have seen that part of it that the stairs led up to: I believe she might sit thus, first and last, twenty minutes: it was the time they went and got a pint of wine, and mulled it.

When it came, did she drink much?—She drank but very little: then somebody put the thing thus, Now let us call mother Wells in: I said, Hold, gentlemen, this will be an Old-Bailey story, and whoever is fixed upon for the committing the fact, they'll certainly be hanged; let the room be filled full of people, and let her go and find out the people whom

she accuses with robbing her; and proposed to carry her into the parlour, where were a great many people: she was carried in; and Mary Squires sat on the right hand of the chimney, upon a low chair, almost doubled together, with a black bounet on; I am sure I could not see her face.

To what part of the room did Mary Squires then direct her looks?—I believe her face was pointing to the window, straight as she sat, and mother Wells sat on the left-hand side of the fire: I said to Canning, Now look for the woman that robbed you; she immediately pointed to Mary Squires, and said, That old woman in the corner was the woman that robbed me.

Did she see her face at that time?—I could not, but I will not pretend to say what she could see; I stood close to her; somebody said, (I think it was Mary Squires's daughter) Do you hear what the gentlewoman says? she says you robbed her. The old woman got up from the stool immediately, and said—

Mr. Morton. I object against that being mentioned; it is no evidence.

Court. He may give an account of what was said in the defendant's hearing and presence.

Nash. The old woman came up to her, and said, Madam, do you say I robbed you? (and put herself in a particular posture, and had a sort of a clout about her face:) pray, madam, look at this face; and sure, if you have once seen it before, you must have remembered it, for God Almighty, I think, never made such another; pray, madam, when do you say I robbed you? She answered, It was on the first day of this new year.—The first day of this new year, madam, do you say? Lord bless me! I was an hundred and twenty miles from this place then. I with my finger tapped her on the shoulder, and said, Dame, where was you? She replied, I was at Abbotsbury in Dorsetshire, and there are a hundred people I can bring to prove it; and some of them have known me twenty, thirty, and forty years. I think there were twenty people saying she has been here but a very little time. There was a poor woman they called Natus, sat there, who said, she herself had been there, I think, ten or eleven weeks, and that she had never seen Canning there before; and she said, Squires had been there but a very little time. After this was done, Canning was carried out of the room, and carried up the stairs facing the street-door into all the rooms; I did not go up with her: after that she was carried up into the hay-loft; there she said, 'she believed that was the room.'

Mr. Dury. Are these her words, 'she believed'?—Nash. I think I can take upon me to swear they were her words. I asked her, what she knew in the room? she turned about on her left hand, and said, 'This is the room, for here is the hay I lay upon, but I think there is more of it than there was then,' pointing to the loose hay on her left hand. Upon that, she was asked by the people, that had

her under the arms, what could she note more in the room? They took up a pitcher that stood upon the ground, and held it up to her; she said, 'Yes, that is the jug I had my water in:' then a gentleman that was there took hold of a tobacco-mould, which was in a corner, and asked her, if she remembered that? she said, 'she remembered that.' He asked her what else she remembered, (I think that was Mr. Hague) and added, 'Do you remember these three saddles?' (that were in the room) she said, 'I believe there might be one;' the saddles seemed to be all over dust, they seemed to have been laid up there out of the way for a long time: then she was asked, if she remembered the nest of drawers? she said, she did not remember them. A gentleman made answer, Have you been here twenty-eight days, and never remember them drawers? she said, she did not remember them. Then Mr. Hague asked, why she did not strive to get out at that window? (that is the east window fronting the stairs) she said, she thought it had been fastened.

Did she say she had tried to see if it was fast?—I don't remember she said she had.

Did Natus's wife say any thing about her lying in the room?—Natus's wife said in the parlour, that her husband and she had laid there, in this hay-loft, ten or eleven weeks: Canning's mother was in the room, lamenting sadly, that that was the hay that her poor dear girl had laid upon.

Was the girl asked whether she remembered the jack-line?—She was; she said, she did not remember seeing it.

Was the tub of pollard mentioned to her?—I think it was not.

Did she continue positive that Squires was the woman who robbed her?—I heard no contradiction to that.

What has led you to recollect, at this distance of time, all these particulars?—It was so remarkable, it could not slip out of my head; it was at that time the subject of conversation: it is well known I told my sentiments the same night to abundance of people that came to know about it.

Knowing all these particulars, which would have been extremely necessary to have been proved in the defence of Mary Squires and mother Wells, how came you, when these people were to be tried, the one for a capital felony, and the other as an accessory, not to be an evidence then?—I was here some part of the time the girl was giving her evidence, and really was a little discontented in my mind, about her giving her evidence at that time, and her varying from the particulars she first related before Mr. Alderman Chitty, and then to us: we had a very large feast at Goldsmiths-hall, and I was obliged to give my attendance, because I am butler to the company; I had the care of, may be, three or four thousand pounds worth of plate; so that I stayed in court but till eleven o'clock, being obliged to be there, and I did not think there was any

danger of her being convicted upon such an incredible story.

Had you a subpoena?—No, I had not.

Did you then know that Mary Squires was upon trial for her life?—I did, and I did not think she would have been cast, indeed.

Had you apprehended her in danger of being convicted, should you have thought yourself excusable in not giving evidence?—If she had died, and I not gave my evidence, I should not have forgiven myself; I should have been very angry with myself; but in my own single opinion I did not think she would have been convicted; I thought the whole circumstance of the thing collected together could not amount to full proof, and apprehended the woman was in no danger.

If you had apprehended it possible that the woman should have been convicted, would you not have stayed and given evidence?—I would have gone and made an excuse, and come again.

Have you been always of the opinion you are now, that Canning's evidence was untrue?—I have always insisted upon the same I have now related. At the trial of Mary Squires, I went home and told Mr. Flower, the assistant of the Goldsmiths' company, how far I had heard of the trial, and said, I think it is impossible, with all the circumstances, that she can be convicted; and he said, he thought so too.

How came you not to acquaint the Court, that you, of your own knowledge, knew she was guilty of perjury?—I can give no reason for that.

What conduct did you pursue after the conviction of Squires, in order to atone for your not giving evidence for her?—Some time after that, I heard the old woman had a respite; I immediately waited on my lord mayor, and told him, I believed I could let him into the whole affair, as well as any man could.

Did you do this voluntarily?—I did; I was very glad to hear there was some design of saving the poor woman; I did it not out of spite to the girl, but merely in justice to the gypsy.

Cross-examined by Mr. Morton.

Did you hear the girl positively charge Mary Squires with robbing her at Enfield-Wash, on the trial of Mary Squires?—I did.

Did you hear her finish her evidence?—I cannot tell whether she had quite done or not, for I looked at my watch, and found it was time to go; so went away.

What did Mr. Flower say?—He said they never could convict her.

Whether your dissatisfaction that you have given an account of, was not owing to the observation you made at mother Wells's upon the answers the girl gave there on the 1st of February?—I did then think she was mistaken in the woman.

Whether you heard the girl give any account of this at her mother's?—I never was at her mother's.

When the old woman made her face so odd,
VOL. XIX.

by putting herself in a particular posture, as you described, did the girl alter in her opinion?—No, I did not hear she did.

Was Canning in the room, when Natna's wife said she had laid in the room 10 or 11 weeks?—She first said she had laid in the house; whether it was before we went up into the room, I cannot say; but I am certain she said so in the parlour, when Canning was by.

Did you continue to have a good opinion of Canning?—I dropped my opinion quite about her being innocent.

Look at this letter, is it your hand-writing? (He takes a letter in his hand.)—It is my hand writing.

When was it wrote?—The day it bears date. Who is it wrote to?—To Mr. Lyon.

John Hague sworn.

Hague. I am a goldsmith, and live in Noble-street, and am acquainted with Mr. Nash: he came to me on the 31st of January 1753, at night, and told me of an extraordinary affair; the contents were what he had heard before Mr. Alderman Chitty from Elizabeth Canning; he desired me, and I agreed to go down to Enfield Wash with him. Mr. Nash, Mr. Lyon, Mr. Aldridge, and myself, went together in a coach on the next morning. Before we got down we met a man on horseback (who it was, I do not know); he came to the coach-side, and said, We have taken them all. When we came there, we went to Mrs. Wells's directly; we first went into the parlour on the left-hand, there we saw the people that were taken; after we had talked with them, we went to take a view of the house; we went up the stairs, and saw the rooms; then we came down, and went up into the hay-loft or workshop, and finding nothing that answered the description the girl had given before Mr. Alderman Chitty, as Mr. Nash had said to us, he said, Here is no room answers the description she gave: we went over to Cantril's and got a glass of wine to refresh ourselves.

Mr. Willes. Was Mr. Adamson in the room called the hay-loft, when you were?—*Hague.* He was; he and Scarrat were saying to one another, Do you go, and do you go, and at last they tossed up a half-penny, and it fell to Adamson's lot to go; he took his horse and went, and came back with great triumph, with a whip lashing over his head, saying, By God we are all right, she says there is a little hay in the room; and in about a quarter of an hour after this, Canning came; she was first brought to mother Wells's door, and was taken into the kitchen on the right hand; she was set upon the dresser in the kitchen on the left hand, and the door opening to the hay-loft was then open, which she could not miss to see; but she did not mention a word that that was the place where she had been in; she sat there a few minutes; then they took her off, and set her in a chair; she never opened her lips about her stays being cut off there.

How long do you think she was in the
2 G

kitchen?—In sitting on the dresser and in the chair, I believe she had been there a little better than a quarter of an hour; then they carried her into the parlour, and set her upon a table; mother Wells sat very close to her; as they were bringing her in, mother Wells said, with a sort of a sneer, Why, the girl is sick; there was no answer made to that; as Canning was sitting, she pointed to the gypsy woman, and said, That is the woman that cut my stays off.

Was the gypsy in such a situation, that she could then see her face?—Upon my word, I think she could not; I was close to her, she was smoking a pipe.

Upon that, what did the gypsy say or do?—Lucy Squires went up to her mother, and said, Mother, the girl says that you have cut her stays off: then the old woman got up, and in a great trembling, she took her bonnet off, and stroked her hair up, and said, "Madam, consider what a remarkable woman I am; would you go to take a life away? I was at Abbotsbury at that time."

Did she say how many miles that was from town?—I don't remember she did; but George Squires then said it was a hundred and twenty miles from London.

Have you heard Mr. Nash give evidence a little time ago?—I have not heard a word of his evidence.

Did any body else take notice how long the gypsy had been at Enfield?—No, I don't remember any body did.

Do you remember seeing Judith Natus?—I cannot say I heard her say any thing.

How long had Canning been in that room, before you took her up into the hay-loft?—I believe, about half an hour; I led her up stairs myself; I had hold on one arm, and another person on the other, but I do not know who it was; he has not appeared since; but before we went there, we went into several other rooms: she was very quick, and said, This is not it, and that is not it.

What did she say upon her first coming into the hay-loft?—When we got to the top of the stairs, she turned upon her right hand next to the chimney, and took no manner of notice of any thing: then turning to the left, This is the room, says she, that I was confined in: then her mother said, Ay, this is the room where my poor child was confined in. Said I, Good woman, were you confined here with her? No, says she, but I believe everything my daughter says: then I said, Pray hold your tongue, and do not answer any questions. There I saw a very large hole on the right hand coming up stairs, large enough for a large cat to go through; it was open.

How high is it from the floor?—It is close to the floor; the jack-line run through it, and a pulley just over it; if there had been a mouse in the room, she might have seen it.

Were you in that room as soon as Nash and Aldridge?—No, they had been there before.

There I saw also a dirty nasty hay-bed on the ground, nothing but hay, which I sup-

pose was taken from the other hay, where we were told Fortune Natus and his wife lay. I asked Canning whether she remembered the pulley? she said, No, she never saw it. There is a little narrow chimney, about fifteen or sixteen inches wide; there was no grate, or appearance that there ever had been one in the chimney; it was full of hardly any thing else but cobwebs, which seemed to have been there a considerable time, they were so nasty and dirty.

Were the cobwebs so spread about the chimney, that it was impossible there should have been a grate there two days before?—Yes, Sir. There was an old casement over the chimney that was very dirty and dusty: I said to Canning, Child, did you take this for a picture? she said, No. When I took it away, all the cobwebs came with it from the top to the bottom; and on the place from whence it was taken, there appeared a print of it, that looked as if it had been there a year or two.

Was there any mark of any place, as if the picture had been there?—No, Sir.

Did you observe the window that looks towards the east?—I did; it is a casement large enough for me to get out at; that is it which fronts the stairs: I asked her how she came not to get out there, and opened it when I had hold of her arm; she said, Sir, I believe it was nailed; then I looked to see if there were any appearance of nails being there, and could see none at all.

How high is this window from the ground?—It might be about ten feet; it went into a little narrow kind of a ditch, about half a yard wide, where was a bank up against it, and a hedge and a field behind it; in the hedge were several trees near the window.

Did the branches look as if they had been lopped lately?—Yes, they did.

How much hay do you think there might be in the room?—I believe about half a load; it lay in the room on the same side the window was on; it seemed to have laid there a long time: there was another window opened into the road, boarded up on one side, and a casement on the other that opened, that is to the north, and there is a lane at the corner of it; I looked out at it; there was no pent-house or shed under it; it was perpendicular. Mr. Adamson turned some of the hay over to look for the stays. I saw also a chest of drawers, which, I dare venture to say, had been there more than a year, if not two; they were so very dusty betwixt the drawers and the wall, that I did not care to meddle with them.

Do you remember a barrel or tub in the room?—I cannot say I do; there was a tobacco-mould over Fortune Natus's bed; somebody asked her, if she knew that? she said, she did. There were two women's saddles, and a man's saddle; I asked her, if she saw them? she said, she believed there was one; they all appeared to have been there a long while, they were very nasty and dusty.

Did you observe the door that leads to this room, how it fastened?—I did particularly; I

could not perceive there ever was a lock upon it; I believe there never was one; it fastened only by a latch and a button; I will not be positive there was a latch; I said to the girl, Zounds, child, I cannot think you were ever here at all.

What answer did she make to that?—She made me none at all.

Did you hear Judith Natus say any thing in Canning's presence about the room?—I cannot say whether I did or not.

Did you go away satisfied with what you had seen?—No, I went away very much dissatisfied. When we were in the coach going home, Mr. Nash, and Mr. Aldridge, and I gave our opinions to Mr. Lyon, that we did not think she was there; we said, she must be mistaken: he was so angry at it, that he did not speak to us all the way home, and that, I suppose, is the reason we were not subpoenaed or called.

How came you not to come and give your opinion in favour of Squires?—I was in court all the while, and I'll give my reasons why. When they were first taken up, Canning said, Virtue Hall was one of the girls that stood by when her stays were taken off; at the same time Virtue Hall, with all the seeming innocence, laughed in her face, and said, God forgive you, madam, I never saw you in this house in my life. She had challenged her and Lucy Squires with being by: Lucy Squires said the very same as she did. Seeing such seeming innocence in her there, and when in court to hear her swearing such a thing that I thought to be as false as the gospel is true, I protest I had not power to speak; I believed she was perjured in all she said; that is the whole reason why I did not speak: but had I had spirits, I would have spoke.

After Squires was convicted, did you approve of your own conduct?—Upon my word, Sir, I was not easy upon my being silent. I went of my own free-will before my lord-mayor, and gave an account of what I knew, the same as now.

Had you any acquaintance with Alderman Gascoyne then?—No, I do not know that ever I had seen him before.

How long after the trial was it, that you went to my lord mayor?—It was about a fortnight or three weeks after; it was long before Squires was respited.

Had you any knowledge of Canning before you went down with her?—No, I never saw her before in my life.

Did you go with her as her friend?—I did, as much her friend as any one that went along with her; and before she came down, did as much abuse old mother Wells, and George Squires, and the people in the house.

Cross-examined by Mr. Nares.

Were you present at the whole trial of Mary Squires?—I was.

How long were you in court after Virtue Hall had been examined as a witness?—She was the second witness.

Were you so much alarmed, you could not recover yourself in the whole trial?—Upon my oath, I could not recover myself; I really was shocked at it.

Had you heard Canning give her information of the room?—No, I had not; I had it from Mr. Nash.

Did you see Canning's mother in the hay-loft?—I did; she followed us up there, and said them words to her as I said before.

Are you sure you saw her in the hay-loft?—Yes, I am.

Did she continue there the whole time you were examining it?—I do not know that.

How near is the dresser in the kitchen to the stairs?—It is very close to the stairs.

Can you from that dresser see up the stairs, if the door is open?—When the door is open, you may sit on any part of the dresser, and see quite up into the room; to be sure she could see quite up into the room.

Was Mr. Adamson in the hay-loft when the girl was there?—I do not remember I saw him there then; I saw him there before the girl came down to Enfield-Wash.

Were you in the room all the time the girl was?—I was.

Did you hear any body ask her, what was to be seen out at the window?—I did not hear that; I saw him and Bob Scarrat going to tear the boards down before the girl came there, and they were pulled down before she came.

What did they do that for?—I do not know; it may be through prejudice; I do not know the reason why.

Whether there was not an observation of yours, or somebody else, that those boards had been but lately done up?—No, not by me, or any body else that I know of.

Edward Aldridge sworn.

Aldridge. I live in Foster-lane, and am a working silversmith; I am acquainted with Mr. Nash, Mr. Hague, and Mr. Lyon. On the 1st of February 1753, I went down along with them to Enfield-Wash, having been told how sadly Mr. Lyon's maid had been used. When we were on the road, there was a man came on horseback, and told us they had taken up the people of the house.

Mr. Gascoyne. Have you heard any of the evidence given by Mr. Nash and Mr. Hague?

—*Aldridge.* No, I have not. When we got to Enfield-Wash, we went to Mrs. Wells's house; I went into the parlour; there were all the people sitting all round the fire; then I went into the kitchen by myself, and so all over the house: I was in the room where the girl says she was confined; it is called by the name of the hay-loft. I believe I was there before Mr. Nash was; I was then alone.

In what circumstance was this particular window that looks towards the north?—It was part of it glass, and part wood.

Had the casement wood over it?—That I cannot tell; I am sure part of it was boarded up.

That part that was not boarded up, had that any appearance of any thing nailed up?—I was not so curious while I was there to examine it: they had described the room to me as being a square room, and a room with a grate in it. After I had been there, Canning came down, and was carried into the kitchen, and set on a dresser.

Was the door open that leads up into the hay-loft?—I cannot be sure of that; I was not in the kitchen all the time she was there. She looked about as if she did not know where she was. I was with her when she was carried into the parlour: as soon as we had taken her in there, mother Wells came to her, and said, Madam, do you know me? No, said she, I do not know that ever I saw you in my life before: then George Squires came up and said, Madam, do you know me? She said, No, I don't know that ever I saw you in my life; it was that old woman in the corner that cut my stays off. I was close by Canning at the time.

Did you see the gypsy's face at the time?—No, I never saw her face till she got up: Madam, said she, I cut your stays off! (she threw her things open) I am very remarkable; if ever you see me before, you must know me. She mentioned Abbotsbury, and several other places' names, which I have forgot, where she said she was.

Could Canning see the gypsy's face in that position she was in at the time she charged her?—That I cannot tell: when Canning went up into the hay-loft, I followed just after her: I remember seeing the hole in the wall; when I went up before, there was a great whisp of hay in it, which I took out and put in again; when it was out, I could look all over the kitchen; it was a hole where the jack-line was; it was pretty large, I could get my two hands in it; there was a pulley hung over it, but it then had no communication with the jack.

Did you ask Canning any question?—No; I heard Mr. Hague ask her, why she did not get out at that window? she said, she believed it was fastened up.

Did you hear any body ask her, if she remembered that hole?—No: there was hay between the stairs and the jack-hole, and a little square chimney just at the corner.

Were there any pictures over it?—There was a casement over it, that seemed to have been there a great while, because it had cobwebs over it, and was tied, as it were, to the wall by them; and the chimney was covered with cobwebs from one side to the other, and full of dirt, and no sign that there had been a grate there at all.

Did you look at the window towards the east?—No, I did not. I came down stairs and left them above.

Do you remember a chest of drawers being in the room?—I do.

Did you hear her asked any thing concerning them?—No, I did not.

Do you remember some saddles, a tobacco-mould, and about half a load of hay being there?—I do: there were three saddles, and a large quantity of hay.

Did you see ever an old stool, or table?—I did not take notice of any. I went up just after the chest of drawers were removed a little way from the wall; it seemed as if it had stood there twenty years. I remember there was a barrel with some stuff in it, bran or flour, pollard I believe.

Did the hay seem as if it had been there pretty long?—It did, because it was pretty hard.

Were you satisfied with the room upon seeing it?—I was satisfied it was not like a place of confinement; neither did I believe she was ever there.

Did you, upon your being in the room two or three times, observe the window towards the chimney?—Yes; it was a narrow casement window, big enough for a man to get out at.

How far was it from the ground?—Any body might drop out of it very easily, without hurting themselves.

Did you look to see if the window had been fastened?—I looked, but could not find any thing like fastening to it.

Did you examine the door, how that was fastened?—Yes; it was not fastened at all, only with a button; there was no lock to it; there were some holes where locks had been; they looked like key holes, pretty large holes.

Was it probable to think there had not been a lock upon the door for a month?—Yes, and longer than that.

Might you venture to swear, by the appearance of the door, there had been no lock upon it for a week before?—That I might, or for a month before.

Or a year?—Things alter very much in a year.

Did you go down as a friend of the girl's?—I did, and at my own expence.

After examining these circumstances, did you return with the belief of her story, or not?—I went and stood at the door, and there came one Hall, a school-master, who lives at Theobalds, and said to me, What do you think of it? I said, The girl is mistaken; I believe she never was here.

Is there any pent-house under the window, where it is supposed she made her escape?—No; there was a cellar-door under it; no boards, no pent-house; it was perpendicular to the ground.

Did you observe the wall on the out-side?—I did; I went out in particular to look at it; there was no sign of clawing the wall, or any thing.

When you returned to town, upon the whole, what did you think of it?—Upon the whole, I did not think she had been there.

How came you not to appear as a witness for Squires upon her trial?—I was never subpoenaed.

Were you in court on that trial?—I was at the beginning of it.

Why did you not stay all the time?—Because we had a dinner at Goldsmiths'-hall, and I was going to it.

Were you not very much concerned at your conduct, when you heard she was convicted?—I said to Mr. White the officer, at going out, What do you think of it? he said, he thought she would be acquitted: I said, I thought so too.

How came you, after this, to go before my lord mayor?—My lord mayor had heard of me by Mr. Hague or Mr. Nash: they desired me to go with them.

Had you any acquaintance with the lord mayor before that?—No, I had not.

How long after the conviction of Mary Squires was it, that you went before my lord mayor?—I can't justly tell.

Was it a week after?—It was a great deal longer than that.

Did you give the same account there, as you have done now?—I believe I gave exactly the same.

Had you any acquaintance with Canning before?—No, I had not. I went with Mr. Lyon, because I had heard a bad character of Wells at Enfield-Wash, and was glad to hear she was taken, in order to be brought to justice.

Did Mr. Lyon and you all return very good friends?—They went before justice Tashmaker, and I was quite tired of the thing. I went to an ale-house, and got some mutton chops, and half a pint of wine: I thought it was not worth hearing.

Cross-examined by Mr. Williams.

Were you with Elizabeth Canning in the kitchen?—I was: she seemed to stare about her, as though she did not know where she was.

Did any body ask her if she knew the place?—No; nobody did, as I know of.

How long might she be in the kitchen?—Not a long time; she had some wine brought her there.

Did she seem to be ill?—She did, to be faint and ill then.

How long was she before she pointed to the old woman, after George Squires asked her the question whether she knew him?—It was immediately after.

Did she speak that of her own accord?—I believe she did; I don't think any body prompted her to it: I saw nobody talk to her then.

When did you declare your dissatisfaction first?—I declared it before I left the house.

When did you cease to be her friend?—I soon ceased to be her friend.

How long after this was it you had conversation with Mr. and Mrs. Howard about this? and upon what account did you go down there to them?—I was going down to Enfield-Wash, I cannot tell how long after; I don't know whether it was not that week. I hardly

knew the gentleman; I have heard say he is a surveyor of the window-lights: I remember I went down to Mr. Edward Aldridge's at Enfield-Wash; when I went out, I was desired to take some of the papers (her printed case in order for a subscription) to Mr. Aldridge there.

Did you recommend it to them about subscribing for the girl?—I did not deliver papers: Mr. Aldridge took one in his pocket with him, and I went with him to Mr. Howard's; we had some discourse with him, but I can't say what it was justly.

I'll put you in mind of one thing: did you, or did you not, say you were satisfied with the girl's description she gave of the house, either to Mr. or Mrs. Howard?—I denied it from the very first.

Did you say you thought she had been at the house, or did you declare you thought she had not?—If I declared any thing about it, I declared she was not at the house; whether I did, or did not, I am sure, if I said any thing, I said she was not confined there.

Did you any ways recommend this paper to Mr. or Mrs. Howard, or endeavour, with Mr. Aldridge, to encourage the case?—No; I only left the paper with him; I did not encourage the case either one way or other; we did talk about the gypsey, whether she was there; they could not tell what time she had been there. I asked them, how long they thought she had been there, Mrs. Howard said, she could not call to mind how long she had been there, but said, she thought she had been there some time, for she knew her very well.

How many papers had you there?—I had but one.

How long after the conviction of the old woman was it before you went before my lord-mayor?—Mr. Nash and Mr. Hague had been there two or three times before I had been there, and they desired me to go with them.

Was it a month after?—It was that, to be sure.

How came you, when you heard this poor woman was reprieved, upon an information made on her behalf, when every body was then endeavouring to explain the matter, not to go before the magistrate in a month's time? Did not you think it a matter of justice to go?—When I was called for, I did: it was no business of mine to trouble my head about it to go.

William White sworn.

White. I am an officer under my lord mayor. I remember going down to Enfield-Wash, on the 1st of February 1753, to apprehend Susannah Wells. There was a warrant went down before me: I met three gentlemen there with the warrant: I apprehended it was to take up mother Wells, for cutting off Elizabeth Canning's stays: I went over the way to a public-house; then somebody said they saw mother Wells go by; then I said, Let us go over and secure every body in the house: there were four of us, Mr. Adamson, Mr. Wintlebury, I, and another person whom I do not

know: we went there: when we were in the parlour, Mr. Adamson pointed to mother Wells, and said, That is she; there were two or three other women in the room with her. I immediately drew my hanger, and said, they were all prisoners. I put a centry over them, and went to the other parts of the house, and took all that were in the house, and put them into the parlour: mother Squires and her two daughters were in a fore room up one pair of stairs: George Squires was brought into the room by some of the people: I told him he must be detained. Gentlemen, said he, look over every thing that I have here: I turned them all out, and the old and young women's things too, to look for the stays, but no such thing was found.

Mr. Willes. Did you tell them the reason of your apprehending them?

White. I did not just then: I said, there was a robbery committed, and they must not go away: I found one of mother Wells's daughters, and Virtue Hall next, and brought them to the rest. After this, I went into the kitchen on the right hand, and looked round. After that, I saw a woman's head, by looking over the door through a chasm, in a place they call the hay-loft. There was at the bottom of it seven steps to go up. I went and fetched her down, and put her amongst the rest; this was Judith Natus; she appeared to be just getting up.

What time of the day might this be?—I take it to be about nine in the morning. After I could find nobody else, I went up into the hay-loft to take a view of it; I just looked round, and saw the hay, and two windows, some saddles, a chest of drawers, an old barrel, a musket, and a tub, and a great deal of lumber that I can't particularly describe.

How much hay might there be?—If it had been bound up, I believe there were about the value of 12 or 15 trusses; it seemed to have laid there a great while: I saw also a little stove chimney without a grate in it. I did not stay to make particular observation.

Were there any pictures over the chimney?—No, there were none: I saw the bed Judith Natus had lain in, that was opposite the fire-place. When I had looked round the room, I was a little surprized, and thought the girl was mistaken; so I went out on the outside, and looked under the window that fronts the road, the north window: I could not observe any thing particular there, neither the footsteps of any body dropping from the window, or print of their clothes by dropping down; it was clay ground; it was so soft, that a step of a dog might make an impression. There was a heap of human dung lay under it, about as high as the body of a quart bottle; there was no appearance of any body being there for some time; neither did it appear to me as if any body had been out of that window: I called Mr. Adamson to shew him; he would have persuaded me there were some scratches on the wall with her foot, but I could not see any.

Was there any pent-house or shed between the ground and the window?—No, there was not; the wall was perpendicular from the ground. I was in the parlour amongst them when Canning came down, which I believe was about twelve or one o'clock; she was carried into the kitchen, and set upon the dresser opposite the parlour; she sat there about four or five minutes.

Were the other witnesses there at that time?—There were so many people, I can't tell. After this, she was carried up stairs to where I fetched the gypsy from, but I did not go up stairs with them; neither did I go up into the hay-loft with her. The prisoners being all in the parlour, it was proposed to bring them one at a time into the kitchen; I objected against that, and desired they would all go back again into the parlour, and let Canning go in and pick the woman out from among them all, that had robbed her; I was afraid somebody would go and give a signal; then we went into the parlour; they were all placed in a circle round the fire; I believe, before they were moved, Mary Squires was on the left-hand side of the fire; Wells sat with her elbow against the fire-place, on the right-hand side; this was before they got up to come in one at a time; after this, their positions were most of them altered; and when Canning came in, which could not be above a minute or two after, upon some occasion, Wells was shifted, and got into Squires's side, and Squires in her place. Canning fixed upon the old gypsy, as soon as she came into the middle of them; the gypsy was sitting in the corner stooping, I think, with a black bonnet on. Canning said, That is the woman there, pointing to her: I saw her fix her eye immediately on that corner of the room.

Was her face fronting Canning?—No, it was cross the fire-place, as I apprehend.

Do you think Canning could see her face then?—I can't answer for what she could see: I begged of her, before she went in, for God's sake, to be sure before she fixed upon any body.

Whom did you expect she would have fixed upon?—I expected she would have fixed upon mother Wells, before she went into the room. When she had fixed upon the gypsy, one of her daughters got up, and went to the old woman, and said, This gentlewoman says you have robbed her. Canning was then standing in the middle of the room amongst the people. The gypsy woman came up to her, and opened her face, and said, Me rob you! I never saw you in my life before; for God Almighty's sake, don't swear my life away. When I said there was a robbery committed, George Squires asked me, when the robbery was committed? (his mother and two sisters were then with him) I said, it was on the 1st of January. He said, We were in Dorsetshire at that time, at a place called Abbotsbury; we went there to keep our Christmas. Then I took an opportunity to find out mother Wells's daughter by herself.

Was Canning present?—No.

Mr. Morton. Then what Wells's daughter said, is not evidence against the defendant.

Mr. Willes. I meant what was said in Canning's presence.

White. They all said they were at Abbotsbury, while Canning was in the room; that is, the son, two daughters, and mother.

Mr. Willes. Did they mention keeping their Christmas before Canning?—White. No, they did not mention that in the parlour, but they did to me before Canning came; we stayed some time; then we went before justice Tashmaker at Edmonton with them all in a cart.

Cross-examined by Mr. Morton.

I think you are an officer in London?—I am, but I had a constable there.

Was one Long, a son-in-law to mother Wells, in the house?—I believe he was there with a cart to carry them: there were a great many people; I did not know Long.

After you had collected the people out of all the rooms, you say you went up stairs?—I did.

Did you meet with any obstruction?—There was a man made some obstruction, and said, he would first see the warrant; upon which I went to the constable and fetched it, and went up.

In whose custody did you leave the prisoners?—With the people that went down with me; the officer that had the warrant was in the parlour.

When you went down, did you leave that man alone?—I believe he stood upon the stairs, till I fetched the warrant; he was at the door of the room, but said he would not open it till he had seen the warrant.

Was that man's name Long?—There was one Long that carried them to justice Tashmaker's; but whether that was he, I cannot tell.

The Long I mean is son-in-law to Mrs. Wells.—Then I don't know him.

Were they all uniform in giving the account of being at Abbotsbury?—They were.

Mention what the old woman said?—She said she was at Abbotsbury on the 1st of January; and George and Lucy said, they were there; and Mary said, she was at her uncle's in the Borough; she said she was there at Christmas.

You say Adamson and you had no other conception but that mother Wells was the thief?—We did think so.

Was there any shewing any body to Canning, when she came in?—No, Sir, not as I saw; she, of her own accord, voluntarily picked out Mrs. Squires as the person that cut off her stays.

Mr. Davy. We shall now produce several witnesses, who, at various times, during the month of January 1753, were in the very room in which the defendant swore she was confined.

Fortune Natus sworn.

Natus. I live at Waltham-Cross, when I

am at home; I have lived there almost two years.

Mr. Davy. Were you there before the year 1752?—Natus. I was there a good while before that.

Did you ever live at Enfield-Wash, and when did you come there?—On the Monday fortnight after my lord-mayor's day, of sir Crisp Gascoyne's mayoralty, I came from the Wheat-sheaf at Waltham-Cross, and went to lodge at Mrs. Wells's house at Enfield-Wash.

Are you a married man?—I am, Sir; my wife's name is Judith; she lived with me all the time.

In what room did you lodge at Mrs. Wells's?—In a room properly called the workshop; that is, the room that goes up out of the kitchen, about seven or eight steps to go up.

Is it a long or square room?—It is a long room, no squareness belongs to it, with a pan-tile roof.

How many windows are there to it?—There are two; one facing the feet of my bed, it was a single casement; and the other at the farther end of the room, upon the left hand as I lay, a larger than the other, one half boarded, and the other half glass, looking into the great road; and there was a chimney facing the foot of my bed, on the right hand side, in the corner of the room next the little window.

What was your bed?—It was made of hay and straw mixed together.

Had you any pillow or bolster, and what was it made of?—I had a sack of wool for my bolster.

Did your wife lie with you on this bed?—She did, Sir.

Mention the furniture of the room?—When I came first into the room, there was pretty nigh half a load of hay, as nigh as I can guess; a large chest of drawers on the left-hand side, about half way in the room; two or three side-saddles, one man's saddle; a large box that had some pollard in it, it was a deepish drawer, and formerly did belong to the chest of drawers; a tub to hold some chaff for Mrs. Wells's horse, and a tub with some iron hoops on it; an old gun, and a barrel of a gun besides; the gun stood in the corner upon some pantiles; an old lanthorn, an old spit, and an old cross-cut saw, that stood upright in the chimney; there were pullies and a line that belonged to a jack, that came through the hole at the right hand of my bed, over my head; the hole the line came through was large enough to put three of my fists in, and about a foot in length; I used to put a wisp of hay in it to keep out the cold; there was also the sign of the Crown there, almost at the feet of my bed.

Was the sign made of wood or copper?—It was made of wood.

Was there any grate in the chimney?—No, there never was a grate in the room since I knew the house.

Did you observe any thing else in the room?—I observed a bar there, that belonged to the bar in the kitchen, where they used to keep all

their liquor; it was old, so they brought it up stairs.

Were there any pictures in the room?—I never saw a picture in the room in my life.

What was over the chimney?—There was an old iron casement on the top of the chimney; it was all iron, no glass at all, to the best of my remembrance.

Was there any lead in it?—There was no lead in it, as I think, only the frame of a casement.

How long did you lodge there?—I lodged there ten weeks, all but three days, and in no other place but this room. I lay out of it but one night in all the time, that was on a Wednesday night; my wife never lay a night out of it in that time, except that night I can't tell, I not being there.

Was the quantity of hay decreased, when you lodged there?—It was; they kept a horse, and had some for him out of it constantly, almost every day.

How much hay might there be left, when you last lay there?—It might be the value of ten or twelve trusses, if it had been tied up.

Was any of the furniture of the room taken out while you were there?—None at all, but the sign of the Crown, that was bought by Ezra Whiffin.

When did he buy that?—I cannot justly say that; I did not see him take it away.

How do you know that he bought it?—Because he has now got it hanging up at his door. There was a large piece of wood under the foot of my bed, and some irons in it that belonged to the sign; he has had them since he bought the sign, and the piece of wood is in the chamber now. I was there new and old Christmas, and all the month of January, till I was taken up on the 2d of February.

Look at that young woman, (meaning Canning) did you ever see her there in January?—I don't know any thing of her; I never saw her in the house, or at the house; I only had a glimpse of her at justice Tashmaker's; when they were taken up, I was at work, and was sent for home.

Did any body besides your wife and yourself go into that room?—Yes, one John Howit, Mrs. Wells's son; he came there for some pollard to feed his mother's sow and pigs with, and several times for hay, when I was there; and Sarah Howit, his sister, she often came for pollard to serve the pigs; she almost always lived at home: I have seen the widow Long there; her maiden name was Elizabeth Wells; I have seen her there several times in the month of January; there are two Longs; one of them is Mr. Long's own daughter, she never was there: I have seen Virtue Hall in that room.

Did Virtue Hall lodge in the house?—She was a lodger there before I knew the house, in one of the best chambers.

Do you remember when the gypsy first came there?—I cannot well remember the day punctually that they came there; they came

about a week and a day before they were taken up.

What rooms did they lodge in?—They lodged up the main stairs, in one of the best rooms.

Mention, if you can, what rooms the several people lay in?—I can describe none of them, because I never was much in them: Virtue Hall lay along with Mrs. Wells: I had been in the rooms, but never to take much notice of them.

Describe the several rooms to which the stair-case leads.—There was one room on the left-hand side the stair-case; there Mrs. Wells and Virtue Hall lay in one bed, I believe; the old gypsy lay in a room opposite.

Where did George Squires lie?—I don't know.

Have you any particular reason for remembering the time of the gypsy's coming to Wells's house?—I am no ways exact to the day, but by reason she looked so frightful, that I did not care to be at the fire with her.

Had you ever seen Mary Squires, or her son, or daughters, before the time you mention?—No, I never had, Sir, in all the course of my life.

Do you know who came to Enfield-Wash with Mary Squires?—No, I don't, because I was then at work; her son and two daughters lodged there all the time she did.

Did they board in the house?—No, they went to the shops to buy their victuals; they were acquainted with Mrs. Larney, who sells butter, cheese, bread, and bacon; she lives about two stones-cast from Mrs. Wells's house.

Is she a married woman?—She is; her husband is a bricklayer, I think, named John.

Do you remember any pitcher in the house?—I remember one very well; it was a largish black pitcher, broken about the mouth; my wife made use of it over-night, before we were taken up, to fetch water from a pump over the way, at Mr. Howard's, for my supper: Virtue Hall, and Mrs. Wells, and Sarah Howit, used to go there for water.

Do you remember any bed-gown Mrs. Wells had?—No, I don't remember she ever had any at all.

Look at this pitcher, handkerchief, and bed-gown; do you know either of them?—I'll swear to the pitcher, that is Mrs. Wells's; I never saw the handkerchief and bed-gown in my life.

Do you remember one Robert White coming to Wells's house?—I do; he used to come there, as far as I know, under pretence of courting Sal Howit, almost every night; I have known him five or six years; he has seen me go to bed in that room several nights.

Cross-examined by Mr. Nares.

What is your business?—I am a poor labouring man.

Where have you been since you were taken up?—I have been at work at Mr. Bell's, at the Four Swans, at Waltham-Cross.

Did you work for him before?—No, I did not, Sir.

Are you sure this is the pitcher that used to go so often to the pump?—This is it.

How came you to go to live at Enfield-Wash?—I went there from London, being hired by a farmer at Waltham-Cross, and I could not have constant lodging there.

Who directed you to mother Wells's house?—A man, whose name is Payne, and my wife, went and asked for lodging; I was to pay nine-pence per week.

Why did not you lodge in the other part of the house?—There were no rooms empty there.

Was not there a garret empty?—I don't know, I never was up there.

Were not you sometimes disturbed of your rest by people making a noise in the kitchen?—They could not come into the kitchen but I could hear them; I very seldom heard much noise; sometimes I slept almost all night.

What time do the family use to go to bed?—The family generally go to bed betwixt nine and ten o'clock; I never knew any harm by the house; the people that belong to the house have got a very bad character; but from what I know of it, I never saw any harm in it; and it is a very sober, honest house; I never saw any ill tricks, or irregularity, all the time I was there.

What time of the day did Robert White use to come?—He used to come when he left off his day's work, may-be about six or seven o'clock.

How long did he use to stay?—May-be two hours, seldom longer.

Was there any other lodger there besides you?—Virtue Hall was another.

What did she use to do for a living?—She used to spin.

She was a very industrious girl; was she not?—I cannot say for that, she used to work but a little.

Can you remember when the sign was carried out?—I cannot say when it was really; I do not say what time I missed it, but only I remember its being there.

What time were the sign-irons carried out?—They were not carried out till some time in January, before I was taken up.

How long before you were taken up?—It may be more than a week or ten days before.

Now I would ask you whether you were in company with Arthur Newit?—I have several times; I have work'd for him.

Do you know one John Jackson?—I do; he is a farmer, and lives about a mile out of Ware town.

Do you know William Hubbard?—I cannot say I do.

Did you ever take an oath upon this affair?—The first I ever took was before sir Crisp Gascoyne, at the Mansion-house.

How long is that ago?—I cannot recollect that.

VOL. XIX.

Do you think it is more than six months ago?—It must be more than that.

Are you sure the girl never was in that room?—Yes, Sir, I am, the time I lodged there, which was ten weeks all but three days.

Did you ever fall in company with Mr. Newit after this?—Yes, several times.

Do you remember what conversation passed?—He has taxed me several times with swearing false, and offered to lay a wager that I lodged in another house at Enfield-Wash, besides mother Wells's.

Was ever such a wager laid?—I believe there was: but what I said was truth.

What was the wager?—I believe it was a shilling a-piece, I think so; but it was drawn, because he found he was wrong.

We have those present that can give an account of it, so be careful: say whether or not, upon that conclusion, you did admit you had lodged at another house?—No, gentlemen, I am come here to speak the truth; I never did admit, in their presence, that I lodged in another room, or in another house.

Did you never admit you had lost your wager, and that you had laid in another room?—I never did admit it; I did not lose the wager at all, because it was drawn.

By Mr. Davy.

Mr. Davy. When were you applied to, to lay this wager?—*F. Natus.* It is about a quarter of a year ago.

Where was this?—It was at Mr. Bell's house at the Four Swans at Waltham-Cross.

What was the wager?—I cannot say what money was laid, I down'd with my money myself.

Who was in the room at that time?—There were several people there drinking; I cannot say whether they were common men or gentlemen.

Was the money staked?—I cannot say whether it was a shilling; the money was staked down.

Who held the stakes?—I don't know.

Did Mrs. Bell hold it?—I don't know that she did; I will not be sure of that; I had some of mine again.

Why had you it not all again?—I paid for a decanter of beer out of it.

Did Mr. Newit pay for any out of it?—He paid for none.

Did you drink part of the beer?—I did, Sir.

Were you here upon the trial of Mary Squires?—I had a subpoena, and did come, and was in the Old-Bailey yard, and up near the door.

What prevented your coming into court to give evidence?—Because I was not called; none of the witnesses were called, never a one.

Was there any other reason?—No other reason, but they were not called.

Were you not assaulted?—I was, at the place that turns out of the Old-Bailey yard, three or four times, and I shewed my subpoena.

2 D

Who assaulted you?—There was a tallish man that kept the gate, pitted very much with the small pox. he was the only person that turned me out of the yard.

Did any other person use you ill?—There were several other people, but none touched me to turn me out.

Were you alone?—I was with the other witnesses; they stood upon the steps; two or three of them were turned out of the yard.

What were the other witnesses attending for?—For the same as I did.

What are their names?—I cannot say half their names.

Name some of them.—There was the widow Long was one; they wanted to mob her.

Mr. Nares. I must obstruct this; this does no ways affect Canning, if it was the neglect of the officers; it cannot be proved that she was privy to it.

Judith Natus sworn.

J. Natus. The last witness is my husband; he does husbandry-work; he did work for Mr. Payne at Waltham-Cross; and we then lodged at Mrs. Arnold's, a fortnight; she bid us provide ourselves, because we were very poor; and at the fortnight's end we came to Mrs. Wells's house at Enfield-Wash, where we lodged ten weeks all but three days, before we were taken up; I cannot tell the day of the month when we came there.

Mr. Willes. What month was it in?—*J. Natus.* I cannot tell.

Was it in September, October, November, or December?—I cannot tell.

Was it before new Christmas-day?—It was.

How long is it ago?—Upon my word I cannot tell, because I am no scholar.

During the ten weeks all but three days, how many nights did you lie out of that house?—I never lay out of it one night during the whole time; my husband lay out of it one night, and but one.

What room did you lie in?—We lay in a room they call the workshop.

In what part of the house is it?—They go through the kitchen, and up eight stairs, as near as I can guess; our bed was of hay and straw, on the right hand going up; we had a sack of wool for our bolster.

On which side was the head of your bed?—It looked into the kitchen.

Was there any hole near your bed?—Yes, there was one at the head of the bed; we used to stuff it with hay to keep the cold out; it was there before we came there.

Where did that hole look into, when it was not stopped up?—It looked into the kitchen.

Describe the room; is there any chimney in it?—There is, and a casement over it.

What do you mean by a casement over it?—There was an old casement, all to pieces almost, over the chimney, when we came into the room.

Was there any glass in it?—There might be

about half a casement, not much glass to signify.

Was there any grate in the chimney?—No, there never was for the time I was there.

Was there any chest of drawers?—There was a nest of drawers, which I used to put my bread and cheese in, because the mice should not run away with the cheese.

Was this chest of drawers on the right or left-hand side of your bed?—They were on the left-hand side.

Was the hole you used to stop with hay of any use?—No, none at all.

How big was it?—It was about as big as my two double fists.

What was hung over this hole?—The jack-line that was at the head of my bed.

Then cannot you tell the use of the hole?—I believe it was for the jack-line to go through.

Pray, what other furniture was there in the room?—I believe, as nigh as I can guess, there was about half a load of hay, that was there before we came.

What was there in the room besides?—There were pan-tiles at the farther end of the room, which had laid there before we came; an old spit, and an old lanthorn, just by the chimney; one man's saddle, and two women's saddles; there was a saw, and a tub which Mrs. Wells used to put chaff in for the horse, and a box that she used to put pollard in for the pigs, that stood on the left-hand side.

Did she use to keep pigs?—Yes, Sir, she did, in a little sort of a wash-house. She used to go into the room for pollard every day, and feed them with it. There was a sign of a Fountain there; it stood in the room before we came, behind a tub where the chaff was.

Was there ever a gun there?—Yes, there was a gun.

Mr. Nares. Don't put words into her mouth.

Mr. Willes. Was there one sign or two?

J. Natus. There were two, the Fountain and the Crown.

Where was the sign of the Crown?—They stood together, fronting you as you go up. Mr. Whiffin bought the sign of the Crown before old Christmas; the irons that belonged to the sign-post went at the feet of my bed, and he bought them: he took them away about a week or a fortnight before we were taken up, as nigh as I can guess.

How long had Mrs. Squires lodged there, before she was taken up?—She had lodged there a week and one day.

Do you know George Squires?—I do; I never saw him in my life before he came to lodge there: there were two daughters, one is named Lucy.

Where did they use to lie?—They used to lie up stairs in the other part of the house; she and her two daughters lay in a chamber over the parlour.

Were there any other young people in the house?—There were nobody at all in the house but them and ourselves.

In what room of the house did Virtue Hall

lodge?—In the room fronting the stairs, near where the gypsies lodged.

Had there been any use made of this hay?—They used to fetch it for the horse.

Who used to fetch it?—Sal Howit; she is Mrs. Wells's daughter; and Mrs. Wells herself, and Virtue Hall used to fetch some, and sometimes pollard for the pigs.

How came Sal Howit to be Mrs. Wells's daughter?—Mrs. Wells had two husbands.

How was this house supplied with water?—Sometimes we fetched it from a gentleman's pump from over the way.

Look at this pitcher.—I cannot swear to the pitcher; but I have fetched water myself many a time in such a black pitcher; I think it was not broke so much at the mouth as it is now: one may be like another: I cannot say it is the same; I think it was not quite so big as this.

Look upon this bed-gown, examine it well.—I do; I never saw this in my life, before they came and took us up: Mrs. Wells had no bed-gown.

Look at that young woman, (meaning Elizabeth Canning) did you ever see her at Mrs. Wells's?—I never did, before she came with them to take us up, if that was the last word I was to speak.

Look at this handkerchief; do you know it?—I never saw it in my life before.

Were you subpoenaed at Squires's trial, in order to give evidence?—I was; but they would not let me come in.

You were taken up with the rest, were you?—I was, and carried before justice Tashmaker, and from thence to justice Fielding. Canning cleared me; she said she never saw me before.

Did you give the same account as you do now?—I did.

Cross-examined by Mr. Williams.

Did she charge you with any thing when you were taken up?—No, she did not.

Did she charge Mrs. Wells at all?—No, she did not.

Did you hear her say Virtue Hall was by, when Mrs. Squires cut the lacing of her stays?—I cannot say I heard her say it.

What countryman is your husband?—He comes from Gloucestershire.

From whence are you?—I was bred and born at Ware in Hertfordshire.

FRIDAY, May 3.

Mary Larney sworn.

Larney. I live at Enfield-Wash, and keep a chandler's shop. I have known Fortune Natus and his wife some considerable time; they have bought goods of me, that is, bread, butter, cheese and beer.

Mr. Davy. When was the first time you ever saw them?

Larney. It was some time after Michaelmas was twelve-month, between that and Christmas they lodged at Mrs. Wells's house.

Did you ever hear them say in what part of the house they lodged?—No, I never did, indeed.

How long did they remain there?—They remained there after the time they were taken up, for they came back after that.

Do you remember any other lodgers Mrs. Wells had in her house?—Virtue Hall used to come sometimes for things, and I remember the gypsies coming.

When was the first time of your seeing them?—It was on a Wednesday; and the Thursday was se'nnight after, in the morning, they were taken up.

When you saw the gypsies, how many of them were there?—Lucy was the first I saw of them; she knocked at my door, and asked me if I sold small bread, on the Wednesday; I said, Yes; I sold her a loaf and some cheese and small-beer, and lent her a pitcher to carry it home; (I live opposite Mrs. Wells's house) in the evening of the same day old Mrs. Squires came. George brought the pitcher home the next morning. He or the sister came every day till they were taken up, and had things of me, and sometimes the old gentlewoman for tobacco; I saw them commonly two or three times a-day; that very morning they were taken up, they had tea.

What is your husband's name?—His name is John Larney; he is a bricklayer.

Do you know whether Mrs. Wells keeps any cattle?—She keeps a horse and a hog.

How long have you known her?—I have known her almost forty years; ever since I can remember.

With what did she use to feed her horse?—I have seen them fetch grains; and I know she bought hay, for I saw it brought in, and by the badness of the weather it was spoiled.

When was it brought in?—In the seasonable time of hay-making, before last Christmas was twelve-month.

Where did she put it?—As she said then, she put it into the room called the shop.

Mr. Nares. I object against that, as legal evidence.

Mr. Davy. I am not asking any thing Mrs. Wells said since 1752, but what she said before, when it was impossible for her to know of this affair, when it could serve no purpose to speak falsely; that is evidence.

Mr. Nares. There is one plain rule as to the evidence of hearsay; that is, that when you can have that very person that proves this very fact, she is the person to be called; this is not evidence at all.

Court. The Court are of opinion that it will be proper for Wells to give her own evidence.

Mr. Davy. Were you ever in this workshop at Mrs. Wells's?—Larney. No, not till after the people were taken up.

Do you remember seeing any hay carried to the house after that time you have mentioned?—No, I do not.

How much was brought there in the year 1752?—It was loose upon the cart; I don't

know how much there was of it; I saw it carried to the door, but did not see it put into the workshop.

What door did you see it carried to?—Towards the stable door, as they call it.

Near what part of the house is the stable?—The lower part towards London; it lies in a line with the house.

Is there any loft over the stable?—Not as I know of.

To what part of the house was this hay carried?—I saw it standing against the stable.

Did you see it unloaded?—No, I did not.

Cross-examined by Mr. Morton.

How was this hay brought?—It was brought in a cart, and drawn up to the stable which ranges along with the house; I saw no more of it.

What countrywoman are you?—I was born and bred at Enfield-Wash.

How long has Mrs. Wells lived in that house?—She lived there before I can remember.

A good sort of a house, was it not?—I did not frequent the house.

What is the general reputation of the house?—I suppose, by the report, you know what a house it was.

Mr. Davy. We will suppose it to be a most infamous house.

Mr. Morton. Did you ever see any gypsies there before?—*Larney*. No, never before that time, to my knowledge; I never saw any at Mrs. Wells's before. I was very much surprised, and put the money I took of her into a pail of water, because I had heard they can get the money again.

Whose money were you afraid would be so nimble, Lucy's or the old woman's?—I had put Lucy's in my pocket amongst other money; it was the old woman's money I put in the water.

Do you know William Smith?—He lives two or three miles from me, upon the Chace; he is a farmer.

Do you know Samuel Arnot?—I know no such name, unless it be he that lives up in the town.

Do you know Mr. Howard and his wife?—They are people of very good character, to be sure.

Do you know Humphry Holding?—I do; he lives in Turkey-street, about half a mile from me.

Do you know Mr. Story?—I have no acquaintance with him, or knowledge of him.

Sarah Howit sworn.

wit. I am daughter to Susannah lived at Enfield-Wash with her at *sq*. Canning said she was confined

Do you know Mary Squires? I do, upon the account of her use a week and one day, and my; they were all three to-

gether; they came on the Wednesday, and were taken up the Thursday se'night after.

Look at that pitcher; do you know it?—There was a pitcher that used to go frequently to Mr. Howard's pump.

Is this the pitcher?—I cannot tell; it was a black pitcher.

Did you live there the time Fortune Natus and his wife were there?—I did.

What time did they come?—I cannot say at what time they came.

How long were they there before Mary Squires came?—O! a great while; they were there the time Squires was there, and the time that Canning said she was confined there; and they lay in the room she says she was confined in, which was the workshop.

What do you mean by workshop?—I mean the long room that you go through the kitchen to go up to it.

What did Natus and his wife lie upon there?—They lay on hay and straw.

Can you speak particularly, how long they were there?—They were there two months.

What use was made of this room?—There was a great deal of loose hay in it, and lumber; the hay was for an old horse my mother had. There was pollard in a great drawer, to feed a sow and pigs.

Do you remember about Christmas-time, before Squires came there, whether the room was locked up?—No, there never was a lock upon the door in my memory; I remember it ever since I was born almost; I was born in the house.

Were you ever in that room in that month of January?—I was almost every day.

Are you sure of that?—I am sure of it.

Can you take upon you to swear you were at your mother's all the month of December?—Yes, I can.

Can you, that you were all the month of January?—I lay in that house every night in the month of January?

Do you remember, about a fortnight or three weeks before Squires came to your house, that any body was in that workshop with you?—*Virtue Hall* went into it frequently, as much as I: we were there both together at the time the trees (against the little window, a casement that faces the stairs) were lopped.

At what time was it that the trees were lopped?—I believe it was on the 8th of January; there were Edward Allen, Giles Knight, and John *Larney*, that lopped them.

Was the casement open or shut?—I opened it myself at that time.

Did any thing pass between you and them? There were words passed, but I cannot tell what the conversation was.

Cross-examined by Mr. Nares.

Have you lived at this house of your mother's all your life-time?—I was bred up there, and lived there some time, not the greatest part of my life.

How long have you been absent from thence?

—I have been five or six years from it, and never saw my mother's house in the time.

How came you to be at home at this time?

—I was out of place, and so came home.

How long had you been at home before the gypsies came there?—I believe about a year and a half, or two years.

How do you get your living?—I go out to get my bread, to work in the country, sometimes harvest-work; I have no family affair with my mother; I used to be in the family, when I was not engaged another way.

Do you remember what quantity of hay your mother had at this time?—There was a great deal of it; I believe, not a load.

Had she any other hay for her horse?—No, she had not; it was carried to the horse from time to time.

How much hay might there be when Natus lay there?—There was a great deal.

Can't you tell any thing of this conversation between these men and you?—I cannot.

Did you begin, or they?—I don't know whether Virtue Hall began, or who.

Who conversed with them most?—I said some things, but can't tell what; I don't pretend to say one word that passed.

Did they begin with you or you with them?—I can't tell who began.

Were they acquaintance of yours?—Edward Allen went to school with me.

What sort of trees were they?—They are great high trees.

Which lopped the tree?—Giles Knight; they were not all at work at the same time; my mother gave them a full pot to lop the tree; I saw them drink it.

Who had the lop?—Larney had the lop.

Whose trees were they?—They are Richard Allen's trees; they only cut off some part that hung over the place.

How much in quantity was cut off?—I can't tell; I thought there was a faggot, but I did not see Larney make it up; I saw him go by with some of it.

Were these people sent there on purpose?—No; two were hedging round the fields.

What did the others do, while Knight lopped the tree?—They stood on the ground, and looked on.

How did Virtue Hall and you stand, by the side of each other at the window?—Virtue Hall looked over my shoulder.

Could the men see you both?—Yes, Sir; but I was the principal person that was looking out at the window.

Was there any other window in the house that looked towards that part?—No, not directly; there is one, but it stands slanting.

By Mr. Recorder.

Were you present when the gypsy, her son and daughter, and your mother, were taken up?—Yes, I was.

Were you present when Elizabeth Canning was brought there?—I was then shut up in the parlour with the others.

Do you remember Elizabeth Canning being brought into the parlour?—I do.

Recollect what passed there.—She swore to the gypsy-woman, and did not see her face.

Are you sure of that?—She had never seen her face; she swore to her before she saw her face; I am sure of it.

What did the gypsy-woman say upon that?

—The poor woman did not know it was she that she swore to, till her daughter Lucy said, Mother, she swears you cut off her stays: then the gypsy got up and said, Look, madam, don't say it is me that cut off your stays; and pushed up her hat; look, for God's sake, and don't swear to me; don't say it is me, for I am innocent; or to that purpose; I may not repeat directly the words in particular.

Did she say where she was at that time?—

No, she did not, but George did; but what he said, I can't tell.

Can you describe in what sort of a posture the gypsy sat, when Canning came into the parlour?—She was sat with her pipe in her mouth, by the fire-side, with a hat and cloak on, with her hand upon her knee.

Upon your oath, whether Elizabeth Canning could see her face at that time?—She could not.

Did she give any reason, why she desired her not to swear against her?—I did not hear any reason; after she swore to her, then she shewed herself, and pushed her hat up.

By Mr. Nares.

Had Elizabeth Canning seen your mother's face before the time she spoke to the gypsy?

—Yes, Sir; yes, in the room.

Did she charge your mother?—No, she did not.

Did she pitch upon the gypsy of her own accord?—I don't know whether she did or no.

Did you hear any body tell her to pitch upon her?—No, I did not.

How came you not to be examined upon the trial of your mother?—I was not subpoenaed up; I have but two subpoenas, one before the grand jury, and the other here.

Recorder. What was the reason you were not subpoenaed upon your mother's trial?

Howit. I was not; I know not the reason.

John Larney sworn.

J. Larney. I am husband to Mary Larney; I live at Enfield at the two bridges; I am a bricklayer. I was along with Edward Allen and Giles Knight, near the house of Susannah Wells, January 8, 1753. Giles Knight lopped a tree; he told me, if I would come over, I should have the lops: when we were there, Edward Allen flung some dust into the window of the workshop near the trees, to Sal Howit and Virtue Hall, who were within-side.

Mr. Gascoyne. In what position did they stand?—Larney. Sal Howit looked over Virtue Hall's head.

What conversation passed upon this?—Upon

my word, I can't tell; there were words passed, but I don't believe there were many; when he lulled the dust in, they bid him be easy.

Where was Knight at the time?—He was then in the tree, and I stood upon the ground by the tree.

How long did you talk to them through the window?—It might be the value of ten minutes.

Did they both look out at the window at the same time?—They did, and kept talking to us.

Who had the boughs of this tree?—Mrs. Wells.

Who carried them to her?—I don't know; I believe they were flung over the hedge to her; I had the arms, and she the small lop.

What did you do with them?—I carried them home, and we burnt them: we had half a dozen or a full pot of beer for lopping the tree; I don't know which.

Who do these trees belong to?—They belong to Richard Allen. This window looks into the room properly called the workshop.

Is there ever another window that looks the same way as this does?—There is one above upon the stairs going into the garret, that belongs to the house.

Are you sure it was not that window at the garret stairs, that these two women were looking out at?—I am very sure it was not.

Nor a cellar window?—No, it was not. There were three other windows in the workshop, and I plaistered them up, and left two, one at the north end, and the other at the east, that they looked out at.

What was this room built for?—It was built for a carpenter's shop. Mrs. Wells's first husband was a carpenter.

How far was this east window from the ground, that they were looking out at?—I believe it may be about seven or eight foot.

In what condition is the wall?—It is lath and plaister, very slight; there are a great many holes in it; that part towards the south you might shake down with your hand.

Was it in that condition at the time you were lopping the tree?—I can't say that, because people have been up in it, and beating it about.

Were there so many holes in it, when you were lopping the tree, as there are now?—There were not; but I did not much mind it.

Which is the tallest of the two, Virtue Hall, or Sarah Howit?—Sarah Howit, it may be, by two inches.

Recollect, as well as you can, whether you can positively say, who was the undermost, and who the uppermost?—To the best of my knowledge, Virtue Hall stood nearest.

Cross-examined by Mr. Williams.

Whereabouts do you live?—I live opposite Wells's house.

Have you been much at her house?—I have often, and all over her house.

When was it you were lopping the trees?—On the 8th of January; I believe on a Monday.

Pray, how came you to be so particular as the time?—Because the arms of the trees

that I carried home set my chimney on fire on the 10th, and I christened my child on the 12th, and Mrs. Wells was at my house at the christening.

What quantity of this lop might you have?—About half a dozen pretty large sticks, about as big as my wrist. Knight was busy there, and came and begged a little small-beer, and said, if I would come, he'd give me the lop.

Had you seen Virtue Hall or Howit that day before?—I can't say; I may forget, if I had.

Were you at the tree before they were at the window?—They came there partly as soon as we.

Did they continue there till you had done?—They did partly.

How long might you be there in all?—It might be about ten minutes.

Can you recollect what was said at flinging the dirt up?—I believe she said, Don't, you'll break the windows.

Who stood foremost?—They stood both together.

Did they stand a-breast of each other?—No, the window is not big enough. Virtue Hall looked under Sal's breast, and Sal stood over the shoulder of Virtue Hall.

Does that window upon the stair-case look upon the trees?—It does.

Is it directly over the other window?—No, it is partly over it.

Are you sure they looked out at the lower window?—I am positive of that.

When was the first time you gave this account you have given here, about your having spoke to these women on the 8th of January?—I never was sworn before.

Do you remember the trial of the gypsy?—I do.

When you heard of that, what did you say about Canning's being confined in that room? Did you ever say it was true or false?—I mentioned several times the circumstances of the women looking out at the window.

To whom?—To different people.

Did you then mention the day?—Yes, the 8th of January.

Did you ever mention it before Mary Squires was tried?—Yes.

To many persons?—Yes.

Why were you not subpoenaed up?—My wife was. I did not know it was very material to give an account of it; and did not think proper to put myself forward, and I was obliged to get my bread another way.

Who was in the tree?—Giles Knight. I was right against the tree on the ground.

What year were these other windows plaistered up in?—In the year 1750; the date of the year is there; I put the stones up myself.

You say the south-side is very rotten; how was it when you were lopping the trees?—I did not see it then, the hedge parted us.

When was the first time you saw Mary Squires?—The Saturday before she was fetched away, and never before to my knowledge.

Giles Knight sworn.

G. Knight. I live at Enfield, and have these forty-two years. I am a gardener by trade.

Mr. Davy. How far do you live from Mrs. Wells's house?—*G. Knight.* About a mile and a half; I was hedging near her house; I lopped some boughs off a tree, within about a couple of yards from her house, at the north corner, near a window.

Is there a window in the garret of that house?—Yes, there is.

Were you ever in the garret?—No.

Did you see any body looking out at that window, when you was lopping the tree?—No, but I did out of a window below that; they were Virtue Hall and Sarah Howit.

What room do they call that, at the window of which you saw these women?—I do not know; the window is about ten feet high.

Who were with you?—John Larney and Edward Allen were.

Did Virtue Hall and Sarah Howit both look out together?—Yes, Sarah Howit was looking over Virtue Hall.

Had you any conversation with them?—I had not: I believe Edward Allen spoke to them.

Did you hear the women speak?—I did; but don't know what they said; I think Allen threw a couple of clods of dirt in to them.

Where did he stand?—Just against the window.

Who had the lops of the tree?—I gave it to John Larney; he had the biggest, I don't know who had the rest. Allen was at work with me that day hedging in the field for one Mr. Allen.

Did you see Mrs. Wells at that time?—Yes; we had some beer from Cantril's; mother Wells paid for it.

When was this?—This was on the 8th of January.

How do you know it to be precisely on the 8th of January?—Because it was on the Monday after Old Christmas-day.

What led you to take particular notice of the time?—Mrs. Picket had a cart, loaded with chalk, broke down on Old Christmas-day, but it came home that day.

Have you seen any of the other witnesses since they have been examined?—No, I have seen none of them.

What time of the day was it, when the two women were looking out at the window?—It was in the morning, I believe, or some time in the forenoon.

Do you remember the trial of the old gypsey here?—Yes, I was here; I was subpoenaed on mother Wells's side.

What prevented your appearing in court as a witness?—Because I was not called; I was in the yard.

Was it in your power to have come in, if you had a mind?—I did not know for that: I did not know the way of it.

Were you ever a witness in any cause before now?—No, I never was, till I went before the grand jury upon this.

How large was that window, at which the women were looking out?—I believe big enough for me to get out at.

How big is the garret window?—That is bigger than this below.

Is the garret window in a direct line over the other?—I don't know that.

Cross-examined by Mr. Morton.

Was that directly over the other window?—No; that above was directly over against the tree I lopped.

How many boughs did you lop off?—Six or seven.

Who had it?—John Larney.

What wood was it?—It was elm.

Mr. Morton. Should you have been afraid of setting your chimney on fire with it?

Mr. Davy. What weather was it?—*Knight.* It was frosty weather.

Edward Allen sworn.

E. Allen. I live at Enfield high-way.

Mr. Willes. What business do you follow?—*E. Allen.* I am a costermonger; I go a hedging and ditching: Richard Allen is my brother: he has a field near mother Wells's house: Giles Knight and I were stopping the gaps round it, on the 8th of January: there is a tree that hangs over a lane by her house; we cut some boughs off it; John Larney was there; he came to have the biggest of the wood, which he had, and the rest was thrown over to mother Wells's. She gave us a full pot of beer for doing it. The beer was fetched from Mr. Cantril's. At the time Giles Knight lopped the tree, I saw Virtue Hall and Sarah Howit looking out at a little window; I tossed up several chumps of dirt to them; the place they were in was a sort of a leantoo, on the back part of the house.

How high is that window from the ground?—It may be about ten feet to the bottom of the window.

Do you remember what words passed between you?—No, I do not.

Is there ever another window belonging to that house, which looks out as that does?—There is one at the top of the house partly, that may be twenty foot above the other, where they were.

Were you ever in this room in the leantoo?—Yes, I have twice since this talk of the girl's being confined there.

What sort of a room is it?—It is a long room, with some hay and stuff in it.

Do you remember the trial of Squires and mother Wells?—I do.

How came you not to come up then, and give evidence?—I was not ordered to come; I had no subpoena.

When did you first tell this circumstance of lopping the tree?—I told it, when I was asked the question.

Have you mentioned these circumstances before Squires's trial?—I have several times.

Cross-examined by Mr. Nares.

Were they both at the window?—They were.

Can't you remember what passed between you?—Upon my word, I do not know.

Had she said any thing to you to provoke you to throw dirt?—No; we did not throw it in malice.

Were you acquainted with them before?—I was.

How did they stand at the window?—They stood one by the side of the other.

Did you see Squires and Wells taken away?—I did; I saw them get into the cart.

Did you mention this of seeing them at the window then?—I did.

To whom?—I cannot tell to what person particularly; it was to several that were in the room.

Did you go before justice Tashmaker?—No, I did not.

Recorder. Did you hear at that time, that Elizabeth Canning was so long in that room?—*E. Allen.* I did.

Recorder. Were you not surprised, when you heard she was confined there?—*E. Allen.* I was surprised; and said, if she was there, I thought we should have heard something of her; and if I had, I should presently have fetched her out.

Mr. Nares. Whether, at the time you heard Canning had said she was confined in that room, from the 1st of January to the time of her making her escape, did you tell this story, that you had been at the window lopping a tree?—*E. Allen.* Yes, I did.

John Cantril sworn.

Cantril. I live not above a hundred yards from Wells's house; I keep a public-house: Giles Knight and Edward Allen came to my house on Monday the 8th of January; they said they had done but an indifferent day's work, for they had been at play with mother Wells's daughter, out at the back window, throwing clods of dirt in at the casement, and they had been lopping of trees, and a-hedging.

Mr. Gascogne. What is your reason for being particular to the day?—*Cantril.* They came to breakfast; they wanted to know if I had got any small meat; I said, I should roast a large piece on the morrow, which I did, it being the 9th; I seldom roast less than five stone, to give to my customers for Christmas beef: I have done it for years: mother Wells used to buy her liquor of me sometimes.

When did you first see the old gypsey?—I never saw her till that morning she was taken up; then she came into my house to light her pipe: I think I saw her son the Wednesday before that; he came into my house very early, and said, Let's have a halfpennyworth

of you ever seen him before?—No, nor since.

Is there any thing about any hay of

Mrs. Wells's?—I saw the hay loaded in the field where it grew, by the New-River side; I was then a-fishing, and I saw it unloaded at this very window, that this young woman says she got out at. [He looks at the model.] That is the window at the end of it.

What hay-harvest was this hay brought in?—It was the hay-harvest before the last.

Do you know the stable?—I do very well.

Is there a loft over that?—Yes, there is.

Can you assign any reason, why the hay was not put up there?—There used to come bargemen and others, that would rob her when she put the hay there, therefore she put it in this place to prevent that.

Cross-examined by Mr. Williams.

How many loads did you see loaded?—I saw but one load; it was a little cart, and one horse to draw it.

Had she a horse?—She had; but it was the man's horse that drew his cart, to the best of my memory.

How much hay might there be of it?—It is possible there might be half a score trusses.

What sort of a window is it, that they put the hay in at?—One part of it was glass, and the other boarded over.

Was it so when they were pitching the hay in?—I can't say how it was then.

Was the board on the side of the glass, or over it, or under it?—One half to the upright in the middle was boarded, the other side glass, to the best of my memory.

Mr. Davy. Did you know Natus and his wife?—*Cantril.* I did; they used to lodge at Mrs. Wells's; but I can't say how long; but I think they had been there backwards and forwards, about three months; the woman used to come to our house for gin.

Do you know in which room they lay?—No, I do not.

Esra Whiffin sworn.

Whiffin. I live at the White-Hart and Crown at Enfield-Wash, a public-house: I was told by a glazier, he knowing I wanted some irons to a sign, that Susannah Wells had a sign sawed down in the rebellion time, and she had the irons to dispose of; I went to her house on the 18th of January 1753, and asked her; she said, she could find them; she and I went together through the kitchen into a room called the lumber-room; it had formerly been a workshop, or a shuffle-board room; it is a long room; it is about seven or eight steps up out of the kitchen.

Mr. Davy. Did you take any notice what was in the room?—*Whiffin.* I can't say I did; but Judith Natus was in bed in that room upon some hay, with a sheet over it. The bed was on the right hand going in. As we were looking about for the irons, Mrs. Wells said, Now I recollect myself, it lies under the feet of this poor creature's bed: we looked and found them in a piece of wood there. Then Fortune Natus's wife raised herself up upon her elbow, and

said, What are you going to do, or What are you about? Mrs. Wells said, We are only looking for a piece of wood. I took it, and set it upon an end, and said, Well, girl, what must you have? she said, I will not sell the wood, it is of use to this poor creature's bed; the irons I'll have a shilling for: I gave it her directly, and said, I have a son below stairs, if you'll let him take it home, and take the irons out, he shall bring the wood again; he took it, and carried it home, and took the hooks out and carried the wood back again, and there it is now.

What are the circumstances by which you recollect the time?—I owed Mr. Prosser, a brewer, at the White Lyon, Ratcliff-Highway, 11l. 7s. and on the 8th of January, Alexander Livingstone joined in a note with me; it was upon demand; but he gave me some time to pay it, and I was going to borrow five guineas, to enable me to pay it, of Robert Mitcham, at the Globe at Wormleigh; so I went directly there, as soon as I had sent my son home with the wood to take the irons out; but he was gone to Cambridge; so I came back and went to London that same day, and carried what money I had; and that satisfied the person, and in about three weeks time I paid the remainder.

To whom was the note made payable?—To Bomar Lovit, at the Iron-Gate, Tower-Hill; he is an officer, he arrested me on the 8th of January, on Mr. Prosser's suit.

Are you sure this was on the 8th of January?—As I hope to be saved, that was the day; I have the note here.

Produce it (which he did, and the note was read); Alexander Livingstone and I signed this the day it bears date.

Who was in the room at that time besides Mrs. Wells, Judith Natus, and you?—Nobody else as I know of.

Did you look about the room?—I did, and saw nobody else; I removed some of the hay, and should have removed a great deal more, had she not found it.

A great deal of hay! how much was there?—I believe there might be five hundred weight, that is, ten trusses; the top of it lay as high as I could reach.

Cross-examined by Mr. Morton.

What is the glazier's name?—William Metcalf; he painted my sign, that is, only the Crown.

Was it put up in January?—No, it was not until February.

When did he mention these sign-irons to you?—I don't remember that; but it was before the 18th of January.

When was your sign brought home?—I don't know whether it was in January or February.

Did he mention these irons before the sign was brought home?—My sign stood in my house a month, I believe, before it was put up; so I cannot tell whether it was before or after.

What time did you keep Christmas?—I

VOL. XIX.

went by the New Stile, for I dropped the Old Stile, and hope all other people did.

What day of the week was the 18th of January?—It was on a Thursday.

Court. Consider that.—E. Whiffin. My lord, it is true.

Mr. Morton. Do you know Mr. Harrington?—E. Whiffin. I do.

Had you ever any talk with him about this matter?—I talked with him about the time I was in this room.

When did you talk with him?—I don't know the time; but it was not my business to tell every body what I knew, but I answered him as I thought proper.

Don't you know what week it was when you talked with him?—No, I do not; I don't know within a week or a fortnight of the time; he asked me abundance of questions, and I was not in a mind to resolve him; I thought he was not a proper man to ask me questions, and I answered him just as I pleased.

What month was it in?—I do not know.

What year was it in?—It was some time in the year 1753.

How long is it ago?—It is above a year ago.

Were you asked by any body, whether you could fix the time you went into the room?—I don't remember any body asked me that; but if they did, it was a silly question.

What were you asked by Mr. Harrington?—He talked a great deal more than what became him: he asked me, what day of the year? I told him it was the 18th of January, and I never told any body any time else.

Are you sure of that?—I am.

Did you say any thing of seeing any body else in the room at that time?—I don't know whether I did or not.

Or that Judith Natus was in the room?—I might.

Did he ask you, if you saw the woman's face?—I told him, I did not force my discourse to him; I told him, I saw Judith Natus in bed; he asked several questions, but I resolved him no farther; I said, I saw her face, and that I knew her plainly.

Were you asked whether she spoke to you?

—No, I don't remember that.

Do you remember you said you did not hear her speak?—No, I don't remember that.

Were you at the trial of Mary Squires?—I was subpoenaed up, but was not admitted in.

Did you try to come in?—There was a constable in the yard that denied my coming into the yard for a good while, and so he did Fortune Natus's wife a good while.

Were you present when they were denied?—I was not.

Have you been examined before?—I have been examined by my lord-mayor, and gave the same account as now.

Mr. Dary. Look at the prisoner; did you ever see her before?—E. Whiffin. No, I never saw her face before in my life, as I know of.

Upon your oath, do you believe she was in

that room?—Upon my oath, I did not see her in the room.

Upon your oath, is she the woman that lay in that bed?—Upon my oath, she is not; I have made oath of that before.

Juryman. Where did you buy the sign?—*E. Whiffin.* I bought it of Mrs. Wells, but it was a good while before; it was about three weeks before Christmas was twelve-months.

Alexander Livingstone sworn:

Mr. Willes. Look at this note; is this your hand-writing?—*Livingstone.* My name at the bottom is.

When did you sign it?—I think I signed it the day it bears date: Ezra Whiffin signed the same day; he was then arrested by Bomar Lovit.

Was there any mention made of dating it before or after?—No, none.

Who wrote the body of the note?—Bomar Lovit did.

Did you sign it the same day it was drawn?—I did, at the house of Whiffin at Enfield Wash; I was a boarder with him then.

How long after Christmas was it that you signed it?—It was signed directly after it was wrote, the day it bears date; I have no reason to believe to the contrary. (The note is shewn to the Jury.)

John Whiffin sworn.

J. Whiffin. Ezra Whiffin is my father. I have been coachman to a gentleman at Hertford ever since February 14, 1753; before that I was at my father's from old Christmas-day; I went with my father to Mrs. Wells's house on the 18th of January, New Style; he was going to the Globe at Wormleigh, to Mr. Mitcham. When we went into Mrs. Wells's, she was gone over the way; we stayed there till she came in; then my father and she went and fetched that piece of wood, and I carried it home, and took the hooks out, and brought the wood back to her house again.

Mr. Gascoyne. In which room did you stay while they went for the wood?—*J. Whiffin.* I stayed in the first room on the left-hand side.

Did you see your father and Mrs. Wells go into that room where that wood was?—No; I did not go out of the room where I was, till they came to me again.

When did you return the piece of wood again?—I did in three or four days.

Did you know of the debt your father owed Mr. Prosser?—I did; and Mr. Livingstone entered his hand to the note to pay it to Mr. Lovit.

Cross-examined by Mr. Nares.

Were you at home with your father from the old Christmas-day, to the 14th of February, 1753?—I was.

Did you see Mr. Metcalf at your father's in that time?—I did.

Did he paint a sign for your father?—He did.

When was that brought home?—It was brought home before I was at my father's; I went there on old Christmas-day; it stood then in the parlour.

Elizabeth Long sworn.

E. Long. I am daughter to Mrs. Wells; I have been a married woman; my husband is dead; my maiden name was Wells; I used very frequently, every day in the year 1753, to go to my mother's; I lived but three houses from her.

Mr. Davy. Were you at her house in the month of January in that year?—*E. Long.* I believe I was there every day in that month, and all over the house, excepting the garrets.

Who lived in the house the first and second weeks of January?—My mother, and my sister, and Virtue Hall, and Fortune Natus and his wife.

When did you see Fortune Natus and his wife there?—I had seen them there from before January; they were there, from first to last, about ten weeks.

Did you use to go up into this bay-loft?—I have for Judith Natus, for her to come to my house to help me to do what I wanted to be done: I have frequently gone into that room to her; she used to lie there; I have seen her and her husband in bed in the month of January there.

Did you ever see any body else in that room, in the month of January?—No, Sir.

Look at that young woman there (meaning Elizabeth Canning).—I never saw her there; she never was at my mother's house, till she came down, and they were taken up.

Do you remember the furniture of that room?—Yes, I do; the chimney is on the right hand going up stairs, at the foot of Fortune Natus's bed.

Was there a grate in it?—No, there never was in this world; I have remembered it twenty-two years; there was a great nest of drawers, three women's saddles, and a man's saddle, a tub that my mother kept her chaff in for the horse, and a great deal of hay, and a drawer of pollard for the sow and pigs.

Who fed the horse, sow and pigs, during that time?—I know I went in, in January, to fetch some pollard out of the drawer to feed the pigs; but I went in so frequently, I can't tell the particular days.

Are you sure there were three women's saddles and a man's saddle in the room?—Indeed, there were.

Look at this pitcher.—It looks like my mother's pitcher, but I will not be positive; she had such a one with a broken mouth, which she used every day.

Did you see it in the month of January?—Yes, I have seen our people fetch water with it in January.

Look at that bed-gown.—I never saw this in my life, till I was at my lord-mayor's; my mother, my sister, nor I, never wore it; it is none belonging to our family; my mother has

never a bed-gown as I know of; there was nobody at my mother's house had a bed-gown, that I am sure of.

Look at this handkerchief; do you know it?—No, I do not; I never saw that till at my lord-mayor's.

When did Mary Squires come to your mother's house?—She came on a Wednesday, and was there, from first to last, a week and a day, before she was taken up, which was on a Thursday.

Had you ever seen her before?—No, never in my life; if I had, I must have known it; her face is a very remarkable one.

Do you remember her family that came with her?—There were two daughters and a son; the old woman called one Lucy, the other Polly, and the son George.

Were you in the house when Elizabeth Canning came down there to take your mother up?—I was coming out of the parlour, when she was carried into the kitchen; I had heard a great disturbance, and I went to my mother's house, after the gentlemen were got there.

Was the door going up into the workshop open, when she sat upon the dresser?—I think it was.

Was she removed to any other part of the kitchen?—Never, as I know of.

Did any body ask her, if she knew that room?—Not as I heard; when she was brought into the parlour, my mother, Mrs. Squires, her two daughters and son, and Virtue Hall, and my sister, were sitting round the fire; she pointed to Mary Squires, and said, That is the woman that cut my stays off; she was sitting on the right hand of the chimney-place.

Could you see Squires's face then?—The gentlemen were all before me; I could not see her face, and she did not turn her face, as I saw; she had a hat and cloak on, and a clout, on her head, instead of a cap, and sat holding her head down.

Was she smoking a pipe?—I can't tell whether she was or not.

Did she sit upright?—I think she did not; she is not an upright woman. Canning spoke twice before Mary Squires heard her. One of her daughters got up, (I don't know which it was) and said, Mother, the young woman says you cut her stays off. Then she got up, and said to the young woman, Young woman you are mistaken; I am a very remarkable woman, and have got the evil in my face, and you may know me by night or by day. She shewed her face by putting her hand up to her clout on each side to make her face bare.

Did you hear the young woman mention the time of the robbery?—I can't say I did, or any body else.

Did George or Lucy then say where they were on the 1st of January?—Not then, as I remember.

Did you come as a witness, when your mother was tried with Mrs. Squires?—I came into the Old-Bailey yard, and the people would

not let me come in; there were other witnesses; I subpoenaed them myself.

How many witnesses did you serve with subpoenas to attend at that trial?—Eight: I had the subpoenas of a lawyer, Mr. Talmash; he lives in Red Lion-street: I delivered one to Fortune Natus, and another to his wife, one to Mary Larney, one to Giles Knight; I can't recollect them all: somebody knowed me to be mother Wells's daughter, and they pushed me out, and would not let me come in; they frightened me very much, and I went back again, and up two or three pair of stairs in a house in the Old-Bailey, and heard the mob cry out, Mother Wells's daughter!

Cross-examined by Mr. Williams.

Who was with you at that time?—Mary Larney and Giles Knight were with me; I saw them go into the yard with me; I cannot say whereabouts they were.

Did John Larney go into the yard?—I did not subpoena him.

Are you sure Giles Knight was refused being in the yard?—I am not.

How long had you been parted from your mother?—Not long; I had not been married quite a year, and I lived at home a quarter of a year after I was married.

Were you away a month?—I am sure I was not; I lived in that house three quarters of a year, and don't know I missed a day in all that time going to my mother's house, and used to go into the workshop sometimes for ashes to carry home for my own use.

What January do you speak of?—I mean that January the young woman says; I think it is above a year ago.

What month is this?—I can't justly tell of a sudden.

Is it May, or November, or December?—May, I think.

Were you before justice Tashmaker, when they were carried there?—They did not take me away, and I did not go there at all.

Mr. Dary. Were you often at this workshop, within a week, or fortnight, or three weeks before your mother was taken up?—E. Long. I was there every day; I used to go frequently to breakfast there.

John Howit sworn.

J. Howit. I am a carpenter; Mrs. Wells is my mother; I have lived at Enfield-Wash about seven years; I used to go to her house now and then; I was at work at Breman-Green, about seven miles from thence; having done work, I was discharged from that place on the 19th of January; about six o'clock at night I came to my mother's house.

Mr. Willes. Do you know the hay-loft?—J. Howit. I know the workshop, and was in it on the 19th, 20th, and 21st of January.

What led you to go there?—My mother sent me up to serve the sow; and I had brought my tools, and lodged them in that very room; and on Sunday the 20th I went

to fetch my axe and saw, to cut some wood for my wife.

Was any body in the room then?—Yes, Fortune Natus and his wife were.

What business had they there?—They lay in that room.

How do you know they lay in the room?—Because I saw them in bed, or what they call a bed; it was on the right-hand side going up; they had sacks to lay their heads on, and what they thought fit to cover them.

Had they a pillow or bolster?—I can't say they had.

Look at Elizabeth Canning; did you ever see her there in that room?—No, I never did.

Canning. I never saw him before, as I know of.

Cross-examined by Mr. Morton.

You say you wanted your axe and saw to cut wood for your wife: where does she live?—We live just by the ten-mile stone, about a quarter of a mile from my mother's.

Did you go home first to your house, or to your mother's on the Saturday?—I went to my mother's first, and there I left my tools.

Which is nearest your master's, where you came from?—My mother's is.

How came you to leave your tools at your mother's?—By reason that was nearest, and I was tired of them.

What time of the morning of the Sunday was it you went for them?—About nine o'clock.

Are you sure you spoke to Fortune Natus and his wife, as they were in bed in that room? I am positive of it.

How came you not to be here, when your mother was tried?—Because I was never asked any questions before, nor had I a subpoena at all.

Had you heard that this girl said she was confined in this room?—Yes, but I can't say how long.

Then how came it, you did not come and give testimony against it?—I was asked no questions, and I was not to come without; I was up here, but the mob would not let us come in.

Did you design to come in as a witness?—Yes, I did; we went to Mr. Legg's in Green Arbour court, and had like to have been knocked on the head, them that had got subpoenas, and them that had not.

Who was your mother's attorney at that time?—Mr. Talmash.

Did you ever go to him, and tell him about your coming home, and going into that room three days together in January?—No, I never did.

Juryman. We should be glad to know, whether that drawer was in the chest of drawers, or a single drawer of itself?—Howit. It is one of them drawers, but it was not in it; it was swelled, and would not go in.

Robert White sworn.

R. White. I live at Enfield, and am a day

labourer; I have been at mother Wells's house a great many times.

Mr. Gascoyne. Were you there in the year 1753?—White. I was, in old Christmas, and new Christmas too; I was there commonly four or five times a week.

What day in January was you there?—I am not so well learned to give an account of the day of the month.

What Christmas do you mean?—I mean last Christmas was twelvemonth; Natus had quartered at my brother's, and I knowing him, used to go and keep him company, and used to stay there sometimes till eight or nine o'clock, and used to come as soon as I had done my labour, at about seven.

Which room had you used to be together in?—I used to be in the kitchen, at the right hand going into the house.

Do you know the door that goes into the hay-loft?—Yes, I do; it is the room that Natus and his wife lay in, but I was not in it the time they lay there.

Did you ever see that door open that goes up into the hay-loft?—Yes, I have, and have seen Fortune Natus and his wife both go in, and come out again; I remember they did on a Sunday morning in particular.

Have you ever seen any body else go into that room?—No, Sir.

How long might you keep going to this house?—I believe it might be almost two months, or nine weeks.

Were you ever in the kitchen any time when Mary Squires was there?—No, I never was.

Do you know the day of the month she came there?—No, I do not.

Cross-examined by Mr. Nares.

Did you ever see Mary Squires?—I saw her go by the barn where I labour, about four or five days before she was taken up; but I did not see her face then.

Did you ever see any of the young ones?—I saw one of the daughters once go into the parlour one Sunday.

John Donoval sworn.

Donoval. I surveyed the room (Elizabeth Canning said she was confined in) on Easter Eve, the 13th of April last.

Mr. Dury. Give the Court the dimensions of it.—Donoval. It is thirty-five foot, three inches and a half, from quarter to quarter in the inside of the room upon the floor, by nine foot eight inches.

Is this, that is produced here, a true model of it, according to its proportion?—This model is exactly in proportion with it, and there is the scale upon the roof. [There was the hole for the jack-line, a window on the opposite side to the stairs, another at the end, and a chimney at one corner, a chest of drawers, and saddles, and jack-pullies, drawn on the wall, &c.]

George Talmash sworn.

G. Talmash. I having some knowledge of

Mrs. Wells, and hearing of this extraordinary story, I went out of curiosity to Bridewell to see her: when I came there, she addressed herself to me, and desired I would be concerned for her, as her attorney; I did not care to be concerned in it: after that, her daughter came to my house, with a list of witnesses to the number of eight, and desired me to take out subpoenas for them. I sued them out; I remember one was for Fortune Natus, another for Judith Natus, and another for Ezra Whiffin; I can't pretend to tell all the rest of their names now. I delivered them to the woman, and gave her directions to serve them.

Mr. Willes. When that trial came on, can you tell why those people did not appear?—*Talmash*. No, no more than what they told me; I was concerned no more in it.

Elizabeth Mayle sworn.

E. Mayle. I am a midwife; I brought this girl, Elizabeth Canning, into the world, and laid her mother of more children; I am intimately acquainted in the family.

Mr. Davy. Were you at Mrs. Canning's house in February last was twelve-month?—

Mayle. I was in the beginning of February; I saw the mother and the daughter also.

Can you mention the day?—It was the 2d or 3d; it was the first week, I am sure.

Where does she live?—She lives in Aldermanbury Postern; the daughter was then lying on a bed in her mother's house.

Had you any conversation with the mother, in the daughter's presence, about the daughter's misfortunes?—I had.

Was the daughter awake?—She was: I had business by the house, and I went in, in order to inquire if she had heard of her daughter Elizabeth. As soon as I came in, Mrs. Canning said, Madam! O Lord, madam! have you heard of my misfortune? I said, I had read it in the newspapers in the month of January, and asked her if she had heard of her daughter; she said, Yes, she has come home as naked as she was born.

Are you sure she mentioned these words, Naked as she was born?—I am positive of it: I immediately said, O Lord! what, without a shift on? She said, No, she had a shift on. Then I asked her where her daughter was? She said, behind me. I turned about to the girl, and said, Lord bless me! Bet, how came this about? She said, I was coming over Moorfields one night, and two men came up to me, one took hold of my two hands and pulled me along, and the other robbed me: I said, Of what, child? She said, Of half a guinea and three shillings and some half-pence, my gown and my cloak. I said, My dear, don't trouble yourself about these things, for God Almighty will raise you friends to get you more; I hope the men did not use you ill, so as to debauch you: she said, she could not tell, for she had her fits. Said I, What did they do with you after they had robbed you? She said, They carried me to Enfield-Wash. I

asked her where Enfield-Wash was? she said, Out of town. I asked, what they did with her there? She said, they carried her into a house, and as soon as she came in, there was an old gypsey took a knife and cut her stays off, and put her hand into her pocket and pulled a farthing out, and put it in again, and hit her a slap on the face, and called her bitch, and bid her go up stairs. I said to her mother, Mrs. Canning, have you got this shift your child went abroad in? Sure never was such a case before. I said, I'll tell you if any body has debauched your child, if you'll let me see it. She immediately reached it, and I looked at it, and said, Mrs. Canning, is this the shift your daughter went away in?—She said, Yes: then I said, I supposed it was washed since she had been gone: she said, No, how could that be? for she was in a room where nobody came to her.

Mr. Morton. Was the prisoner present and heard all this?—*E. Mayle*. She was. We stood by her bed-side. She said, she had been confined in a room, where she lived upon nothing but bread and water. I said, I think the shift is too clean, except you have had it washed since she came home. She said, No, it had not been washed. I said, Then, my dear, you may make yourself easy, for I can see by it, that no man has debauched your child; but it is uncommonly clean to be wore so long. Then the mother said, she never had a stool all the time she was gone: then, I said, she must have a glyster given her; but I can assure you no man has debauched your child in this shift unless it has been washed since. She again, said, No, it had not.

Mr. Davy. Did the shift appear to be dirty enough to have been wore three weeks and some days?—No, it did not; there were three little spots of excrement, about the bigness of the upper part of my thumb: I don't think it was dirty enough to have been wore three weeks by any clean woman that ever sat still in a room, because every woman must go to bed and get up; and by sitting by the fire the dust will arise.

Do you think it had been wore three weeks?—I don't think it had.

Did you take notice of the bottom of it, whether it was draggled?—I did; I took particular notice of that; I saw no dirt there; there was a hole on the right side of the shift down one of the gussets, but there was no draggled tail, not at all.

How long did it appear to have been wore?—It seemed as if it had been wore a week, or such a matter; I can't tell how long it had been wore.

Had you been acquainted much with her?—I had been acquainted with the girl from her birth.

How long do you think she might have been in making that shift so dirty as it was?—About a week.

Did the girl herself say any thing to you on this occasion?—Yes; she told me how she

had been used, and the gypsy had cut off her stays, as I said before. I left her mother an order to give her a glyster: she said, Will you examine her body, to see if she has been hurt-ed? I said, No; I never was before the face of a judge in the Old-Bailey in my life, and I did not care to be in dirty work: going away, she said to her little girl, Go and call Mrs. Woodward over the way to me: when she came in, Mrs. Canning said to me, Will you say what you said before? I said, Yes, Mrs. Canning, with all the pleasure in life; if this shift has not been washed, I'll make an oath before a judge no man had copulation with her. I went away; I had proposed to bring a doctor. I returned in about half an hour; I went to the bed-side to the girl, and said, Bet, I was very sorry I did not ask you whether your feet were not very sore in walking barefoot: she said, No, they are not; I had my shoes and stockings on, they did not take them from me. This I look upon to be from the mother's agony of mind, that made her say she was come home naked. I said, What more had you on? she said, My under-petticoat, and an old bed-gown, which I found in a corner of the room: then I said, Good-bye, child; and went away.

Did the mother seem to be pleased or displeased at what you said?—She fell down on her knees, and held up her hands, and said, Thank God, my daughter is not a whore!

Was her mother angry with you for any thing you said or did, then or afterwards?—She was not then; but she was two days after, when I came there, as I did not go the next day before the doctor, as I proposed. Then there were with her two young women and an elderly woman: I said, Mrs. Canning, I am come to ask if Bet has had a stool? she said, No. I said, Then she must die, without you have given her glysters, and she has relief that way; and asked her, why she did not give it her? she said, she had. I asked her, if any thing came off with it? she said, Yes, a little: I said, If nothing more came off, she is a dead girl, and all the world can't save her life: I went and took hold on the girl's right hand with my left, and said, Now she seems as cold as death, and if she has no passage, she must die, and all the world can't save her.

Mr. *Morton*. Was the daughter there when the mother was angry?—*Mayle*. Yes, Sir. A young woman in the room said, How can you frighten the girl out of her life, to tell her she must die, when she has no fever? Then I turned to another woman, and said, Did you ever hear there was such a thing before? I said, there was one thing in her favour, she has not been debauched: I said, Reach the shift, to this gentlewoman (she was a grave woman): I said, Let her judge the case, and see that your child has not been debauched: when that was reached out, the old gentlewoman said, I don't see any thing like it: I said, Look over it well; do you think this has

were three weeks and three days? No,

says she, I don't think it has, I don't think that is likely. Mrs. Canning said, she had no stool all the while: I said, Here is three spots upon it; I said, Behold it. Then Mrs. Canning said, Do you come here to set my other friends against me?

Mr. *Davy*. Who was that other woman?—

E. *Mayle*. I don't know her name.

Was it Mrs. Woodward?—No, it was not.

Was it observed that there were no marks of her being according to the course of other women?—That old gentlewoman mentioned it, and Mrs. Canning said, her daughter had got cold, and had been out of order for three or four months.

What is the mother?—She is a fine likely woman as any, and a woman that I respect as much as any woman, and the girl too.

Cross-examined by Mr. *Williams*.

What sort of a character has she had?—I never know'd any ill of the girl, or heard any in my life.

Have you been intimately acquainted with her?—I have, and never heard any reflection upon her character; and I don't question but the mother was very anxious about her daughter not being debauched.

Might not that matter of excrement have been from the day before she was carried there?—It might, and the mother told me so then.

What was your reason of being so inquisitive in this?—I was so, as a lover of truth, and a friend, fearing the girl had been debauched.

Mr. *Davy*. Now we shall prove the defendant's Information before justice Fielding, in order to shew a material variance, both in that and her evidence on the trial, particularly in respect to the time of expending the water.

Mr. *Brogden* sworn.

Brogden. I am clerk to justice Fielding.

Mr. *Davy*. Look on this paper.

Brogden. This is the Information of Elizabeth Canning, taken before justice Fielding, the 7th of February, 1753. (It is read.)

THE INFORMATION OF ELIZABETH CANNING, of Aldermanbury Postern, London, Spinster, taken upon oath this 7th day of February, in the year of our Lord 1753.

' This informant upon her oath, saith,
' That on Monday the 1st day of January last
' past, she this informant went to see her uncle
' and aunt, who live at Saltpetre-Bank, near
' Rosemary-lane, in the county of Middlesex,
' and continued with them until the evening;
' and saith, that upon her return home, about
' half an hour after nine, being opposite to
' Bethlem-gate, in Moor-fields, she this in-
' formant was seized by two men, (whose names
' are unknown to this informant) who both had
' brown bob wigs on, and drab-coloured great
' coats, one of whom held her this informant,
' whilst the other feloniously and violently
' took from her one shaving hat, one stuff gown,

' and one linen apron, which she had on, and
' also half a guinea in gold, and three shillings
' in silver; and then he that held her, threat-
' ened to do for her this informant: and this
' informant saith, that immediately after,
' they the said two men violently took hold
' of her, and dragged her up into the gravel
' walk that leads down to the said gate,
' and about the middle thereof, he the said
' man that first held her, gave her with
' his fist a very violent blow upon the right
' temple, which threw her into a fit, and
' deprived her of her senses (which fits she
' this informant saith she is accustomed and
' subject to upon being frightened, and that
' they often continue for six or seven hours).
' And this informant saith, that when she came
' to herself, she perceived that she was carrying
' along by the same two men, in a large road-
' way; and saith, that in a little time after she
' was so recovered, she was able to walk alone;
' however they continued to pull her along,
' which still so intimidated and affrighted her,
' that she durst not call out for assistance, or
' speak to them. And this informant saith, that
' in about half an hour after she had so reco-
' vered herself, they the said two men carried
' her this informant into a house (which, as she
' this informant heard from some of them, was
' about four o'clock in the morning, and which
' house, as she this informant hath since heard
' and believes, is situate at Enfield-Wash, in
' the county of Middlesex, and is reputed to be
' a very bad and disorderly bawdy-house, and oc-
' cupied by one——Wells, widow) and there
' this informant saw in the kitchen an old gyp-
' sey woman, and two young women, whose
' names were unknown to this informant, but
' the name of one of them this informant hath
' since heard and believes is Virtue Hall: and
' saith, that the said old gypsy woman took
' hold of this informant's hand, and promised to
' give her fine clothes, if she would go their
' way, (meaning, as this informant understood,
' to become a prostitute) which this informant
' refusing to do, she the said old gypsy woman
' took a knife out of a drawer, and cut the lace
' of the stays of her this informant, and took
' the said stays away from her, and one of the
' said men took off her cap, and then the said two
' men went away with it, and she this inform-
' ant hath never since seen any of her things.
' And this informant saith, that soon after they
' were gone (which she this informant believes
' was about five in the morning), she the said
' old gypsy woman forced her this informant
' up an old pair of stairs, and pushed her into a
' back room, like an hay-loft, without any fur-
' niture whatsoever in the same, and there
' locked her this informant up, threatening her
' this informant, that if she made the least noise
' or disturbance, she the said old gypsy woman
' would cut her throat; and then she went
' away. And this informant saith, that when
' it grew light, upon her looking round to see
' in what a dismal place she was, she this in-
' formant discovered a large black jug, with

' the neck much broken, wherein was some
' water, and upon the floor several pieces of
' bread, near in quantity to a quarter loaf,
' and a small parcel of hay. And saith, that she
' continued in this room, or place, from the said
' Tuesday morning the 2d day of January,
' until about half an hour after four of the clock
' in the afternoon of Monday the 29th day of
' the same month of January, without having
' or receiving any other sustenance or provision,
' than the said bread and water, (except a small
' mince-pye, which she this informant had in
' her pocket) or any thing to lie on, other than the
' said hay, and without any person or persons
' coming to her, although she often heard the
' name of Mrs. and Mother Wells called upon,
' whom she understood was the mistress of the
' house. And this informant saith, that on
' Friday the 26th day of January last past, she
' this informant had consumed all the aforesaid
' bread and water, and continued without
' having any thing to eat or drink, until the
' Monday following, when she this informant
' being almost famished with hunger, and
' starved with cold, and almost naked during the
' whole time of her confinement, about half an
' hour after four in the afternoon of the said
' 29th day of January, broke out at a window
' of the said room, or place, and got to her
' friends in London, about a quarter after ten
' the same night, in a most weak, miserable
' condition, being very near starved to death.
' And this informant saith, that she ever
' since hath been, and now is, in a very
' weak and declining state and condition
' of health; and although all possible care and
' assistance is given to her, yet whatever small
' nutriment she this informant is able to take,
' the same receives no passage through her,
' but what is forced by the apothecary's assist-
' ance and medicines. The mark of

E. C.

' ELIZABETH CANNING.'

Sworn before me, this 7th day of February,
' 1753.

H. FIELDING.'

Mr. Deputy Molineux sworn.

Mr. Deputy Molineux. I was at sir Crisp
Gascoyne's when Canning came there, at the
time that Virtue Hall was there; sir Crisp was
then lord-mayor; I and others were desired to
go and hear her examination; after my lord
had concluded his examining of Virtue Hall, he
turned to Betty Canning, and asked her, If
she had any thing to say? she said, No, she
had nothing at all more than she had said upon
the trial; my lord said nothing further to her;
the bed-gown and pitcher were on the table;
Betty Canning was rolling up the bed-gown,
in order to take it away, as I apprehended;
my lord said, Child, you must not take that
away, you must leave that with me; upon
which she replied, and said, It is my mother's;
it shocked me a good deal, because I had heard
it said, that she came home in a bed-gown,
and that she found it in the room where she
was confined; I mentioned this to several per-

ple that very afternoon, that were very strong advocates in the affair.

Mr. Willes. Did she demand the pitcher at that time?

Mr. Deputy Molineux. I don't remember she did.

Cross-examined by Mr. Morton.

I had not asked you a question, if I had not found you was at the examination of Virtue Hall: were you there upon the first of her being brought in to be examined?—I was, the first of that day.

Had she recanted that day?—I had heard that she had; I heard my lord-mayor say he had gone through the examination.

Were you there the day before she was examined publicly, the day when she recanted?—No, I was not.

Samuel Reed sworn.

Reed. I was present the time Mr. Molineux speaks of. I very particularly remember she was going to fold up this bed-gown; my lord-mayor said, Child, you must not have that; she said, It is my mother's; which struck me very much.

Mr. Nares. Did any body ask her to explain what she meant by it?—Reed. No, Sir.

Mr. Davy. We have several witnesses to call to the characters of those who have been examined; and desire to know the pleasure of the Court, whether we shall call them now, or stay till they are attacked.

Court. Stay till they are attacked.

Mr. Davy. Then we have done for the present.

Mr. Morton (afterwards Chief-Justice of Chester).

May it please your lordship, and you gentlemen of the jury; I am counsel in this cause for the unfortunate prisoner Elizabeth Canning; and unfortunate she certainly is, whether, upon the whole, you shall think her guilty, or acquit her of the heinous crime of which she now stands indicted. For guilty of such an offence, at her years, she cannot have been, without having been very unfortunate in a most profligate and abandoned education; and should you think her innocent, most unfortunate must she surely be thought by all, because she is now brought to answer for a most foul offence in herself, merely for having done her duty in prosecuting others for the most unheard-of violation of her own person and property, and the laws of her country. But the more unfortunate such an accusation, under such circumstances, renders the defendant, the more, I am sensible, she will be entitled to that patience, which you have already shewn in the progress of this trial. And, gentlemen, when I consider how long that patience and attention has been already exercised, when I see before me that even short minutes have swelled to no less than six or seven sheets,

I am too sensible that I have neither ability nor experience to do my client that justice, which the extraordinary nature of her case requires. But, as I have been unfortunately fixed upon for my present station, I hope, the great length of the trial, the great pains taken by the gentlemen on behalf of the prosecution, the numerous facts and minute circumstances that have been laid before you, will be some excuse, at least, for the many defects and omissions that will appear in my opening for the defendant. And, before I go into the particulars of the case, I shall premise and agree with Mr. Davy in his opening, that if the perjury was corrupt and wilfully false, it is one of the most abominable and horrid pieces of corruption ever brought into a court of justice: a falsehood the most cruel and impious! So much so, that I will also agree with him, that if it should appear by the course of the whole evidence, that the defendant was never in the house of Susannah Wells, and that Mary Squires was not the actor of the mischief there supposed to be done, Canning's magnitude of offence deserves even a particular law, which this country has not yet thought proper to enact in cases of perjury.

But, gentlemen, you, as a jury, will guard your judgments against all impulses, which must necessarily arise from considerations of this nature, from reflections on the consequences of the crime, into the truth of which alone you are now to inquire. Facts alone are the proper objects of your attention: and glad I am, for the sake of justice and truth, that a fact of this importance, I say, of this importance (for, in a free country, the nature and circumstances of the crime, not the condition of the criminal, makes every inquiry more or less important) is to be investigated and determined by a jury of distinguished property and integrity—by a jury selected by the prosecutor, in a manner, I believe, unparalleled in any prosecution, when the crown is not directly concerned: for, I believe, gentlemen, that you are the selected choice of the prosecutor, after no less than seventeen challenges: and therefore, surely, the prosecutor can now have none: the defendant, I believe, never had any diffidence of the impartiality and ability of any jury, legally returned from the citizens of London.

And, gentlemen, in making such observations as may occur to me to be material for the defence of my client, I shall, in the outset, beg leave to remind you, what the accusation is against this girl now at the bar: it is for wilful, malicious, and corrupt perjury, committed in this court, and that with the aggravated circumstances of being designed to destroy the life of an innocent fellow-creature. Let me add, that this crime, gentlemen, is supposed to be committed, when the defendant was under the age of 19 years.

This charge has been fully opened by Mr. Davy, and endeavoured to be supported three manner of ways: the first (which has been

most relied upon, and, I think, with the prosecutor's counsel, is the most material part of the case) is the *alibi* defence of Mary Squires, and the positive proof they have brought of several persons being in the place of Canning's confinement, during the time she says she was there. If both these are proved, beyond all possibility of doubt in your minds, then you must conclude Canning could not swear true in the manner she has.

The second method of proving this heavy charge, is endeavoured to be made out from the improbability of the defendant's own story; and the third, by her own conduct, in the delays and precautions taken in not appearing to make an earlier defence. Mr. Willes makes use of a very remarkable expression, well known in the law-books, *fugam fecit*, she has flown from justice; and from thence would infer, (I mean legally) it is confessing her own guilt. I am very sorry this fact was at all observed upon; because, if it had not, I might have been at liberty to have passed over circumstances of persons and things, which I must now take notice of, in order to shew, that the delay of this day's trial can, in no humane and impartial breast, be any evidence of Canning's guilt;—was a step that every person, in her unhappy situation, would have taken; was a conduct that those, who had then the care of her defence, would have been void of common sense, had they not advised it.—For, gentlemen, in these days, who would trust the trial and test of their character, and their liberty depending thereon, to the same person, both supreme judge and prosecutor?

However popish legends may have attempted to persuade us, that such impartiality has existed,—that a judge has even condemned, and passed sentence on himself;—yet, in these happier times, when men are at liberty to see and judge for themselves, such traditions will never influence any man, endued with the least reasoning faculties, not to wish the provinces of judge and prosecutor, at least, may ever be distinct and independent in this country. I speak this without even the remotest thought of casting any reflection on the integrity and justice of any of those, who preside in our courts in these times.—There never was a time, when the subject was equally secure in this respect: but it does by no means follow from thence, that failings, inseparable from human nature, are not to be guarded against by those, who may suffer from them. And that a prejudice to our own cause, is such a failing, is so obvious to every candid man's own breast,—that no man, with any pretence to an upright heart, would trust himself in such a situation, as the present prosecutor must have been in, had the present examination come on, when he so properly presided in the magistracy of this city.

But what was another known reason of this delay?

It is notorious, the girl was (and from motives not to be disavowed here, or in any other

court) advised to remove her cause from this place, to the supreme court of all criminal proceedings in Westminster-hall.

Was this a step that looks like an evasion of justice? Do those, who hope to elude the force of justice, voluntarily approach the most awful tribunal? Happy might it have been for her, and for the course of justice, had her design and attempt, in this particular, been agreeable to the rules of that court: for, however satisfied I am, that all here wish, and mean, to do complete justice; yet the obstructions, which we have here met with from a licentious rabble (the effect of which on some men's minds no one knows) would probably have been avoided, could the defendant's choice of a more solemn trial have been complied with.—But no sooner was one just cause of delay removed;—sooner was the other, as just reason, not to be complied with, by the course of legal proceedings;—than Canning immediately submitted to her defence in the place she now stands.

If therefore I have wiped off all aspersions of her guilt, from a supposed intent to avoid her trial,—what arguments may I not justly raise in favour of her innocence, from her appearance here at all?

If she was conscious of the least fear of conviction,—(and what person, really guilty, is free from these fears?)—Why did not she make her flight from justice? She had not even gratitude to detain her. No friends were to suffer, either in person or fortune, by her flight. She was under no recognizance, either by self or friends.

In opposition to even the remotest apprehension of the punishment of the crime of perjury (and especially such a perjury,) could the place of Canning's abode be the object of a moment's doubt? Whether a servant in London, or elsewhere, must be surely very indifferent to one in her station.

It may possibly be some comfort, even to be a servant in England, preferably to other countries. But suppose her only apprized of the nature of her crime, and she must know her residence here of a very short duration. Under such circumstances, therefore, can any one doubt, that such a delinquent would not have made her own choice of her place of exile, especially, when by such choice she should have avoided the most severe part of her punishment, if guilty,—that of slavery?

I hope therefore the imputation of her guilt, at least from this circumstance mentioned by Mr. Willes, is entirely wiped off.

I must now, gentlemen, beg leave to make two or three observations, in offering to you my thoughts on the prosecutor's own case, as it stands unanswered by any facts on our side. And in this part, I shall invert the order laid down by my two learned friends, Mr. Davy and Mr. Willes; and begin first with the improbability objected to Canning's own tale, because, (I think,) even allowing the improbability of her story to be a sufficient proof to ground a conviction of perjury on, I can by no

means think there is a greater share of improbability in the defendant's relation, than there is in many parts of the account given to contradict the truth of it.

It would be endless, in this place, to follow the learned gentlemen's example, and to observe, as minutely as they have done, on the several facts related by Canning, and their evidence to disprove them.

I shall therefore confine myself, on this head of improbability, to the general facts related by Canning in her own story, and to some general objections, which that relation has furnished the prosecutor's learned counsel with.

And what are their objections to the improbability of her story? They consist in the circumstances of the time of her absence, the nature of the place of her confinement, the particular manner in which she led her life there, the seemingly surprising account of the first robbery.—I cannot forbear observing in this place, to what forced and strange observations on facts one of the gentlemen was driven, in order to keep alive his own cry of improbability.

Mr. Davy, I think, endeavours to raise five different objections of improbability from his observations.—The first is, it is very strange, says he, that there should appear no premeditation previous to the robbery in Moorfields.—Mr. Davy has had much more experience, particularly in this court, than I have had.—I was therefore the more surprized to hear such an observation come from a gentleman, who must have heard so many unhappy wretches tried in this place, for crimes that would be doubly shocking, did all the circumstances appear the effect of design and premeditation in the authors: and shall it then be urged as an argument of every felon's innocence, that we are not able to shew that his guilty act was deliberately premeditated? Such reasoning would, I apprehend, be as effectually serviceable to villainy as a general pardon.

The next improbability is made to arise from the very great danger which these robbers (whom Mr. Davy must still suppose to be all coolness and deliberation) naturally foresaw in carrying Canning so far from the place of her robbery to her prison.

But, for my own part, only suppose any robbers, for once, rash enough to commit any robbery at all, between nine and ten o'clock at night in the middle of winter, in such a place as Moorfields, (and I would to God every day did not afford instances of such unpremeditated rashness) and where is then the improbability of the subsequent attempts?

Is it improbable that such villains should not at once be satisfied with the trifling sum of money, and the gown and apron?—Is it in the least incredible, that those, who were either of Mrs. Wells's or Mrs. Squires's gang, should be desirous of adding one more prostitute to the retinue of this notorious bawd, or smuggling gypsy?

Mr. Davy was so drove to support the improbability of Canning's relation in this part of

his observation, that we are now told, robbers themselves must be thought so wary and circumspect, that they must even have apprehended immediate discovery from the resort of those, who go to see the unhappy inhabitants of one side of this square. What! between nine and ten at night!

If the learned gentleman has not already gratified this curiosity, I hope he will, at least, chuse a more seasonable hour, lest the keepers there may be led to mistake the motive of so unexpected and unreasonable a visit.

We are then to see this improbability from the known humanity of street-robbers.—These, he thinks, were never cruel on purpose.—This is, I own, an observation of great good-nature. I wish there was the least foundation in fact for the support of it.—But because we cannot assign a motive or reason for every instance of cruelty and barbarity these ruffians commit, are we to shut out all belief that such acts of violence are committed?

Because, therefore, there is no design of murder proved, we must not believe that these humane, these deliberate, these wary robbers could be tempted to offer any violence to Canning that was not absolutely necessary to a supposed premeditated design of robbery.

There is one more observation, and that, perhaps, might afford an argument of improbability, and that is the prisoner's great caution in husbanding her water; for now I am accompanying Mr. Davy in his observations at Enfield-Wash. But how does this appear, that she did husband her water at all; in the manner Mr. Davy supposes?

Canning's evidence, or relation, at no one time, or place, justifies this observation: all she tells, or swears, is, that the bread and water lasted to such a time; but no where does she relate, how regular she made her meals. If there is a possibility, that this bread and water was sufficient to sustain human nature twenty-eight days, all that part of the case, of Mr. Davy's eking it out ounce by ounce, falls to the ground.

Another observation was made, which would appear of some weight, if founded on facts, either admitted or proved.

Says Mr. Davy, if she had a mind to escape, she might, every hour of the day, have pushed out the plaister-wall. She did attempt, she says, to open the window, and could not. But where is there any proof, or admission, that she might have escaped every hour of the day, if she would? Another improbability is to arise, that the people never came to see whether Canning was there or not.—But this once more, resting solely on Mr. Davy's imagination, wants a support of proof. Canning herself says, she once saw a person look through the crack of the door, to see if she was gone.—From whence, therefore, are we to collect, that this improbability ever did happen?—For might not this observation through the crack be repeated a hundred times, and Canning not observe it?

We are now come to the last and great objection, which is for ever to overturn this story, on the foot of improbability: that is, that Canning should return from the Wash, without attempting to take any shelter till she reached her own house. This, I admit, is a fact related by herself, and she is consistent, in this part of her story, on every relation of it; but I leave you, gentlemen, to judge, what inference of improbability arises from hence.—Is it possible for you to determine, in your own minds, what would be the conduct of any one, or more people, in such a situation? Different judgments, and different resolutions, would be acted upon by very different ideas, under such circumstances.—And therefore I submit, that no argument of improbability can be drawn from this conduct in Canning, that would not equally have furnished Mr. Davy's speech, had she acted a quite different part, and made her story known at the first house she came by.

Mr. Davy having now finished his chain of observation, and, as he supposes, entirely destroyed all pretence to truth in Canning's narration; yet thinks it necessary to ask one question,—was ever a story attended with such improbable and incoherent circumstances? Many very improbable things, many very incoherent ones, have happened; and therefore I might safely answer to this doubtful question, Yes; I think as improbable, as incoherent circumstances have been true. But the guilt or innocence of the defendant will not receive the least light or assistance from either question or answer.

And, therefore, allow such refined observations their utmost latitude, (and as they have been thus relied on by the prosecutor's counsel, I have been obliged to take some notice of them) and let us then see, where just observations on facts will turn the weight of improbability.

This is a fact not disputed, Canning was certainly missing.—That she gave a particular account of her absence on her return home, January 29, 1758, is not disputed.—She was particular in circumstances of place, persons, and things: the remarkable pitcher now before you in particular.

Now on this state of facts all uncontradicted, permit me only to ask a few questions, as the properest answer that can be given to the observations on the head of improbability. If Canning was absolutely ignorant of the place she was resolved to charge as her prison, could she have ventured to mention any one circumstance she did? In such a sort of room, as the gentlemen themselves allow she did describe,—even a chimney would have been a hazardous particular.—But, that she should descend to such a pitcher, as now produced, was risking the whole on a circumstance, that would fail her a trillion to one.

The very person of Squires, stamped, as Mr. Davy says, by God, with a particularity never to be forgotten—would Canning have ventured

to fix on such a person? Though Canning was not equal in her description of Squires's deformity with Mr. Davy, the account of the person who robbed her is too remarkable to proceed from mere invention.

Now it is certainly most probable, that if any person at all had been described to Canning,—it must have been Wells:—for, according to the prosecutor's account, Squires had come there but a few days before Canning's return home; and yet Canning's description neither did fit, nor would she charge Wells on sight. The person of Wells, even by the prosecutor, was supposed as unknown by Canning as that of Squires. The name, indeed, of Wells or Wills, (now too supposed by the prosecutor to have been named by Scarrat to Canning) was mentioned by her at her first return,—and from this circumstance every body had predetermined mother Wells for the robber.—Mr. Willes assures you, nobody dreamed of a gypsy.—Every body had fixed on Wells, as she was known to be the mistress of the house, and as the house was infamously known to be capable of harbouring those that were capable of any villainy.—Every body therefore fixed their attention on Wells.—And yet, gentlemen, the prosecutor's own witness, Mr. Aldridge, tells you, that Squires was directly pitched on by Canning.—She could not have been more ready, if she had received her description from Mr. Davy.

But, gentlemen, arguments and inferences on evidence of this kind would be endless.—No deduction from them can, or ought to conclude your judgment on a charge of this kind: yet the gentlemen for the prosecution have throughout grounded all their argument on this head, that some story was necessary to be forged.—Suppose this granted, in order to argue with them in their own way, let me ask them,—could a weak, illiterate woman (however supported) have either invented, or, when invented, be uniform in the proof of it? Would any one, endued with the most common share of understanding herself, or assisted by those who were, have taken a tale so very difficult to have gained belief?

Surely, a description of persons, places, and things, really not existing, would as probably have gained belief, and yet have been much more easily managed, in case of more particular inquiries.

But, however strange many of the circumstances of this tale may seem, I apprehend it is not so destitute of all presumptive proofs, as has been contended.

I have before said, no one doubts that Canning was missing. That the condition of her body, on her return, was most miserable, has been proved by some of the prosecutor's witnesses; will be confirmed by such of ours, whose characters and stations place them above all suspicion of being privy to, or capable of supporting a fraud of any kind.

The same will prove, that several symptoms attending this unhappy girl's illness, were

unerring tokens of some most extraordinary treatment she had received.

The answer attempted to these uncontradicted facts, is, all this was practised for the sake of gain—to become a false object of charity, or more probably, says Mr. Davy, to cover the reproach of whoredom. To this answer I will make no other reply, than ask this one question,—what fact of distress, however uncontroverted, may not be supposed to have proceeded from a design to deceive and impose?—And, in this instance, we have had nothing but mere suppositions to induce your belief, that all Canning's sufferings were fraudulent.

I will trespass with only one question more, on the head of improbability. Canning was missing—where was she? After more than a twelve-month's inquiry—that inquiry backed with as active a prosecution as ever was carried on in this kingdom—that prosecution made the universal object of argument and curiosity—and yet not the least surmise of any other place of confinement than that alledged by Canning herself. To this we have had no other account than Mr. Davy's bare opinion—she was secreted somewhere—to conceal a pregnancy—or to get free of disorders incident to the gay and young.

If this was the fact, I shall venture to pronounce she might have made more of her means of secrecy, than by any distress she could counterfeit, even in these charitable days.—But to give such a supposition, as Mr. Davy's, the least colour of truth, we must suppose that Canning, poor, illiterate, and friendless, has succeeded in an attempt, that money, art, and friends have scarce ever effected.

I will therefore, leave this part of the prosecutor's case, upon which, I am sensible, I have taken up more of your time, and the court's, than may have been necessary; not only as I think the supposed motives of all Canning's story, at least, as improbable, as the facts related by her; but also, as I hope this will be the last prosecution, where I shall hear a conviction of wilful and corrupt perjury contended for on the mere improbability of any facts, which have been credited by twelve men on their oaths, and that too in a case where the merciful ear is ever most open. Since, gentlemen, it is not to be denied, here at least, where I can vouch the annals of this place for my assertion,—that things, seemingly impossible for human power to have performed, have been proved true—things, the most unlikely to be attested as true, if false, have been credited, and yet have been utterly false.

There are two known instances of this kind: the one, that most improbable ride from a place near this city to York in one day, on the same horse: I had almost said, as improbable a performance as Mr. Davy's flight round the atmosphere! yet this was a certain fact done, was attested and believed in this court, and by that proof the prisoner was acquitted of a robbery, which he confessed himself actually guilty of, as soon as acquitted.—Under the

other head, is the well-known story of a steward's son belonging to a noble family*—If I remember, it was the Gainsborough family; but that is not material. There the steward was missing, and a large sum of money supposed to have been taken from him; his own son accused himself, his mother, and his sister, of the murder and robbery, and that they had thrown the body into such a pit.—The pit was searched, and no body found; and yet, as the son persisted in his own accusation, they were indicted, tried, and hanged.—Yet, some time after, the father returned, gave a particular account of his absence, and the cause of it.—Now, in both these instances, who, on the first relation, could either assent to the truth of the one, or would doubt the truth of the other?—And yet the one was uncontroversibly proved to be true, and the other demonstrably false. I mention these facts, to shew the great danger of acquitting or condemning against positive proof on oath, on refined arguments of improbability, which we see are thus capable of deceiving.

And, indeed, I cannot but express some degree of wonder in this place, that a point of this nature should have been thus laboured by the prosecutor,—as he has contended for, and has endeavoured to produce proof of facts, which, if credited, would make all resort to supposition useless.—I infer, therefore, that even touching on suppositions and arguments of improbability implies a diffidence in their proof of facts.

But having done with this part of the case, which rests on the head of improbability, it now remains to examine how the charge is otherwise supported; and how it is to be answered on our part. And, after the great attention you have given, I need not remind you, that the stress of the proof has been levelled to shew Mary Squires was elsewhere; on which Mr. Davy has logically concluded, (*ergo*) Canning has wilfully sworn false. But this is not a necessary consequence. How does it necessarily follow, that though Squires was elsewhere, Canning has maliciously perjured herself? May there not be a similitude in deformity, that may deceive, as well as there may be in the more admired part of the sex?

But having, in general, denied the truth of Mr. Davy's inference, I shall waive this part of my defence so far as to agree with Mr. Davy, that Squires is so stamp, that it is scarce possible to mistake her. Canning has sworn she is not mistaken; twelve men upon their oaths have believed her; and her defence now is, that she is not mistaken. It will be as needless as prolix, to go minutely through every branch of the prosecutor's evidence, that is meant to prove the contrary. The witnesses are many: however, all their force is direct and obvious to a single point, viz. to prove Squires at Abbotsbury and other places, from the 29th

* See the Case of the Perrys in this Collection, vol. 14, p. 1312. See it cited in Barbot's Case, vol. 18, p. 1294.

of December 1754, to the 1st of February 1755: when we shall endeavour to prove she was at Enfield.

It is not quite immaterial to remark, that Esther Hopkins and Alice Farnham, the two first witnesses, are not quite positive, but believe only they are the persons.

You will observe from hence, that Abbotsbury is to be the grand scene of contradiction: there all the witnesses, whether united by a long course of smuggling, or only occasionally there, are express and positive: other circumstances, surely not altogether common in the course of a gypsy's life, are reserved only for their residence at Abbotsbury. In all other places Squires is attempted to be shewn properly as a vagrant,—fortune-telling,—staying a night only in a place, and lodged in barns.

But when once brought to Abbotsbury, without any cause opened or proved, they are at once to halt, not as gypsies, but become, in an instant, remarkable guests; live in the new part of the house, instead of lying in a barn; instead of being gypsies, that every one avoids, except such as want to deal in fortune-telling and smuggled goods, they are now companions of those of the best rank in the place, and at two balls in one week. This so ugly and deformed woman, whom they have brought a man that subsisted on charity at Enfield, to swear that he chose rather to sit in the cold, than by the fire where she was in company; I say, this extraordinary piece of deformity you are to believe at Abbotsbury present at all meetings usual at this season, and caressed as a principal guest.

One remark will suffice for all this particularity of description at Abbotsbury. This time was necessary to be consumed somewhere, or the *alibi* evidence, prior in point of time, would not defeat the gypsy's arrival at Enfield, in contradiction to evidence, which they are aware we have to produce. You will now observe, that it has been thought necessary to have some standard to resort to, as a reason for all this particular series of evidence and recollection, relative to all these three gypsies.—It happens, that most of the evidence have chosen the late change of stile as their common object of memory.—Scarce one, who did not remember this or that particular fact, by the era of old or new Christmas.—I wish this may be the only scene of falsehood and confusion flowing from this law. I was myself against it, as I thought it likely to be productive of mistakes in evidence, and don't yet see any use it ever can be of to the public.

It is, however, I confess, natural to confirm our remembrance of particular persons or things by remarkable *eras* in point of time. But I much doubt, whether this is not the occasion of the whole mistake in this case; not, perhaps, designed by all, though by others calculated merely to add a credit to facts, that a mere positive averment would fail to establish.

And in the evidence of the second witness, Alice Farnham, at Winyard's Gap, (which was

given with great modesty, and an air of truth) there is a particular, which induces me to believe, that the year must be mistaken by this witness. In order to convince you that she was not mistaken in the persons of the gypsies,—she recollects they told her they would come and see her again at old Christmas.

It was then the 31st of December.—These gypsies, as you have heard from all their own accounts, on their return hither to winter quarters; Abbotsbury, a remarkable point in view; and yet all this must be defeated, if they had then the least intent of being at Winyard's Gap again at old Christmas; but this is very reconcilable, supposing it the year before, that these wanderers were in those parts.—And this is no unnatural supposition; for the change of stile was then enacted into a law, though it had not taken place; and therefore the first old Christmas was no uncommon day of return for these gypsies, as dissenters from the New Stile, to fix on. But surely, gentlemen, if this extensive scene of *alibi* proof ought to find credit with you, it is evident George and Lucy Squires were the most proper evidence to support the truth of it.

To this I desired to appeal, as being the best evidence, when I observed those two in court, after all other witnesses were, by order, obliged to withdraw.—The prosecutor's counsel saw the force of this appeal, and agreed to call these two witnesses in succession.—George was called.—If Lucy had been ventured, and they two had agreed in points of facts, of persons, and times, as they must have done, if true in the accounts they gave—I say, if this had been done, I then agreed, and I still say, that I must have submitted, that the defendant was at least mistaken in her evidence against Mary Squires.

But, gentlemen, you have heard George alone. From his cross-examination, the danger of a manifest contradiction became too apparent. George hardly supported himself.—If Lucy was called, and faltered, the whole *alibi* was gone.—Such a trial was therefore not to be ventured. I re-demanded this test of the truth of the *alibi*; but the prosecutor absolutely refused it.—A reason indeed was assigned; but, like many others, the effect of a quick invention, unsupported by proof. Both these witnesses were, at once, made almost ideots. Nothing of this was mentioned in the opening, or as an excuse for not calling them, when at first demanded.

But as Lucy was not called, (which I really think would have determined this whole affair) let me remark a little on the conduct of George. And, gentlemen, where did there appear any defect of understanding, during his examination on behalf of the prosecution? He was clear, quick, and minute, both as to times, names, and places, that were within the route to be proved. Of other places, certainly as remarkable, certainly as natural objects of memory, not a tittle was to be remembered; for to have remembered any thing, would have given a clue.

And, therefore, not a town out of the *alibi*, except Shaftsbury, through a tour from August to December, from Surry quite along the coast of Sussex and Dorset, is to be mentioned. Not a transaction of buying or selling a single wrap of his goods, in any one place out of the *alibi*; and yet it is impossible but their trade must have been their view and support, in one part of their journey as well as another. But I submit, that some parts of the story, in which the prosecutor has allowed this witness to be capable of giving his testimony, afford strong suspicions of falsehood. I will enumerate some of them, that strike me in this light: First, that decrepid old woman's walk from Litten to Abbotsbury, and back again to dinner, and then to Abbotsbury the same evening, seems highly improbable. You are told by other witnesses, that such a walk would necessarily take up more time, than other circumstances of George's story can possibly allow for it.—Add to this, the improbability of her being at Abbotsbury, and that too at Clarke's house, and yet not seen there by one of all her numerous acquaintance. You observe scarce a person there, but has known her intimately for many years. Here, you have heard from many of the witnesses, there was an halt of eight or nine days.—George then tells you, that the first day they went only to Portersham, a very small distance; and from this place such forced marches, as amount to the highest degree of improbability. I asked him a reason for this immediate and unusual expedition.—This was one of the questions, which you find he did not expect to be asked. At last, it was a sister's illness occasioned this hurry.—We received a letter from her by the post on that account. He could not, however, tell where this letter was received, and, perhaps, that might be forgot: but, gentlemen, he could scarce receive this letter at Portersham, because that was a mere occasional resting-place; and if a letter, that really required and occasioned such expedition, was received at Abbotsbury, I desire to have it accounted for, how they came to attempt no further than Portersham the first day. It is obvious therefore to me, that the particular stages this witness gives an account of, were not in pursuance of this letter; but in order to be at Basingstoke on the 18th of January, for a purpose that is very material for the truth of their whole story, and which I shall take particular notice of, when I attend them at that place.

But first let me ask, if such a letter ever went,—if a sister ever sick.—Why not that sister here, to confirm the truth of this plain and simple fact? Is she too of so weak an understanding, as not to be trusted with this question? Did you write a letter to your brother George in January 1753, and to what place? Was you then ill, and did you inform him so by such letter? An answer in the affirmative to either of these questions, from a witness whose character stands, and must stand, unimpeached by any thing which now appears,

would have had great weight, with me at least, in confirming this part of George's evidence.

There is another most remarkable defect in George's account of this journey.—From Coombe to Basingstoke is forty miles:—he wanted, at first, to make this march in two days; but he was put right in his road here by the learned gentleman's rote on his brief, or else they would have been too early at Basingstoke for this material letter:—but, in this three days march of forty miles,—not a single place known;—no witness called that ever saw them;—and yet they eat, drank, and lodged, as in other parts of their journey. And yet, to put the truth of this narration beyond the reach of a doubt, this witness has repeated his whole journey, accompanied by an attorney, not only to refresh his own memory, but to give his testimony a prop and support, which he was no doubt prudently advised it might stand in need of.

It is, surely, somewhat strange, that the nearer he arrived to his own home, the less he should be capable of remembering things and places himself,—the less he should be able to produce persons to remember him, his mother, or his sister. But, gentlemen, this is a glaring objection to his testimony, both between Coombe and Basingstoke, and from Basingstoke to Brentford. But at Basingstoke a circumstance is pretended to have happened, and which, if it really did happen, makes it beyond a doubt, that they were really at Basingstoke on the 18th of January.

This is the letter, supposed to be wrote, by the direction of Lucy, by the landlady at Basingstoke, to her lover Mr. Clarke, whom, you have been told, she danced with at Abbotsbury. You have also been told, that this pledge of Lucy's love was unfortunately delivered to a wrong Mr. Clarke, by some mistake of the Dorchester post-house. Now, gentlemen, you will observe, all that makes this letter, in any degree, a material piece of evidence for the prosecutor, is the time it was wrote: for that these vagabonds may have been in all the places through which the evidence has traced them—that they might dance at Abbotsbury, and that Lucy, whose beauty Mr. Davy himself seems to have been so enamoured with, might there also captivate the heart of Mr. Clarke—is very probable, but intirely immaterial. It was therefore incumbent on the gentlemen for the prosecution to have fixed the time at which this letter was wrote, without the least blot of any suspicion; and not only the time, but that the gypsies actually came on this supposed 18th of January to Basingstoke, directly from Abbotsbury; for otherwise, their being at Enfield-Wash on the 1st, 2d, or 3d of January, and at Basingstoke on the 18th, are not in the least inconsistent: and therefore, gentlemen, I before took notice, that a most material part of this journey was very imperfectly accounted for by George Squires, and not any witness to assist him quite from Coombe to Basingstoke.

How material therefore would it have been, in this part of their case, to have had this wrong Mr. Clarke, to whom this love-epistle was sent by mistake? We should then, at least, have been sure, that it was not of an earlier date than 1753: and, when I come to observe on the letter itself, as produced to the Court, I think some suspicions, on this head, will not appear to be groundless. Mr. Davy with great confidence asserted, that this piece of evidence alone was sufficient to detect the whole imposture. I have allowed how strong it would be, accompanied with some requisites, that, I submit, do not now accompany it. An essential one is, that the letter should, beyond a doubt, appear to you to be wrote on the 18th of January 1753. Mr. Davy and Mr. Willeb have therefore, on all occasions, mentioned this date of the letter, as a fact not disputable, or, indeed, to be disputed. But, gentlemen, you, on oath, must from the appearance of the letter itself, at least think this uncertain; for, however often the date has been repeated 1753, it, in fact, has no other figures than 175; the corner, where the fourth figure should stand, is torn or rubbed off. That corner alone, gentlemen, out of four, though all equally secured by the fold and make of the letter, has suffered by time. When an obliteration, or other accident, happens in so material a part of so very material a piece of evidence, it naturally excites some suspicion. And here again, how material would it have been to have had the wrong Mr. Clarke, who could not, I am sure, have perused so unexpected a letter without some degree of attention? And from him we might possibly have known how the date appeared, when delivered to him.

'Tis also unlucky for this material point of evidence, that the post-mark is by no means plain enough to give any satisfactory account of the time, when this letter actually passed through the post. This, I own, is a defect not in the prosecutor's power to have cured; but therefore it was the more incumbent on him to have authenticated the time and date of the letter, by such means as were in his power; and therefore, I think, the absence of Mr. Clarke greatly discredits the authority of this piece of evidence; for, as I have before said, on the truth and exactness of time depends the whole force of this *alibi* evidence. I doubt I have appeared very prolix on this part of the case: but as the conduct of the prosecution seemed to make this so very material, I hope I have not seemed to trespass too much on that indulgence, which has been so remarkable through this whole cause. I shall therefore close my observations on the other numerous witnesses to this *alibi* part of the case, that however they may agree in general facts, that Squires was at this and that place, as sworn, such account may either be false or immaterial in this prosecution; may be, as other *alibi* defences too often are, absolutely false, or false in point of time; and the one, as well as the other, equally invalidates the whole of this, as

relative to, or material in, a proof of Canning's guilt.

It is therefore one of the corner-stones to the credit of this sort of proofs, that the several witnesses should be uniform in all their circumstances, and particularly in such, which they themselves might not think a necessary or essential part of the case which they are brought to prove. But, gentlemen, you may remember, that in such circumstances there were many contradictory accounts: one in particular was most material, either in establishing or overthrowing George Squires's account of his mother's famous walk to Abbotsbury and back again. To give this a seeming probability, all the subsequent witnesses were to bring them into Abbotsbury very late in the evening; and yet John Ford, one of the gang's most intimate and old acquaintance, swore positively, that he kissed Lucy before three o'clock in the afternoon at Abbotsbury. Mr. Davy was aware, that so signal a token of remembrance would weigh strongly against some of the former evidence; and therefore this witness is directly called drunk. There is another of this sort very material: Hawkins at Litton, though in and about his house the whole morning, remembers not a tittle of this morning's walk by the old woman to Abbotsbury.

Having gone through this range of the prosecutor's evidence, and troubled you with such observations as occurred to me on those parts which they seemed to lay their greatest stress on; I am now in course brought nearer home, and am to see how far another class of witnesses have produced any substantial charge against the defendant. And I hope, gentlemen, I shall have occasion to be much less prolix on this part; because the evidence, in its own nature, is much weaker; and whatever weight it may carry, allowing every tittle of it to be true, there are scarce any three persons to be found, who will agree in drawing the same inferences from the facts related by the set of witnesses I am now come to; that is, gentlemen, those witnesses, who have given you an account of the several occurrences before alderman Chitty, and at the time Canning was down at Enfield, and at other times, when she has, either in ordinary discourse, or in obedience to the civil magistrate, made her confinement and delivery the subject of any description. I will not go through the several parts of these transactions, which the gentlemen for the prosecution have endeavoured to paint so contradictory to each other, as must necessarily stamp the whole for a fiction and forgery. You, gentlemen, have had these different accounts, both the written and related, laid before you. Your understanding and judgment is too sound for me to imagine myself capable of reconciling you to the truth of any contradictions by any observations. It therefore becomes me only to state this branch of the evidence. If it contains any contradictions in facts material, I cannot lessen the force of

them: but if you see what is artfully termed by the prosecutor contradictory accounts, in the light I do in this branch of the evidence, I really and seriously imagine, that we have been wasting your time, both on the one side and the other. For what does it all amount to more than this, that a general fact, compounded of a variety of things done and said, when related on particular occasions, and at different times, has not always been minutely and exactly related the same way? And therefore, from this sort of defect alone, which I believe no various relations of a long story were ever free from, can any weight seem proper to be laid on this part of the prosecutor's case? And yet, so far has this been pushed, that you have had a contradiction endeavoured to be made appear to you, even from the figurative expression of the unhappy mother, in describing her daughter's wretchedness on her return. The midwife telling you, Mrs. Canning said to her, Here is my poor daughter returned as naked as she was born; What! says Mr. Davy, did she say, as naked as she was born? The energy, gentlemen, of the question, was to remind you that all Canning's accounts mentioned a handkerchief on her head, and a bed-gown on her shoulders. One can really be scarce serious in observing on attempts of this kind; and yet, gentlemen, much of your time has been taken up with arguments on such seeming contradictions. Pardon me in digressing in this place to one more remark, that arguments drawn from such seeming contradictions have been the only materials which the printed trash of quacks, inspectors, and justices, have supplied on either side of this question; and yet, gentlemen, from this modern practice of acquitting or condemning in pamphlets, without judge or jury, it is easily foreseen, that not a trial of any importance will soon be laid before a jury in that unprejudiced manner, which the cautious jealousy of the excellent laws of this country requires.

But to return, and to give one proof, how far these contradictions really did carry along with them any conviction of Canning's imposture; let us see whether those, who now make inferences of Canning's guilt from such circumstances, have acted the part, that men, supposed thus convinced, would or could have done.

For, gentlemen, you will observe, that Mr. Nash, Hague, and Aldridge, would now have you believe, that from the 1st of February, the time they attended Canning at Enfield, they were all satisfied that Canning was at least mistaken. I will not ask, whether the contradictions before alderman Chitty, or elsewhere, were the ground of their conviction in this particular. Satisfied they were, that Canning was mistaken; and yet, gentlemen, they were all at the trial of Squires. These men, hitherto of unimpeached characters, saw one life in great jeopardy for felony; another person trying as accessory to that felony; and yet offered no evidence in contradiction to

that proof, which they then believed to be false, and saw was likely to be so fatal.

The reasons for not doing this act of necessary justice you have heard. One of these convinced gentlemen was, if I remember, to attend a city feast. The other was so terrified with the perjury, that he could make no attempts to prevent the fatal effects of it. But there is something still more particular in the conduct of Mr. Nash: I produced a letter to him, dated the 10th of February, which he acknowledged to be his; and you will observe, this is almost a fortnight, after he tells you, that he was convinced that Squires and Wells were not justly accused.

And yet, gentlemen, what is the purport of this letter? It is wrote to one Mr. Lyon, a known and zealous friend of the defendant, and it is to inform Mr. Lyon, that considerable contributions might be raised about Enfield-Wash for the poor unhappy girl, and that he wishes them good luck. Good luck! gentlemen, in what? Will you believe Mr. Nash wished them good luck in a contribution, by the means of which he must know that innocence was designed to be arraigned? that an accusation, he then believed false, would be supported by perjury? Or, are we now to believe, that Mr. Nash, thus convinced, was weak enough to think Canning that poor, unhappy girl, as to be a worthy object of his recommendation to charity? Let the former conduct of these three gentlemen explain and account for themselves, if it can: but yet see how far they have been positive in facts, where we have nothing to do either with their observations or opinions, and which, from henceforth, I think no man can place any reliance on. They have all positively sworn, that Canning continued fixed to her first charge on Squires; though the warrant was taken out against mother Wells; though all her friends, and the city officer, expected, nay, pointed out Wells as the criminal; though Wells was continually running her face close up to Canning's, and interrogating her, Is it me? Is it me, madam? though the more artful gypsy, who is neither deaf nor blind as yet, during this transaction kept her face much concealed, till positively charged by Canning. Then, indeed, directly the mask of her deformity is produced, and made a defence, which, to a person conscious of no guilt, would have appeared a much more natural protection, by being never concealed at all.

While we are still on this scene at Enfield-Wash, if you are to suppose Canning's story all a fiction, nothing but a design to carry on a cheat; why should Canning determine on the gypsy? The name of the gypsy had been echoed through all parts of the house. You cannot suppose Canning ignorant of the life these people lead; never fixed long in a place. Mother Wells then at her usual place of abode,—of an infamous character,—facts both agreed to be known to Canning: and yet Canning, as the foundation of her cheat, determines on a

fact, which, if she knew to be false, she must be morally sure would depend on her evidence alone, and that too (from her own account) liable to be contradicted by the testimony of Virtue Hall; for, in all her accounts, she is uniform, that Virtue Hall was there when she was brought in: and if all this was a known forgery to Canning, could she have left such a witness's character unimpeached by her accusation? For could she then imagine, that instead of Hall's appearing to confute her, she would appear to confirm the truth of her whole testimony?

If inferences drawn from facts are in this enquiry to have their weight in opposition to facts themselves, I only desire this part of the transaction may be remembered, when you take the consideration of this case, under the head of probable or improbable.

Gentlemen, I have hitherto confined myself to observations and answers to such facts as the prosecutor himself has made a part of his case. And as the facts we have to lay before you will not require the illustration of refined arguments and observations, I hope not to trespass much more on your patience. I am sorry my duty has obliged me to have done it so long already. But before I give you the general state of our own evidence, which is all I shall attempt to do in this part of our defence for the prisoner, let me only remark to you the omission of a piece of evidence, so material in the confirmation of Canning's guilt, that I am sure the prosecutor's counsel could not have omitted it, had they really thought the story as false, as they have, by other sort of evidence, endeavoured to make it; that is, gentlemen, their not having called Virtue Hall here to support the truth of her recantation. That they could have had her is certain; that she might give testimony, extremely material, on one side or the other, cannot be denied; that her word, or her oath (I know not which has been relied on) has been deemed void of all credit, cannot, I am sure, be asserted; because I am confident, that it must have been used as one argument, at least, for the application for that mercy which has been shewn to Mary Squires. I say, gentlemen, these are some of my reasons, why I think Virtue Hall has gained credit, since the time she was sworn here in confirmation of Canning's story; and therefore, gentlemen, why is she not now brought here by the prosecutor to give a sanction to the truth of that recantation on oath? What, gentlemen, can the absence of this witness be imputed to, but that they were afraid (I do not mean the counsel were afraid, but the prudent management of their cause was justly afraid) of another solemn and public examination of this witness. I think this observation a just one, or I would not have made it. The gentlemen have rather chose that I should make it, than risk another relapse from Virtue Hall. But, perhaps, whatever may be your verdict, her recantation will still serve for cases and newspapers.

VOL. XIX.

Mr. Recorder. If she had been here, she has already discredited herself, and cannot be a witness.

Mr. Morton continues. With submission, Sir, I must insist on the propriety of my former observation. Virtue Hall, by the known practice and rules of evidence, is a legal and competent witness. Courts of justice can take no notice of private recantations, or of discoveries supposed to be made to magistrates in private, so far as to repel the testimony of a witness: I therefore rely on the propriety of my observation.

And now, gentlemen, I have gone through the case, the evidence, and the conduct of the prosecutor. I shall have occasion to be but very short in stating our answer to each of them; because, as I before said, I shall trust the merits of the defence to absolute facts, not to refined observations on them. Many of the facts, proper on our part, have been proved by the prosecutor's own evidence; such as the absence of Canning, her return, her account of herself, her real condition, her charge of Squires at Enfield-Wash, and many more circumstances which I have already observed on to you. I wish a repetition of the same facts could be wholly excluded from our evidence, merely for the sake of time; but I foresee that is impracticable. But, gentlemen, these facts being already proved, the remainder of our proof is pointed to the absolute overthrow of the truth of the prosecutor's *alibi* of Mary Squires, at the time of Canning's robbery and confinement. In order to do this, we shall call you many witnesses, who have lived in and about Enfield-Wash, from fifteen to thirty years, people of known and established credit.

The prosecutor has had a list of these witnesses now many days, and in that respect the necessary adjournments of this trial have given him an advantage and opportunity of impeaching the credit of all our witnesses, if their characters cannot stand the test of inquiry: I say, by a number of witnesses, unconnected in any respect with the party, in whose behalf they now appear, we shall shew you that this never-to-be forgotten image of Mary Squires was seen at Enfield on several of the days, which the witnesses for the prosecutor fix her to be in the different parts of her journey in the west. We shall not, indeed, have so exact a diary of the various motions of these vagrants, (I might say felons, for so they are by law) or of their various entertainments, their companions and amusements. Whether the want of such particular exactness in the relation of facts in themselves, at the time performed, entirely indifferent, will diminish the credit of our account or not, I shall leave to your own observation. They all, as I have before said, stand free and clear of all imputation as to credit; and they have, almost all of them, some natural as well as particular account to assign for their remembrance of the time of the abode of these remarkable strollers at the Wash.

Some will tell you of their dealing with

2 G

them in one way, some in another. It would be inexcusable to be particular on this head. There are those who took money of them; and from a vulgar belief of some superior power in these people called gypsies, thought it necessary to purify the money so taken, lest it might be conjured from them by this left-handed kind of divinity. There are others who will tell you, that they have parted with their money to this very woman in her trade of fortune-telling,—have been face to face with this remarkable impression of deformity. And therefore so far the *alibi* proved by the prosecutors has an express contradiction in proof. There are other ingredients in our evidence, which afford a light to those parts of Canning's own narration, which gives you both her journey to, and return from the Wash. I only mention all these, in general, because I shall rely on them, when we go into our proof. Whatever other observations either the prosecutor's case and proof, or our own affords, (and many they must be which I have omitted) I am satisfied the care and diligence of the gentlemen, who are on the same side with me, will amply supply.—Tired therefore, as I am, in having attempted to go through so very long a case,—tired, as I am sure you, gentlemen, must be, by that most laudable and impartial attention, which you have shewn through this whole inquiry,—I shall only beg that attention to a very few general observations. The weight and credit of evidence is your province. The weight and credit of arguments and observations, in opposition to facts expressly sworn, you will know how to estimate.—If, on the whole, only a just and rational doubt should remain on your judgments, the policy, the lenity, the justice of our laws, incline to mercy. In circumstances which must have been, nay, yet are doubtful, Squires has found mercy.

And though I am satisfied there never was a time, when the most rigid hand of justice was more properly required to the suppression of perjury; I am as fully convinced there never was a time, when active and resolute prosecutions for other reproachful villainies should be more cautiously deterred by such proceedings as the present against the now defendant.

Mr. Nares.* May it please your lordship, and you gentlemen of the jury; notwithstanding this cause has taken so long time already, and no man upon earth is more sensible of the great care that should be taken not to mispend the time of the Court unnecessarily than myself; yet, as it is now become my duty to make some few observations, I shall make no apology for intruding on your patience somewhat longer, though, perhaps, in the consequence, it may be to little purpose.

I am not only of counsel, but, I will say, greatly concerned for the prisoner at the bar; who, to use the epithet of my learned leader,

* A Judge of C. B. 1771. It has been said that he was the Serjeant Circuit of Foote's farce.

may be truly called extremely unfortunate, and that in many instances; unfortunate in being accused of any crime; if ever so innocent; unfortunate in having once appeared in this court, as a witness, and being so unhappy as to be believed; and unfortunate likewise in this respect, as she is now brought to her trial for a perjury in such a cause, and under such circumstances, as I will venture to say, the annals of time cannot produce a similar instance. It is not my inclination or my meaning to reflect upon any man: I mean not to reflect upon the worshipful magistrate, through whose lenity, though, perhaps, a mistaken or injudicious one, she now stands accused; though I cannot help observing, that this prosecution hath been carried on and supported with more warmth and spirit than any I ever had the honour to attend; and if this warmth and spirit spring merely from a zeal of bringing a supposed criminal to exemplary punishment, far be it from me to blame or condemn it. God forbid such a warmth should ever cool, or such a spirit grow degenerate!

Thus much I think it material to say for the prisoner at the bar, on the nature and manner of her prosecution; that it is totally unprecedented, that, as a prosecutor who had convicted a criminal, she should now come to be tried to overturn that conviction. You know, as well as I, the unfortunate prisoner was a witness against Mary Squires and Susannah Wells; and you know that they were both convicted; and you will recollect one circumstance well worth your consideration, and which I shall endeavour to enforce more strongly hereafter, that it was not on her testimony only that these persons were convicted, but her evidence was supported by the testimony of another person; which person's testimony you are now totally deprived of, because it hath been artfully insinuated to the world, as many other circumstances have been, that she hath now recanted all she swore at the trial, and therefore the poor prisoner at the bar dare not venture to call her, for fear she should by any means be induced to contradict her former evidence; which if she did, the prisoner might be condemned, instead of acquitted, by the mouths of her own witnesses. How that recantation was brought about, I shall hereafter tell you from the instructions of my brief: but I cannot help making this observation at present, that the gentlemen on behalf of the prosecution have not ventured to insinuate, nor attempted to prove, what means were or could be used by, or what influence that woman was or could be under to the poor prisoner and her poor relations, to induce her to swear as she did, if all she swore was so gross a falsity.

And, gentlemen, however, through tenderness or lenity, a magistrate may think, (for the sake of any particular persons being convinced in their own private judgments that such persons have been wrongfully convicted) that such a prosecution is laudable; yet give me leave to say, because I can speak it from great au-

thority, that such inquiries into the guilt or innocence of a prisoner, after they have been legally convicted, are vastly inconvenient and improper; and although prosecutions of this nature may shew kindness to particulars, yet they may be attended with cruelty to mankind in general, as they tend to interrupt, at least, if not overturn that common course of justice, that the wisdom of this kingdom, in all ages, has established; and may, and must serve to intimidate and prevent numbers of people from commencing prosecutions to endeavour to bring the guilty to punishment, lest, by some strange alteration of affairs, they themselves may, in their turn, be prosecuted.

And, gentlemen, when I say prosecutions and inquiries of this nature must be attended with great inconveniency to the community in general, I speak it from authority, in a case in which I was counsel for the prisoner.

There was a man, whose name was Williams, that was indicted at Stafford, for a robbery committed at Wolverhampton town's end the 24th of December. It appeared in evidence, the moment the prisoner was charged with the robbery, he told the prosecutor he was that very day at Islington: the prosecutor, however, swore to the man, though it was by moon-light: after which I called for the prisoner five witnesses, four of them from Islington, and another from Redbourn, near St. Alban's. In my life I never heard so circumstantial an account, and such a vast multitude of concurring circumstances, in point of time, and knowledge of the man, to prove him at Islington at the time the fact was committed; insomuch that the learned judge, who tried the prisoner, asked Mr. Serjeant Haywood, who was of counsel with the prosecutor, What he could say to it? for that he never heard so strong a defence in his life. In reply, they called two poor persons, who swore they saw the prisoner at Wolverhampton the day the robbery was committed. The prisoner was convicted. Soon after, as soon as the prisoner returned to gaol, he declared his brother committed the robbery; and there being a great disposition in the country in general to save the prisoner, supposing him to be innocent, they directed the brother to be taken up, and, on being charged with this robbery, he immediately confessed it, and several other robberies, for which he was immediately committed to Warwick gaol, and for one of which he was afterwards hanged. This account was brought to the judge at Shrewsbury, and he was so far prevailed on as to order the under-sheriff of Staffordshire to write to his agent to enquire into the characters of the Islington witnesses.—The agent accordingly enquired of the clergyman of the parish, and received for an answer, that they were all persons of good character.—This account was sent directly to me at Gloucester, with a request from many gentlemen to wait on the judge with it. This request I complied with, and the judge read the account, but told me he had, notwithstanding, some reasons

to apprehend him guilty; and however he might be inclined to extend his mercy to this prisoner in particular, yet he should not do it, as he thought it of the most dangerous consequence to the justice of the nation in general, to try the guilt or innocence of a prisoner, after his country, on a fair and impartial trial, had found him guilty. After this the man was hanged; and after he was executed, twenty witnesses might have been produced to have proved him at Wolverhampton, when he was sworn to be at Islington, and no person in the country doubted of his guilt. This I mention to shew how dangerous these subsequent trials must necessarily be. Why are they dangerous? Because, supposing people wicked enough, either out of love to the party accused, or malice to the prosecutor, to meditate revenge on him two or three years after, (for there is no time limited to call his prosecutor to an account, and to indict him for perjury) he may be brought to a trial, when, perhaps, all his witnesses are dead, and it will be totally impossible for him to support his testimony. When I have said this, I am sure these observations will and ought, at least, to weigh with you thus far, that if any doubt should arise of the guilt of the prisoner, you will not give the least encouragement to this sort of prosecution; for, supposing people wicked enough either to be tempted by rewards, or promises of rewards, there is not a man living safe or secure from some prosecutions of this nature.

I cannot help once more mentioning the great difficulties the prisoner lies under, in being deprived of the testimony of the only person, who could speak to the same facts the prisoner did, which would prove her innocent. Every body knows that Virtue Hall gave the same account that the prisoner did of the robbery; and what convinces me, beyond all possibility of doubt, that what Virtue Hall said could not be dictated or taught her, is, she did not only go step by step with the prisoner's relation, as far as that went,—but after she had left the story, Virtue Hall took it up again, and told you what became of the stays, and the conversation that passed after she was put into the room, and what she feared from too nice an enquiry into it afterwards. This witness has not been called.

In order to obviate any objections or observations that were expected to be made from not producing her, it hath been thrown out, that if she was produced, she could not be a witness, at least, on behalf of the prosecution, because the moment she came to charge the prisoner, she must confess herself perjured: but I beg leave to insist, that such an objection would only go to the credit, not to her competency; and it was so determined in this court, in an indictment against one Murphy* for a forgery of a seaman's will. There was a pretended will set up and proved in the Commons; the very

* See it in this volume, immediately after the present Case.

man who forged the will, and had sworn in the Commons, to obtain the probate, and to authenticate the will, was called on behalf of the prosecutor, to prove that he forged it by the directions of the prisoner. I made the same objection to his testimony, as is now hinted at with respect to Virtue Hall's; but the Court overruled it, and the man was admitted as evidence. He came and told the Court, all he had said upon oath in the Commons was a contrivance between Murphy and himself, and that every word of it was false; and on his evidence, supported by some corroborating circumstances, the prisoner was convicted. If there wanted other arguments or cases to prove this sort of evidence admissible in this court, I need only mention the common case of subornation of perjury; there the person who hath been suborned, and hath sworn false, is generally, if not always, called to convict the suborner, and to shew and prove by what means he was prevailed on.

Virtue Hall then certainly would have been a proper witness, if they would have called her. I have already mentioned some great difficulties the prisoner is put under from her not being produced: I shall mention only one more; the prisoner may, by this means, be deprived of an opportunity of shewing the Court the methods that were used to bring about this recantation; and, as she may yet be called, which will make this account evidence, and as I apprehend it will be for the benefit of my client, I cannot conceal it. And, gentlemen, I am instructed to say, and have many witnesses in my brief to prove those instructions, that Virtue Hall's recantation was brought about in a very extraordinary manner: she was called upon in public to declare, whether what she had sworn on the trial was true or false. And though I doubt not but the magistrate meant well by it, yet, when called upon thus publicly to make recantation, what did she say? she declared openly, all she had sworn was truth. She was asked the same question again, and she made the same answer; upon which somebody or other suggested, it would be proper to take her in private. For God's sake! why in private? I am sure, by the knowledge I have of the worshipful magistrate, he could never intend to seduce her by rewards or promises: but this may be the case; the poor girl might weakly imagine, that, if she altered her evidence, she might have some rewards, though the strict justice of the magistrate never could or would have given her the least foundation for such a belief. But, as the poor and the ignorant are more liable to be led away with false fears or hopes, built on the weak basis of their own imaginations, the taking her into a private room was by no means proper. After she had been examined in private, she did return and made the recantation. But, if she did make that recantation, why does she not come here, and swear and avow it? I dreaded seeing her appear; because, if all she said was false, it must have been owing to some undue influence, and

in consequence of some deep-laid plan, scheme, or contrivance of the prisoner at the bar, or some other person. Nothing of this nature hath even been suggested; then what room can there be for any presumption of that nature? What could induce Virtue Hall, who had no friendship, nor even acquaintance with the prisoner, to turn evidence on her behalf, against her greatest friend in the world, in whose house she had lived, and, perhaps, been supported? reward she could not have from the poor indigent prisoner, or any of her relations; and therefore the behaviour of Virtue Hall, if she did swear false, is totally unaccountable.

But now, gentlemen, having said this, in order to take off or counteract the prejudices that have artfully been raised against the prisoner; here she now stands at the bar, and she must be tried, however improperly she may have been brought upon her trial. I cannot help mentioning, happy she is, that she has got such a jury to try her; for, according to the best observations I can make, I never saw a jury attend with greater impartiality.

I should now consider what are the principles the counsel for the prosecutor have laid down, as the foundation for proving the prisoner guilty. They say the story is extremely improbable,—full of absurdities, so ridiculous, that no person in his senses could contrive or believe it: but, gentlemen, let me tell you, under the direction of the Court, trials for perjury are not to be determined by matters of improbability. If a person is indicted for perjury, and one witness is only produced to swear directly the contrary, the person cannot be convicted; because there is oath against oath, and the justice of this country is never weighing the credit of witnesses in golden scales; but, if there is oath against oath, the presumptive innocence of each is equal. Then consider, the prisoner hath sworn the fact; this is to be considered an oath by one witness of a fact, which is only attempted to be contradicted by circumstances, or by matter of improbability.

Mr. Davy has said, that no person living, nay, human nature itself is not capable of such cruelty, as that of putting another person to pain merely through wantonness. And I have seen an expression of a very great writer to that purpose, though in other terms, "There is no man upon earth so wicked, as to play the platonic with damnation." Let us consider how far that principle is applicable to the prisoner at the bar. There is a maxim never controverted, 'Nemo repente fuit turpissimus.' I may safely say, no person leaped from exceeding good to exceeding bad in a moment; it takes up a great deal of time to get rid of that natural modesty, which every person is endued with; a man must go by steps to the pitch of wickedness. In what state was this poor girl before this transaction? How do the witnesses on behalf of the prosecutor describe her? "A girl of as good a character as any in the world; I have known her from her birth; and I have never heard any ill of her," was

the language of Mrs. Mayle. How could this girl from this very instant, a girl of a good character, turn that wicked and abandoned wretch, that she must be, to give all this false evidence against a person she had never seen in her life? Is it conceivable she could have had any scheme to injure Squires, who was an utter stranger? It certainly is not. Indeed, could that be conceived, she must be as wicked as Mr. Davy's rhetoric can paint her; but whilst she stands thus accused of wickedness, she must be acquitted of one dangerous part of her character which hath been laid to her charge, which is art or contrivance; for no one can think her capable of either, who can suppose this a formed scheme; because, supposing it to be so, it is the only one that could not fail of being detected.

But the gentlemen have said, and would have you believe, the prisoner's friends have taken great care and pains, as far as possibly they could, to fix this to be the place, and to ascertain the descriptions of it. It is insinuated, a man went, came back again from meeting her on the road, saying, It is all right; there is hay. But when that comes to be observed upon, you will find no more foundation for that relation, than for some other evidence that has been given of the contrivance in ascertaining the place. But could there be any contrivance in ascertaining the person? It would be a reflection on your understandings to intimate that you could think so. Wells was the person pointed out, and the person all the world thought it must be; her own character must have convicted her; she could never have set up a defence like this; the prisoner must have been sure to have fixed her at that place; at least during the time of her confinement. No person would have interposed to have saved her from the gallows. But how did the prisoner act when she came there? That very person, who had been thus pointed out to her, and whom she with safety and impunity might have accused, if she had had any scheme or design of injuring any one, she totally acquits of the fact of robbing her. It was asked, Did she rob you? Her answer was, No. In an instant she said so. One of the company went so far as to say, There was mother Wells. What could be expected from that, but that she would have instantly said, That is the woman? But what does she say? That is not the woman that robbed me; there is the woman that robbed me (pointing to Squires). A person, that no one there did, or could direct her to; because it was contrary to every body's expectation. Then Mr. Davy would have you imagine this was a concerted scheme between her and her mother to raise contributions. Let us try this suggestion upon any one principle of nature or reason. Upon my word, I can scarce think of such a notion, and keep my countenance. I remember the saying of a very great man, which is the best answer that can be made to it: (Hudibras, Pt. 2, Canto 1.)

"The man that hangs, or beats out's brains,
"The devil's in him if he feigns."

Would she go within a hair's-breadth, nay to the very brink of death, to raise friends by way of contribution? Can you a moment doubt, upon hearing even Mrs. Mayle's account of her, that her life was in the utmost danger? Indeed there were no hopes of her recovery. If you have any doubt of that fact, the prisoner hath other witnesses, who could prove it to a demonstration. What! is this girl to kill herself, to have a subscription after her death for the benefit of her family? It is inconceivable to the last degree. Then consider how consistently the mother acted with any scheme or design of that nature. If she intended her daughter should be almost starved, and should be concealed till this was brought about, why did she advertise her daughter? which was the only means to discover her immediately, and marr the plot, if she knew when she was to return. How could she be (as it was beyond what could be feigned) so particularly affected at the sight of her, on her return? These circumstances must be totally laid out of the question, before you can believe it a scheme; or, if she did it designedly, it must be done without any view, either to benefit herself, or any of her family. But then the gentlemen have recourse again to improbabilities: they ask, How could she possibly go from mother Wells's to London, without telling her complaint? Mr. Merton has mentioned many reasons, why she did so. Mr. Davy would have you believe, the only one that could be suggested, was for fear of meeting any of the people belonging to the house; and to answer this, he hath said, why did not she call at gentlemen's houses, as she could never conceive she should meet with mother Wells and her conspirators there? Think of this objection one minute, and you will not want an answer to it. How was this poor wretch, in that condition,—wretched and almost frightful in appearance,—without strength (almost) to tell her story,—to gain credit, if she had complained? She might as well have attempted to have told her story to the winds. She must necessarily argue thus with herself, if she had her senses: Weak as I am, I must endeavour to get home before I tell my complaints; because I must go to the persons that know me, before I can be credited.

The moment she came home, she made known her story; and that was the proper time to make it known. But the manner, in which she related it, I shall observe on hereafter, as it very well deserves your attention.

Having endeavoured to answer some of the objections made to the girl's story, let us now attend a little to the witnesses on behalf of the prosecution, and consider how far these have been consistent with themselves, and how far they are the best witnesses that could have been produced, in order to clear up this intricate affair; because, if it should be obvious (as I dare say it is to every body) that the prosecutor has it in his power to clear up this matter, and yet hath left witnesses unexamined, who were the only ones capable of doing it in point of law as well as reason, every thing must be pre-

sumed, that can be presumed against the prosecution.

It will take up too much of your time to go into critical observations on every witness; therefore I shall only here and there point out some particular circumstances, which, perhaps, may have escaped Mr. Morton's notice, with respect to such inconsistencies. The gentlemen of the other side, conscious to themselves that there have been some gross contradictions, have endeavoured to persuade you, that supposing some circumstances in the account their witnesses have given are inconsistent, and others entirely false; yet you are not to regard any thing that does not go to the very substantial point, which is, whether Squires was then at Enfield-Wash? and that little circumstances are always to be overlooked: but give me leave to tell you, that is not the way of trying the weight of evidence. And I am sure, when you come to consider what the nature of the evidence is, you will perceive it absolutely necessary to go out of the common road in the examination of the witnesses, in order to detect the villainy: you will easily think it is absolutely impossible a set of witnesses can contradict one another in the very point they are called for, when they have been half a year conferring together on that point only; they know how to swear as to that particular; they are upon their guard, as to that; they know how to answer you. Then how are these witnesses to be treated? They are to be taken, as far as possible, off their guard, and to be asked those things they thought never would be inquired into. It is by this means that you are to find out the inconsistency; because truth is always the same, and always consistent; it will be equally so with respect to the circumstances attending a fact, as the very fact itself.

Gentlemen, I shall begin with George Squires, the son:—What did that man say? You observe, Mr. Davy represented him as a weak, ignorant man, and almost stigmatized him for a fool, the moment he appeared; and for what reason? It is not difficult to assign the reason;—because he was apprehensive that he would make some blunder: but was there the least sign of either a weak, an ignorant, or a foolish man, during the whole course of his examination from Abbotsbury to London? There certainly was not. This examination he expected, he was apprised of it, and prepared.—Then consider how he appeared, when taken out of the road from Abbotsbury to London: Mr. Morton asked him, Where did he set out from? He staggered a good deal, and desired to be asked no more questions; at last, he went from Kent, from his sister Mary.—Pray, what house was she at?—I cannot tell.—Where did you lie? where did you trade? or, where did you buy your goods, or where did you dispose of them? In above an hundred and fifty miles travelling, he scarce tells you he went into or by any one town, or notorious place: what is the reason he can give no better account? Why, because

he never expected to have been asked about it. In short, such a strange and improbable account I never heard in all my life.—Then consider the other evidence that has been given. Far be it from me to pretend to say they have not given you an exceeding strong account of this woman's being at South-Parrot, and coming from thence up to London: but there is this observation to be made, even with respect to these witnesses; several of them have said, before the time of Squires's trial, they expected to be called upon as witnesses, and declared what they could prove; yet not one in twenty either did appear on the former trial, or were ever asked to appear. But this observation may be made as to the number of witnesses that have been examined, that, wherever a story is talked of by one or two people, and they have declared that they had seen Mary Squires the gypsy, and that they were acquainted with her, another person, to whom it is related, recollects he hath seen a gypsy; and being told that must be the same, would not any body be almost persuaded, in half a year's time, that they must mean the same person? When the centre is moved, there is a circle succeeds, and spreads from man to man; but supposing the first to be deceived, all the rest might depend upon his credit; whereas, had they been asked, upon recent reflection, abstracted from other people's representations, they never would have spoke with that degree of certainty.

But, supposing these observations to be justly made, Mr. Davy says, there is one set of witnesses that must prove the prisoner guilty, beyond all degree of doubt. We have, says he, some witnesses, which were the girl's friends; they went down to assist her as far as possible, not imagining she would tell a false story; but when her own friends turn against her, it is the strongest evidence in the world, to think she was deceived. The principal witness called for this purpose was Mr. Nash; and he tells you, the very instant he came down to Enfield, he found the girl was in the wrong: he said to her, Child, you are mistaken, you can never have been there. After what he hath here sworn, could you conceive that Mr. Nash, a man of sense, a man of prudence, a man of justice, could ever, after he was convinced the prisoner was in the wrong, continue to give any assistance to the girl in the prosecution? I am sure it is casting a greater reflection upon Mr. Nash, than I would chuse to do on any one, to suppose he could act such a part: but how do we find him acting? Doth he behave consistently with such conviction of her being deceived? Ten days after, he writes to a person of fortune and consequence, (who will be produced) to encourage a subscription in favour of the girl. This objection, I think, is not to be answered. Then another friend of the prisoner's, Mr. Aldridge, is called, and he said exactly the same thing: he was every bit as much convinced; he detested every thing the girl had told him; and, in short, he was the

greatest convert that ever could possibly be imagined. I asked him, Have you had any conversation with Mr. and Mrs. Howard since that time? What does he say? I own I have, and I distributed a paper in favour of the prisoner. And, unless my instructions are false, he then declared he believed the story, and earnestly desired they would encourage the subscription.

I should almost have suspected my brief, which gives me an account of the behaviour of these three gentlemen, who have now been called against the prisoner at the bar, had not they themselves given such an instance of their own behaviour in this very court, as is not to be accounted for. They were all convinced of the mistake of Elizabeth Canning; they have now on their oaths sworn it; they were all convinced that her story was a falsehood, from the beginning to the end; and that the poor woman, the gypsey, who then stood in danger of her life, was as innocent of what she then stood accused of, as the child unborn; they were present in court when this innocent woman was so unjustly accused: what would you have expected they would have done? What common humanity and common honesty would immediately have suggested—would have interposed, and prevented the blow which was just then falling upon the head of the innocent. Did they act in such a manner? No; they acted in a manner which common humanity would make every one presume they were incapable of acting in, had not they themselves sworn it. In short, one was engaged to dinner, another was butler to some great person, and every one had some trifling excuse to desert and forsake the poor wretch, when falling into that destruction which she did not deserve, and which they only were capable of preventing. What conclusion can be drawn from such a behaviour? I will not say, it necessarily follows, that they are in this particular instance prevailed on to say, what they otherwise would not; but thus far I will say, that they have been, according to their own account, influenced by trifling and inconsiderable motives to desert those first principles of honesty and justice, which, notwithstanding all the temptations on earth, they ought obstinately to have adhered to.

Let us now consider the other head of evidence I proposed to observe on. Has here been any evidence omitted, that might serve to clear up the story? Indisputably there has. Why was not Mary Squires, the daughter, called? Why was not Mrs. Wells called, in order to shew you that all this was a falsity? With respect to Mary Squires, have you heard a hint against her character? She could have spoke materially to the fact of her mother's being at another place. She was at Brentford; she wrote to her brother, giving an account of her illness; she would have told you the time when she wrote this letter, and in what manner they went from Brentford to Enfield; but she has not been called. Why was not Lucy Squires called? She was more concerned in it; she, in

short, was the very person that could have made this appear either a falsehood to a demonstration, or thrown such a damp upon the whole prosecution, that they could never have gone on with it. She attended her mother through the whole route, and could have confirmed every single circumstance her brother had related, supposing all true. Why was she not called? I need not mention the reason, it is so extremely obvious: the gentlemen on the other side have art and judgment enough not to call a person to do mischief; they saw how George Squires was baffled and confounded; in short, gave no sort of account whatsoever, when taken the least out of the settled route. What are they afraid of, but that she might contradict her brother? which there seems great reason to imagine must have been the consequence of producing her. Then why was not Wells produced? There may be one good reason assigned for that; but the same reason they assign for not producing of her, must weigh greatly with every body as a corroboration of the innocence of the prisoner, and the truth of her account.

It may be said, that she was a woman convicted: but she is now pardoned, and she is a witness in point of law. But then they will say, she is a woman of bad character, and no credit can be given to her evidence: when they say that, they admit her a woman capable of doing the act complained of, or receiving persons who could do it. They were apprehensive this would cut both ways: for had she been called, and the prisoner could have contradicted her in any circumstance of the story, I am sure you would not only have been induced to have disbelieved what she had said, but to have believed her guilty; and if you did believe that, it would be very hard to direct the line between the innocence or guilt of her and the gypsey; and you would have been able to have distinguished why one attempts a defence, and the other not; because one is always fixed to a spot, and could never have set up this defence; the other is a vagabond, and it ever will be difficult to fix her habitation or residence for one day together.

Gentlemen, these are all the observations that occur to me on the prosecutor's own evidence, except one particular circumstance with respect to the hay said to be in the chamber. You have heard it said, there was a great quantity of hay; and they would have you believe this hay was all a feigned story, founded on the representation of those who went down before, in order to prevent the prisoner's giving a false account. But what does Adamson say when he came back? Says he, she says there is hay in the room, and the description is right. Will you, upon your oaths, say, Adamson had told her there was hay in the room, and that she had never mentioned hay to any one before? No. The meaning of that part of the evidence is plain; the girl had told other people there was hay in the room, though she had not told it to

Adamson before; and we shall prove she declared so, in the very first description she gave of the room. But Mr. Adamson himself will be called in behalf of the prisoner, and he will swear he never dictated to her, or gave her the least intimation to say there was, or was not, hay in the room. And as there was hay in the room, beyond all doubt, I shall only ask this question. How came this description of the room (which is a very extraordinary one) to answer, if the prisoner never had been there, and all her story was an utter falsity? But, gentlemen, there is one argument arising from the prisoner's evidence, that to me, seems totally unanswerable: I myself have heard it mentioned; and it hath been artfully, though now it appears falsely, insinuated to thousands, in order to prejudice them against the prisoner, and to leave no doubt but she must be convicted, that the prosecutor would actually shew where she was at that time. I know the gentleman who related it. And I call on the prosecutor now to account but for any four hours out of twenty-eight days, and I shall be convinced all is a falsity; and that she is not only greatly deceived, but wilfully perjured. Has it been attempted to be proved? I beg leave to say it has not. What weight then ought this circumstance to have with you? It ought to have more or less, according to the time or opportunity that there hath been to prove where she was. Had the fact happened but a week ago, I must confess, it might with truth be said, there was neither time nor opportunity to make the inquiry. But let us consider the circumstances of this case; the fact committed a year and a half ago—talked of before it came to trial—from the time of trial to this time; I will venture to say there never was a fact that hath undergone greater or more particular inquiry. There have been accounts published, which have gone all over the kingdom; and, I believe, I may with truth say, all over Europe. I do not believe there is an individual in this great city that has not heard of this affair, nor hath a company met for one single evening, where this was not a subject-matter of conversation. Then was there not time or opportunity to inquire into it? There certainly was; and unless they can shew what has been suggested, I mean where she was, it is one of the strongest arguments in the world in favour of the prisoner. Thus then it stands on the evidence on behalf of the prosecution.

With respect to our evidence, I shall again take notice, that, as to the facts themselves, one witness hath positively sworn to them; I mean, the prisoner. You cannot now expect other witnesses to swear to confirm her's, as to them; there never was but one, and that the prisoner is now deprived of; therefore all we can do, will be to support her by circumstances and probability. And, in the first place, we shall shew you the utmost probability for her going there, for two reasons: Because she is traced in the road from thence (and not a tittle of evidence to say she was further) towards

London, and not by one person only, or by persons who seemed to take no notice of her; but we have in our briefs no less than three, who saw her go by dressed in that very particular manner in which she came home, tracing her from that very place towards London. One of the men, at one of the turnpikes, where she enquired her way, went farther than merely describing her dress; he had an opportunity, by asking her questions, of seeing her face; and he will tell you, by the observations he made then, and by seeing her soon after, he verily believes her to be the same person.

When she came home, she gave the account you have heard: but the manner in which she gave it, is very well worth your consideration; it was not given in a wanton manner, not with that eagerness, or in that hurry an impostor would have told it, in order to run through the chain of her story, and tell it as soon as she could, fearing she should forget it. How does she tell it? More as if she was desirous of concealing, than of artfully publishing it. You find her at her first arrival so weak, that she could not run into a long detail; and when she grew more able to relate it, it came out only by answers to questions asked from time to time; in which she answered no farther than the question absolutely required, or obliged her. Is that like a formed scheme or story? It seems to me totally otherwise. But what will you say, when this same Mary Squires, who, as Mr. Davy hath urged, cannot be mistaken for another, who has that remarkable stamp upon her countenance, as he hath expressed it, is proved by twenty-five or thirty witnesses (many of whom are persons of figure and fortune) to be at Enfield Wash on the 16th or 17th of December? Was she only seen to go by as a traveller? No, that is not the case; many conversed with her; she talked of losing a little horse, and was lamenting her loss; she enquired after this horse of several; of some who were strangers to her, and of others that had known her for a long time. With respect to the first, they asked her, how they should know her horse? she not only described him, but told them that he had a lock on with her name: they then asked, what her name was? she told them Mary Squires. We shall produce some farmers, in whose barns she hath lain for three or four days together, to identify her person; and no one can suppose but that these witnesses are as little liable to mistakes, as any produced on behalf of the prosecution. And this observation you will carry with you during the whole course of our examination, that we shall not produce one witness, who doth not live within ten miles of London, nor one that the prosecutor hath not long known of; they will be regarded or not, in proportion as their characters do, or do not, stand impeached; and when I have said this, I defy the prosecutor to impeach the character of any one witness. With respect to the witnesses on behalf of the prosecution, it is absolutely impossible to know their characters, or, at least, to

prove them; because one is picked up at one place, and another at another; and the prisoner could never know, before she heard their testimony, who was to be examined against her. Supposing you believe, from the girl's account, from the witnesses we shall produce, that Mary Squires was at Enfield, there is an end of all attempts of the defence that was set up; and I dare say you will believe it, when we prove to you (which we shall certainly do) from gentlemen that went down with the prisoner to Enfield Wash, who had no reason to think mother Wells's was the place, any otherwise than they were led to imagine it the place, from the account she had given of it; and, however Mr. Lyon and Mr. Adamson may differ in point of opinion, yet they must and will tell you, that the place answered, as far as it could be expected, to the description that was given by the prisoner. We are not to catch at nice and minute circumstances, with respect to the description of the room: if you were to make that a rule of judging of the truth of the story, consider how the people that were in the house vary in their descriptions. There were also some pan-tiles, Judith Natus says, in the room: did any body else mention them but herself? One man says, there was a tub in the room: did any body else mention it but him? You observe, it is impossible to be conceived, that this poor girl, who perhaps might be, and indeed there is the greatest reason in the world to be certain, was in a fright, should be so very minute and exact with respect to every particular in the room. But then it is said, supposing the prisoner not contradicted in her account in this respect, yet it is plain her mother and she contradict each other; for the mother was observed to cry out, when her daughter returned, that she was naked. Mrs. Mayle has given you an account of it, and great stress has been laid on this observation: but if we consider this expression coolly, is there any weight in the world to be laid upon the words of a parent, who at that time was inflamed with indignation that her child had been used ill? Is it strange or remarkable, that this mother should aggravate things? Besides, the word 'naked' was in this particular a comparative, not a positive term; and she might certainly be called naked, according to the prisoner's own account, comparatively speaking, to what she was when her mother saw her last.

But supposing this a feigned story, how happened it, that any one description or circumstance, mentioned by the prisoner, should coincide? And there are some circumstances, all must agree, which amazingly correspond. How came the chimney in the corner of the room? How came this pitcher to be in the house? It makes no difference, whether it was in the room or not. How came it to be there at all, and so exactly to answer what she described the first moment she came home? We shall shew you, by persons that went down, other circumstances, altogether as surprising, that confirmed her account. The gentlemen, as if aware of

VOL. XIX.

one, asked, Could any person get out of the window? You observe, White told you, because he was forced so to do, well knowing that Adamson would say so, that he perceived some lime, or lath and plaister, broke from the wall, as if somebody had got out; should that be the case, it is the strongest circumstance in the world. One more I must mention; an account was given from the first instant, that her ear was bloody. A man, who lived over the way, came and found either a piece of iron, or a bid of lead, under that window, all bloody, and the handkerchief produced here is stained with blood; and, if that circumstance should be proved, it is a very strong one, and such as requires the utmost consideration. There is but one observation or two I shall mention, and that is with respect to what has been called the hinge, or sort of criterion, or touch-stone, upon which you are to try this narration; and that is the letter. Mr. Morton has made some strong observations on it; and extremely strange it is, that this letter should not appear dated in such a manner, as to determine the truth when it was wrote, or sent by the post. Was this date (for you will see the letter) put in any place where, either by the opening the letter, or by the wax coming near it, it might be possibly injured, there would be an end of any observations that could be made on the occasion; because you must know, who receive letters upon business, that it is impossible to unfold a letter sometimes without tearing a very material part of it. But how is this? The date is in the very corner of the letter, that corner which was sheltered by the folding of it, and must have been the last that could have received any injury; it was not near the wax or seal, or liable to any injury on that account; and although the outside was all dusty, this part being folded in was as clean as possible; how, therefore, this part of the letter in particular came to be torn off, is a matter beyond my comprehension, and, I am certain, you will give this observation the weight it deserves.

Then thus it stands upon the evidence on both sides: and gentlemen, I shall now only mention to you again, that upon trials for perjury, we are not to convict a person merely upon conjecture, improbability, or argument. I told you before, and under the direction of the Court I shall repeat, that every person's oath, though perjury is assigned in it, is to be considered as one witness: if a man forswears himself in an answer in chancery, one witness only contradicting it is of no signification, as both are to have equal credit: she then is the only person that speaks of the fact of this transaction, and that is not controverted but by circumstances and arguments: and if any witness could have been produced, or any evidence given, that could have cleared up, and explained this intricate affair (for so I will call it, even upon their evidence given), and the prosecutor hath omitted so to do, which to me seems plain to a demonstration, you will then presume in favour of innocence, as far as it is pos-

§ H

sible, and especially against those persons by whom the whole might have been explained; and if you have the least doubt remaining, whether the person is innocent or not, charity and Christianity will induce you to take the favourable side; the consequence of which will be, that the defendant will be acquitted.

Mr. Williams. We shall lay our evidence before you, and begin first with Mr. Lyon, the master of this girl.

Edward Lyon sworn.

E. Lyon. Elizabeth Canning had been my servant about ten weeks: on the 1st of January, 1753, my wife gave her liberty to go to see her uncle, who lived at Saltpetre-Bank.

Mr. Williams. Had you known her any time before?—*E. Lyon.* I have known her sixteen years before she was my servant.

Pray, how has she behaved herself?—Very well: I believe her to be a very honest person. She not coming home that night, we enquired about, and sent to her mother several times, but heard nothing of her.

Whom did you send?—I do not recollect any particular person.

Had she ever been guilty of such neglect before in not coming home?—No, not at all. The first time I saw her afterwards was on the 31st day of the said month before Mr. Alderman Chitty; she was there, in order to take up a person that she said had used her ill at Enfield-Wash. I being a little thick of hearing, cannot give much account of what passed before the alderman; but there was a warrant granted, and several of our neighbours went down to Enfield-Wash the next morning on horseback; I went in a coach with Mr. Nash, Mr. Hague, and Mr. Aldridge; the prisoner and her mother went in a chaise.

Did she give you any description of the room she had been confined in?—Not to me, for I was not with her.

Give an account of what passed between you and a person that met you on the road.—Mr. Wintlebury came riding on horseback, and said they had taken a number of people in Mrs. Wells's house. When we came there, I saw about ten persons, one man and the rest women, sitting round the fire, in what they call the parlour. After I had been there some time, Elizabeth Canning came, and was brought in and set upon the dresser: I went to her, and said, Bet, will you take any thing to refresh you? She said, No. I said, Do not be daunted, for you have friends about you, and, on the other hand, be careful, and challenge nobody in this house without you are positive of them. Sir, said she, I will not. Then, said I, you shall see them. Accordingly she was taken from the dresser, and led by two into the room. She saw Mrs. Wells first, and said, she had nothing to say to her; and upon seeing Mrs. Squires, she said, That is the woman that cut my off.

Did you see Squires then?—I did, very plain.

Was she sitting or standing?—She was sitting first, but she got up out of her chair.

When Elizabeth Canning fixed upon her, was she sitting or standing?—Squires was just got out as she charged her, and came towards her.

Attend to the question: was she sitting or standing up?—The room was full of people: I cannot justly say, whether it was the time she was getting out, or got out: several people got nearer than I did.

Have you any reason to think Elizabeth Canning saw her face, before she fixed upon her person?—I believe she saw her face.

Why do you think so?—I think she would hardly charge her without the sight of her face; I have no other reason.

When Mary Squires was charged with being the person, what was done?—She came up to her, and said, I hope you will not swear my life away, for I never saw you. Then Betty Canning was carried into the kitchen.

Did you hear Mary Squires say where she was at the time?—I did not hear any thing of that.

Did you hear Elizabeth Canning, or any body else, say what day the robbery was committed?—No, I did not hear any body say any thing of it.

Did you see George Squires there?—Yes, I did; he was in the room before Canning came in; he pulled off his hat to me, as soon as I came into the room: I said to him, How came you in this house? He said, I am a traveller, and came here to lodge. I said, Could you not find a house of better character? That, however, you must give a farther account of yourself. Then he sat down.

When Canning came in, was she asked, whether she had any thing to accuse George with?—She saw Lucy before she did him: she said, that young woman was in the room when my stays were cut off: then she saw Virtue Hall, and said the same of her; but they did nothing to her. After that George Squires was brought forward to her: said she, that man looks very much like the man that robbed me in Moorfields, but I will not swear to him: He had pulled his great coat off in the house, I think before she came: he had it on before justice Tashmaker; then she said, she verily believed he was the man, and that was the coat he had on, which he put her gown under, when she was robbed in Moorfields; but she would not swear to him.

Did you at any time receive a letter from Gawen Nash?—I did.

Did he at coming home express any kind of doubt about this affair?—No: we all came home together in the coach; he seemed very well satisfied; I could see but very little otherwise.

Did he say any thing at all, whether he was satisfied or not?—I cannot say but he did say something, but I cannot recollect what: I can

recollect Mr. Hague said, he did not see any grate in the chimney, nor pictures in the front of it. I said, I never heard that mentioned, but these things are moveables, and may be moved: we had a little talk; after that we had a beef-steak at the Three Crowns at Newington, and were good friends.

Did Mr. Hague say any thing else?—No, he said nothing else; there was no matter of doubt between that time and the trial of Mary Squires. Mr. Nash was once at my house afterwards, and as he was going out of the door, he made use of a very odd expression; he said, Mr. Lyon, I hope God Almighty will destroy that model that he made that face by, and never make another by it; a very odd expression, I remember it very well, meaning the gypsey.

Cross-examined by Mr. Davy.

Were you at the Four-Kings last Wednesday?—No, Sir.

I would be glad to know where you live?—I live at Aldermanbury.

What is your business?—I am a carpenter. How long had Elizabeth Canning lived with you?—She had lived with me about ten weeks.

Had you any knowledge of her before?—I knew her in Mr. Wintlebury's service, I believe, near upon two years. I had before that employed her father.

When was the last time you saw her before the 29th of January?—I saw her in the morning before she went out, on the 1st of January.

Can you tell, whether the door from the kitchen to the hay-loft was open or shut, when Elizabeth Canning sat upon the dresser?—I cannot say that, for the room was full of people.

Was the motive of your going down (besides the taking the people up) to make as many observations as you could?—No doubt of that, Sir.

Then why did you not observe towards what part of the kitchen her face was directed, when she sat upon the dresser?—I must have shoved people down if I had, for the room was full of people.

Were you with her in the parlour?—I was just at, or hardly in the parlour-door.

How many people were there between you and Mary Squires?—It is impossible I should tell; there might be five or six between me and the people in a circle round the fire; the parlour was almost full of people.

When they were all in the room, and Canning also there, and you at a distance, whether you could see Mary Squires sitting by the fire?—No otherwise than this, in a clift between the people's shoulders.

Did you see her sitting?—I did; this was all in a very little time before Canning charged her with robbing her.

How far is the chimney from the door?—It may be ten or eleven feet.

Did you see her after Canning was in the room?—I did.

Had you seen her before?—I had; she was

sitting smoking a short pipe by the fire, before Canning came down.

Was her face or back towards you?—She was side-ways, partly to me.

Did you see her sitting on a chair, after Canning was in the room?—No, I did not, till after she got up; but saw her sitting by the fire, between the people, just at Canning's coming into the room.

How long was Canning in the room before she charged her?—She charged her in a very little time.

What did the gypsey do upon that?—She took her hat off, and opened the clout which was upon her head; her face was almost hid with them before.

Could you see the side of her head when you was at the door?—Not then, but before and after I did.

How far was Elizabeth Canning from you?—She was within about three or four feet of me.

Was she in a direct line between you and Squires?—No; she was partly in the centre in the half-moon, and Squires was upon an angle.

Was Canning at your right or left-hand?—She was more to my left hand.

Have you any other reason for believing Canning saw the face of Mary Squires, than from your good opinion of her?—No otherwise.

What was the first thing Squires did or said, after she rose from her seat, to convince Canning that she was not the person who robbed her?—No otherwise than by telling her, as I have told you.

Did she desire Canning to take notice of her face?—I did not hear; I am thick of hearing at some times, and I was then; I am more in winter than at other times.

Did you hear Canning say at what time she had been robbed?—No, I did not.

Did Mary Squires continue speaking after the words you before mentioned?—Very little; the girl was moved away presently afterwards, so that they were in that position but a very little time.

Did Mr. Hague, Mr. Nash, and Mr. Aldridge, and you, return home together after this?—We did.

What was your discourse coming home?—We had very little talk in the coach about it.

Did you return good friends?—We did, and were very jocular, as we were when we went down.

Did you hear or understand any doubt they had touching this affair?—No, I did not.

Was either of them dissatisfied at the account she had given, and at her behaviour when in the house?—No, none at all; we were as agreeable as we were when we went down.

Recollect yourself, and seriously answer, whether you had any conversation with these gentlemen about Canning's mother dreaming a dream?—I never did, nor never mentioned any such thing.

Did you ever say any thing about her mother's going to the conjuror?—Going to a conjuror has been mentioned, but not by me.

Did the mother tell you, five days before her daughter's coming home, that a conjuror had told her she was in the hands of an old woman, and would come home the next week?—She had told other people, as I heard, but not me; I never heard it from her mouth; I never conversed with her about it.

When did you hear it?—I don't know.

When did she return?—On the 29th of January.

Have you ever talked with her, since her return home, of any thing that passed during the time of her absence?—I can say nothing in particular.

If you had any conversation with her about it, it must be particular.—I know nothing but How do you do, Betty? But as to relating how she was used, or any thing like it, I cannot tell any thing in particular.

Then what do you remember upon the whole?—I have often seen her and talked with her since, but cannot remember any particular part, or words, that have been related.

Whether you expressed to her any surprise concerning the account she gave to you of her ill usage?—She has never given me an account in a particular manner; it was always to other persons.

Had you any talk with her, since her return, relating to a cunning man?—No, none at all, nor don't know she has heard it; one thing, I think, I recollect; at Mr. Marshall's house I was with her, and asked her thus: Bet, if you know any thing of this affair, that you believe you are mistaken in, or such like, I desire you will let me know it; don't deceive us upon any account. Sir, said she, I have said nothing but what is really true.

Have you had any dispute or falling-out with Mr. Hague, Mr. Aldridge, or Mr. Nash, on account of this affair?—No, not on any account. Some few words, that I related, were concerning the grate and pictures over the chimney; Mr. Hague was saying there would be some marks left where they had hung.

Were you formerly very intimate with them?—I was with Mr. Nash and Mr. Aldridge, but not with Mr. Hague. I have done business as a carpenter for about sixteen years for the Goldsmiths' company.

Are you acquainted with them now?—We have no conversation now.

What is the reason of the discontinuance of your acquaintance with Mr. Nash?—My reason is this, that he did not appear: that he should seem to have something to say, and not say it. I thought it was an odd thing not to appear, and then to appear afterwards.

Did that break your acquaintance?—It has so.

Did you ever hear him say, before the trial of Squires and Wells, that he did not believe a word of the defendant's story?—No; not at upon no account.

Did you ever hear Mr. Aldridge say so?—No: Mr. Aldridge I have seen casually pass and repass, Your humble servant, and so on; but I was not in his company. When I saw Mr. Nash on the morning of the trial of the gypsy it was, Your servant, and so on; but on conversation. I never was with Mr. Aldridge since the time of coming from Enfield-Wash.

Had you used to be frequently with him before?—No, but casually.

Have you been as intimately acquainted with Mr. Nash since, as before?—I have been at his house. I did not keep from his house on that account. There was no difference, as I know of. I never shunned his house on that account.

Did you belong to a club at his house?—We had a club of all the workmen belonging to the Goldsmiths company at his house; that is plumbers, bricklayers, and others.

How often did you usually meet?—Sometimes once a fortnight, sometimes three weeks.

Did you go pretty constantly?—I did.

Have you frequented that club, and drank there, as you used to do before?—I declared off upon that very account, because he did not appear on Squires's trial; and after that, Mr. Nash making use of my name in sundry places, I resented it.

Then I desire to know of you, whether from the time of your return from Enfield-Wash with Mr. Nash and Mr. Aldridge, to the trial of the gypsy, your intimacy was the same with them as it had been before?—I had not seen Mr. Aldridge. I had no dislike against him till afterwards, that things went in such a line that were disagreeable. Mr. Nash had been at my house, as I observed before. I did not keep from Mr. Nash on that account till after the trial of the gypsy.

Are you sure of that?—I aver it. I know nothing to the contrary. I had no dislike to him, till after that trial.

During that period of time between your return from Enfield-Wash, and the trial of Mary Squires, did you ever hear Nash say any thing of his disbelief of Canning's story, or that he thought it improbable?—Indeed, I did not.

Whether Mr. Nash, Mr. Aldridge, and Mr. Hague, when they went with you to Enfield, had not the same evidence of the truth of the story, and all its circumstances, as you had?—I know the coach stopped two or three times; as for Mr. Aldridge, he was very little there; Mr. Nash was in the house, and saw as much as I did.

Why did not you subpoena those three persons to give evidence on the trial of Squires?—I was not concerned in the thing, there were other persons concerned.

Who were fixed upon as prosecutors?—I don't know.

Were you examined before the grand jury?—No, I was not.

Did not you, on the 15th of February, set your name to a paper to encourage contribu-

tious to carry on the prosecution?—There was my name in print to an advertisement, when there were several gentlemen together.

Did they make use of your name without your consent?—No, they did not: they mentioned this; they thought, as I was the master, it would be more agreeable to put it in; I said, Gentlemen, if that is the case, put it in.

Did not that contain a reward for the apprehending two men concerned in carrying her down to Enfield-Wash? and did you advance any money towards paying that?—I was half a guinea: the rest were the same. As to paying in particular, that was not mentioned.

Mr. Davy. The advertisement concludes with these words: 'Whoever will take or apprehend one, or either of them, &c. Francis Roberts, Aldermanbury, Edward Lyon, Aldermanbury, the girl's master.'

[Cross-examination continued.]

Did you consent to the publication of this paper?—I did.

Whether there was not a subscription going on, in order to encourage her for her virtue? Was you one of those?—I did not go about to get her any money; there were persons that did.

Did you contribute to the expence of the prosecution of the gypsy and Wells at the Old-Bailey?—I did not act; I had no concern in the delivery of the money; the subscription was not made then; I subscribed nothing to that; what I did was since that.

How much did you contribute towards the carrying on the prosecution of Squires?—No more than that half guinea then.

Did you give evidence on that trial of what passed at Wells's house?—I did.

Do you think Mr. Nash, Mr. Aldridge, and Mr. Hague, could hear what passed as well as you?—They could hear better than I.

Did you see them in the room where she says she was confined?—I cannot tell whether they were in the room; I saw them in the house.

Why were the three not called to give evidence against Squires and Wells, as well as yourself?—I as much believed that Mr. Nash, when I saw him in court, came upon that affair, as ever I believed any thing in my life.

Did you at that time believe he would give evidence for or against the gypsy?—I believed he would against the gypsy, as I did.

Was there no club-day betwixt your going down to Enfield-Wash and the trial?—I cannot tell whether there was or not; if there was, I might not be at it. I remember going home after the trial was over: Mr. Aldridge sent his servant after me, who said, his master gave his service to me, and desired to know how the affair went: I said, They are both cast. I went directly to Mr. Nash's, and drank a glass of cyder, but do not know that I saw him.

Were you then angry with Mr. Nash?—No. When you were at justice Tushnetaker's, was

George Squires there, and how was he dressed?—He was; he then had his great coat on.

Was it put on in order for the defendant to see whether that was the man or not?—I don't know that.

Did you not say, upon the trial of Squires and Wells, that she said he looked more like the man after he had that coat on?—She did say to that purpose.

How came the justice not to commit him?—Why, we mentioned that it was a pity they were not all committed.

Did you hear George desire he might be committed?—No, I never did: so different from that, that when the mittimus was writing, he looked over a woman (and seemed to quiver a little) to see whether there was a mittimus making for him, as I took it; but I did not hear him express a word about it.

It seems, you believed the girl's story from the first hearing?—I did.

Did you take any method, from that time to this, to satisfy yourself about it?—I got farther evidence of the story as far as I could, in questioning the girl at Mr. Marshall's, as I mentioned before; I had no doubt at all.

You bid her be careful; do you believe she was careful?—I believe she was.

Then why did you desire her to recollect herself, to see if she was mistaken?—Because there was such a great clamour about it, and I was willing to ask her again.

Mr. Williams. Whether you did not give the gentleman a true answer before, when you told him you had been instrumental in bringing them to be discovered in the advertisement of twenty pounds?

E. Lyon. Yes, I had been, and would have turned out something.

Mr. Williams. My lord, we are now to read the letter that Mr. Nash owes to be his handwriting.—(To E. Lyon.) Is this the letter that you received?

E. Lyon. This is it. (He takes it in his hand.) It appears to have been wrote on the 10th of February.

Mr. Williams. Did not you think he was a well-wisher to the discovery of this affair?

E. Lyon. Indeed I did, and all the time afterwards, to the time of the trial.

Mr. Williams. How old is the girl now?

E. Lyon. I believe about nineteen years of age.

(The Letter read.)

"Mr. Lyon; Feb. 10, 1753.

"I am informed by Mr. Aldridge, who has been at Enfield, that if a person be appointed there to receive contribution, some money would be raised in that place for the unhappy poor girl. I wish you success, and am your's,

"GAWEN NASH."

Directed on the back, "To Mr. Lyon, Aldermanbury."

Thomas Colley sworn.

T. Colley. I am uncle to the prisoner, and

live at Saltpetre-Bank; I am a glass-blower; on the 1st of January was twelve-month, she came to my house, and stayed from twelve o'clock to about nine in the evening. She lived servant then with Mr. Lyon. After we had supped, I and my wife went along with her homewards, to the end of Houndeditch; we parted with her there.

Mr. Morton. How was she dressed?—*T. Colley*. She had a sort of a strip'd gown on, I cannot tell the name of it.

Was she well and hearty at that time?—She was.

Where did she say she was going?—She told me she was going to her master's, and was in her way there when we left her.

Had you any reason in the world to doubt but she was going there?—No, I had not.

How near, and what a-kin is she to you?—My wife is her father's sister.

Had you, upon your oath, any reason to believe that she was a-breeding?—No, I had not.

Cross-examined by Mr. Willes.*

What time did she come?—About twelve o'clock at noon.

Did any body come with her that day?—No, nobody.

Was she in perfect health?—I never saw her better, as I know of.

What had you to dinner?—Some of a cold shoulder of mutton and potatoes, which was dressed the Sunday before.

Did she eat a hearty dinner?—She eat as hearty as she could; she seemed to eat as hearty as I did.

* This cross-examination was ridiculed by Foote in a farce, in the performance of which he exercised his talent of mimicry, by a very successful exhibition of Mr. Willes's peculiarities of voice and manner.

In vindication of Willes, Mr. Malone has observed (in his Inquiry into the Authenticity of the Papers, &c. which in 1795 were published as the writings of Shakspeare, queen Elizabeth and the earl of Southampton) "Persons who are not conversant with legal subjects or the true object of lawyers in their examination of evidence, are frequently surprised at minute questions put to witnesses, which they think either vexatious or impertinent; and on such occasions the well-known question which a late admired comic actor introduced into one of his pieces, and which he rendered still more ridiculous by imitating the thin and stridulous voice of an eminent barrister, who was afterwards raised to the bench—'Pray, now let me ask you, was—the—toast buttered on both sides?' is often mentioned with much satisfaction and applause by those who have attended more to the humour of the theatre, than the investigation of truth. But the judicious lawyer, when he asks, not precisely such questions as the English Aristophanes has invented for him, but, in the case (we will suppose) of a disputed will—whether the testator, when he

This being new-year's day, what did you give her to drink?—She drank some ten-shilling beer, which I had in the house. I was at work in the afternoon.

Does your wife drink tea in the afternoon?—She generally does, whether she has company or not.

Have you seen your niece drink tea?—I have.

Do you think your wife and she had tea that afternoon?—I do really believe they had.

Does your wife generally have bread and butter, or toast with her tea, or not?—She generally chuses toast and butter.

What time did you return home from work?—At about seven in the evening.

What had you for supper?—We had some of a sirloin of beef roasted.

Did your niece eat of that?—She eat a small quantity of that, but could not eat much.

What did she drink after that?—She drank a small quantity of ten-shilling beer.

How far did you go with her?—I went with her to the end of Houndeditch, almost to the Blue Ball.

Who went with you?—None but my spouse and her.

Did you stop at all by the way?—We did not.

What sort of a hat had your cousin on at this time?—She had a sort of a chip, a white hat.

Had you any other entertainment, than what you have mentioned, either at noon or night?—No, we had no other.

Had you any mince-pies in your house?—No, I had not.

Do you know of her buying a penny pye?—I cannot tell where she came by that.

You are sure you gave her none at your house?—I had none, and gave her none.

You don't know what money she had about her?—My wife told me, she asked her to go with her into Rosemary-lane to buy a cloak, when I was at work; but I cannot tell how much money she had in her pocket at that time.

By Mr. Morton.

Was the toast buttered on both sides, do you think? Here have been a great many questions asked in order to force a stool.—*Colley*. I cannot tell.

When did you hear she was missing?—I

made and published it, was sitting up in his bed or in an arm chair;—what was the size or form of the room—how many persons were present—who lighted the candle, or furnished the wax with which it was sealed, &c. perfectly understands what he is about; and in cases of fiction and fraud, the event often proves the propriety of such an examination; for by the answers given to these questions, compared with the testimony of others, and the real fact, the instrument set up is quickly overthrown." See the Examinations (pp. 345, 346) of Clarke and Hawkins, as to whether the fowls were boiled or roasted.

heard that the same evening; her mother's apprentice came to my house that same night, and called and awaked me and my wife out of our sleep, as nigh as I can guess, between eleven and twelve o'clock.

How far is Houndsditch from Aldgate?—It may be about ten yards; I told the apprentice I parted with her at the end of Houndsditch.

What did the apprentice say?—He said, the girl's master had been at his mistress's house, and wanted to know where she was, and upon that account he came to know.

Alice Colley sworn.

A. Colley. I am wife to the last evidence, and aunt to Elizabeth Canning; she came on New-year's day was twelve-month, about twelve o'clock, to our house, having a holiday, and stayed till about nine at night; then my husband and I went along with her as far as the corner of Houndsditch towards her master's house; there we parted with her.

Mr. Nares. Was she in good health?—*A. Colley.* She was, in all appearance, as well as I am now, to outward appearance. I stood and leaned across a post, and saw her go directly on her way down Houndsditch; then we went home to bed, and about twelve at night the apprentice came, and asked, if Betty was here? My husband said, No, I and my wife went with her as far as Houndsditch, and there parted with her. Then the apprentice went away, and came about six in the morning, and my sister along with him; she knocked at the door, and cried, Let me in, which I did; and the apprentice went to the glass-house to my husband; she told me, Betty's master had been with her once or twice, and they did not know where she was; we were all much surprised.

Cross-examined by Mr. Gascoyne.

Did she look to be very hearty?—She did.

What had you for dinner that day?—We had the remains of a cold shoulder of mutton and potatoes.

Did she drink tea?—Yes, she did.

What had you with your tea?—We had toast and butter; she eat but a very little, not very heartily; but I cannot say I minded her much.

Did you go to an ale-house?—No, we did not. I took her once or twice to the glass-house to see my husband work some time in the afternoon.

Was that before tea, or after?—I cannot tell.

Was any body else with you that afternoon?—No, nobody but she and I.

Did you go with her to Rosemary-lane?—No, I did not.

Did you ever separate?—No; only when supper was ready, I desired her to go and ask her uncle to come to supper. She went, and they came together.

Did you send her any where else after that?—No, I did not, only to him to an ale-house, the Black Boy, not above seven or eight doors

from me; and he came with her directly in a few minutes.

Did she tell you what money she had to buy her a cloak?—No, nor did I see what money she had.

Did you hear your husband examined?—No, I did not.

What time did you part from her?—We parted with her at Houndsditch about half an hour after nine.

Did you pass by a pastry-cook's in going?—We did.

Did you buy a pye to treat your niece?—No, I did not.

Is the Blue Ball in Houndsditch in the way to her master's house?—It is.

By Mr. Recorder.

When did you see her first again?—On king Charles's martyrdom, and never till then.

Did she complain she had been confined?—She did, and was in bed, and very ill; and there was a gentlewoman talking to her, named Polly Lyon; we did not care to ask her many questions, she being very ill and in a low condition; she could hardly speak, she was so very faint.

Can you tell what it was occasioned by?—By being used very ill, and half-starved.

Elizabeth Canning sworn.

Canning. I am mother to the girl; she was nineteen the 17th of last September: In December 1752 she lived with Mr. Lyon in Aldermanbury.

Mr. Williams. Did you know of her going to her uncle's, Mr. Colley's?—*Canning.* I did; she called at my house, (it was on a Monday, New-year's-day) and told me, she was going to her uncle.

Was there, or was there not, any account brought to your house that night, that she was not come back?—Mr. Lyon, her master, came to my house just after nine o'clock, and said, he wondered she stayed so long: I was frightened out of my wits: I sent my three children into the fields to see after her, and I sent my apprentice to Mr. Colley's, her uncle; they said, they had parted with her after nine o'clock at Houndsditch. I sent again in the morning, and I went myself before it was light. Mrs. Colley was a-bed then: I said, Let me in, let me in; Mrs. Colley got up, and said, O lack, has not she come in yet? I said, No. She said, she left her there. Her husband was called from the glass-house; and I was ready to run distracted.

From that time to the 30th or 31st of January, did you hear any thing of your daughter, or know where she was?—She came home the day before king Charles's martyrdom, at a quarter after ten o'clock. I had advertised her in the papers the first time on my own head; and then afterwards one Mrs. Maynard, a turner's wife, came to me, and said, Have you advertised her any more? I said, I did not think to do it; indeed it was out of my power, it was very hard with me.

Did you hear any thing in consequence of this advertisement?—One gave me a shilling, and another gave me a shilling; so I advertised her two or three times, and had no account of her.

Upon your oath did you know any thing of her during the time she was gone?—No, I did not.

On this night, what time did your daughter come home?—A quarter after ten.

Where was you when she came home?—I was partly getting into bed, and my apprentice was going to fasten the door. He called and said, Here is somebody at the door. I said, Who is it? he said, Betty. I said, What Betty? he said, Our Betty. My little girl ran screaming up to the chimney: I said, Feel her, feel her: I thought she was an apparition. She came in in this posture (describing it, which was almost double, and walking side-ways, holding her hands before her.) When she came up so, I took her to be an apparition.

What was her dress?—She had a loose bed-gown, and a rag about her head, and her ear was bloody, and the rag was bloody.

Did you, before she brought that bed-gown home, ever see it before?—No, never in my life. I never wore such a thing, so poor as it is with me.

Did any of your neighbours come in, after your daughter came home?—After my daughter came home, the first that came in was Mrs. Woodward; my apprentice James ran and fetched her, and Polly Lyon next door to me; and the third person was Mrs. Myers; then Mr. Roberts's maid, and Mr. Wintlebury.

Now, when these people were come in, was your daughter interrogated by them where she had been?—They asked her, where she had been? her master Wintlebury took her by the hand, and said, Where have you been? she said, Sir, I don't know, but only by seeing my mistress's coach, the Hertfordshire coach: she was not able to say the place where she had been at.

Was she able to give an account of the persons?—No; she said, there was an old woman, and two young ones, and she should know them again if she saw them, she thought.

Did she give an account to you, what sort of an old woman it was?—No, she did not.

Did she give an account what befel her, after her uncle Colley had left her in Moorfields?—She said, she had been robbed, and by what sort of men, but she could not tell who they were; but that it was the same two men that robbed her, that dragged her away.

Who asked her?—We all asked her. She gave an account, that they pulled her along, and after they gave her a blow, she could tell no more, and that she was confined where there was hay in the room; she said, she lived upon bread and water; that from the Friday to the Monday she had none to subsist on; and she gave an account of the mince-pye she bought for her brother.

Did she give a description of a pitcher?—She said there was a broken pitcher of water, that very night.

What was done to her that night? Did you put her to bed?—I did, and it was five o'clock in the morning before I could get any warmth in her feet.

Look at this pitcher (Which she did). Is this your pitcher?—It never was mine.

Did you carry that pitcher down with you?—I did not. I pulled off my own stockings, and put them upon her; and in the morning you might have wrung the things about her, she was in such a sweat. Polly Lyon brought some wine, and Mrs. Woodward and she mull-ed it, and when she had some poured out she could not swallow it; she was in an extreme deplorable condition in regard to her health.

The next day was any body sent for of skill in a physical way?—Mr. Bakler, the apothecary's man, came in that night; he wiped her ear, and put a plaster to it; he gave her some drops, and then went away. His master came in the next morning; he ordered something for her, to give her, in bottles; he asked her as to the state of her health.

What is his name?—His name is Bakler.

Did the apothecary give her any thing in order to cause a stool?—She had no stool till she had three glysters; she continued extremely ill.

Had you the advice of any other?—We had the advice of Dr. Eston. I had not convenience for her, having but one room, and the room which the boy lay in; so she was carried from my house to a house over the way.

How came there to be a suspicion, that it was at mother Wells's that she was confined?—She nominated the name of mother Wills or Wells that night, she did not know which; that she heard them call it very plain; I believe Mr. Wintlebury, Mr. Scarrat, Mrs. Woodward, and Polly Lyon, all were there at that time.

Had any body that was there given her the least hint of Wills or Wells, or any name like it?—No soul ever spoke to her, till her own mouth mentioned it.

How was it first known or believed, that this mother Wills or Wells lived at Enfield-Wash?—I don't know, Sir; because she had described it to be upon the Hertfordshire road: upon this there was application made to Mr. Alderman Chitty.

Who fixed it down to be the house of mother Wells at Enfield-Wash?—I don't know; there were a great many people, and I was so concerned, I did not hear all their talk.

Was there any proposal to go down to Enfield Wash?—There was; we went down on the Thursday after she came home; she came home on a Monday night: there was Mrs. Myers, Mrs. Garrat, my girl and me, and a young child in my arms: we went in a chaise.

Do you recollect any body that met you on the road before you got down?—Yes; Mr. Adamson.

Did he give you or your daughter any, or what description of the house of mother Wells?—Upon my oath he did not.

Did he ask Betty any questions?—His horse would not stand still: he said, Drive, coachman, I wonder you stay so long. The coachman said, the road was so bad, and such a load he had, he could not go faster. He asked her, what sort of a place she was in, and if she could remember it? and she said, she could. Then he rode out, and we came after. When we came down there, I was only in the parlour and kitchen.

Upon your oath, did you ever go up in that room, which goes up where your daughter was confined?—I went up one or two steps, and said, Oh! oh! this is the place of my child's confinement; and a gentleman shoved me, and said, Get you down, get you down.

Recollect, when you came back, did Mr. Adamson bid her tell what was in the room, if she could?—I don't remember he did.

Cross-examined by Mr. Davy.

I think you say, one Mrs. Maynard, a turner's wife, applied to you to advertise her?—She did the second time; but the first time I did it myself.

(He shews her a paper) I should be glad to know whose hand-writing this is.—I don't know whose hand-writing it is.

When you advertised her, did you carry the paper to the press?—No; a young woman did for me; her name is Mary Northan.

Who wrote the paper that Mary Northan carried to the press?—I believe Alice Colley, her aunt, wrote the first advertisement; but I am not sure.

Did you see it before it was carried?—I did, and read it.

Is this it?—I cannot tell.

Are you acquainted with Mrs. Colley's hand-writing?—No, Sir, I am not.

The first was on the 4th of January, and the second was two days afterwards, was it not?—I believe it was.

Who wrote the second?—Indeed I cannot tell, if you would give me all the world.

Did you write it?—No, Sir, I did not; Mrs. Maynard, the turner's wife, advised me to it.

Did she write for you?—No, she did not.

Who carried it to the Advertiser?—Mary Northan carried all the papers.

Who delivered them to her?—I believe I did; I know I did the first.

Did you, or did you not, deliver the second paper to be carried to the press?—I did, I think; I am positive they were delivered in my room, and in my presence.

Who were in the room at that time?—Her aunt Colley was at the first time.

Who else?—I don't know there was any body, but the young girl that carried it, and my children that time.

Who were in the room when the second paper was delivered?—I believe none but the young woman and my children then.

VOL. XIX.

Who had you the first paper of?—My sister Alice Colley wrote it in my room.

Do you know her hand-writing?—I have seen her write twice before; but don't know her hand-writing. She wrote 'scowerer' instead of 'sawyer.'

I see upon it 'scowerer' is struck out, and 'sawyer' wrote; who had you the second paper of?—I believe it was done at the White Lion, at the end of Fore-street, facing the gully-hole, by either the master or somebody there; Polly Northan can tell, for she stayed the writing of it.

Now, had you at that time heard any thing of your daughter's being in Bishopsgate-street?—Yes; I heard it of a gentlewoman at an oil-shop, the sign of the Two Jars through Bishopsgate, towards Cornhill. She informed me, she heard a young voice scream out in a coach; but whether it was a man's or a woman's voice she could not tell.

How long was it before the 6th of January, the time of sending the second paper, that you had this account from that gentlewoman?—I don't know, but it was a night or two nights before.

Then her screaming in Bishopsgate-street was wrote in the paper by your order?—It was. I thought I would leave no stone unturned to find her, and so I told Polly Northan of that.

Where had you the third draught of an advertisement?—That was wrote in my kitchen by one Spencer; he did it by the directions of the gentlewoman at the oil-shop for me, as I was advised by my friends to do it.

Who advised you to put a reward in?—It was her uncle bid me to do that, and said, he'd pay that, if he stripp'd his skin.

Had you any knowledge, at that time, how much money your daughter had in her pocket on the 1st of January?—Yes, I had; for I lent her a little box to put the half guinea in; for I was to have gone out with her on that afternoon to buy a cloak and a pair of mittens.

When was that agreement made to buy a cloak together?—She made that agreement with me, before she went from me to go to her uncle's; she intended to return to me that afternoon, but they would not let her return till she had a bot supper, because they had nothing but cold victuals for dinner.

How much money had she in her pocket at that time?—She had half a guinea, three shillings, and a farthing. I saw the half guinea put into the box, and she put the three shillings loose into her pocket; and the night she returned, she gave the farthing to her brother.

Was thirteen and six-pence farthing all the money she had?—It was.

When you advertised her the last time, did you know then what money she had in her pocket?—Her brother said, she had changed a six-pence, and gave every one of them a penny; and Mrs. Lyon told me, she had given her half a guinea in gold, and three shillings in silver.

Did your child tell you she had changed

six-pence?—Yes; and that she did not give him his penny, because he huffed her; but I find with his penny she bought a penny mince-pye.

Was it a half-penny or a penny each she gave them?—I don't know whether it was a half-penny or a penny a-piece.

Did she turn out her pocket to you?—No, she did not. She shewed me the money; half a guinea, three shillings, and a farthing, is all I saw.

Did she tell you it was all she had?—No, she did not.

How many children had you then?—I had five in the whole with her, with the child in my arms.

Who was to have had the mince-pye?—My little boy.

How came you to advertise that she had twelve shillings and nine-pence half-penny?—I took it so, that she had but twelve shillings and nine-pence half-penny.

Here is by way of postscript, "Had in her pocket twelve shillings, nine-pence halfpenny."—I ordered it to be advertised; she had six-pence more, for what I know.

I observe these words, "twelve shillings, nine-pence halfpenny," are scratched out on this paper; how came that?—I fixed upon that sum, thinking she might have changed some money to give halfpence to the children.

Who wrote the third advertisement?—I can't tell who.

How came part of the writing on the paper to be scratched out? And I observe that part is not printed in the daily paper.—I can't give the reason, if you would give me the world.

When it was delivered to Polly Northan, was it scratched out?—I don't know.

I find in this paper, "This is the last time of advertising;" that also is scratched out, and both these are in different ink and different hands.—I don't know that I ordered her to be advertised, "This is the last time of advertising." I could not have advertised her, had I not had assistance, and my neighbours put me upon it. I don't know that I ordered any thing to be scratched out.

Did you order Polly Northan to carry the papers directly to the printing-office, or elsewhere?—To the printing-office.

After you missed your daughter so long a time, you took all the means in your power to know what was become of her?—Sure I did, I went to all the agents and places where I could think of, fearing some casualty.

Did you go to Wood-street Compter?—The people told me, if there were any quarrels, they would take all away, good and bad together, was the reason I went there.

Did you go to a conjuror?—I did. They call him the astrologer.

Where does he live?—He lives in the Old Bailey.

What is his name?—I don't know his name: he had a black wig over his face.

When did you go to him?—I don't know when I went.

How long after your daughter was missing?—I don't know. It was before she returned.

What was done there?—I told him I had lost my child; and after he had got my money, he bid me go home and advertise her; he said, Make yourself easy, she'll come home again.

Did he tell you when she would return?—No, he did not. He only asked me two or three questions, and wrote, scribble, scribble, scribble along.

Did he tell you she was in the hands of an old woman?—No, he did not.

Recollect yourself.—I don't know whether he did or no: he might, for what I know.

Or what misfortunes had happened to her?—No.

Whether he did not tell you she was in the hands of an old black woman?—The word 'black' I don't remember. I know he frightened me. When he shut the door, and lighted the candles up, he looked so frightful, I was glad to get out at the door again.

What was his first question?—I think, he first asked me, what I came for? I said, for my child.

What were the other questions?—I can't recollect them: it was about her going away. I believe he asked her age.

Did he ask what state of health she was in?—No, Sir.

Nor when was the last time you saw your daughter?—No.

Did he ask any thing about Bishopsgate-street?—I believe I told him that; he bid me advertise her again, makes me think I did.

Did you tell him of a dream you had?—No, I did not.

Had not you a dream or a vision about it?—I don't know of any such thing.

Or an apparition?—No; but I had wandering thoughts.

What did you mean just now, by saying you had wandering thoughts?—I say, I never had rest night or day, for my thoughts were wandering.

How came you to imagine she was confined by an old woman?—It never came into my thoughts that she was; I more thought she was murdered in Houndsditch, and thrown into some ditch there.

At this time, upon your oath, had you ever heard of the name of mother Wells, when you went to this cunning man?—I never heard of that name till she came home.

Did you mention the name of mother Wells to him?—No; I did not. He said, an old woman, I believe.

Did you mention twelve shillings, nine-pence halfpenny to the conjuror?—I believe I did not. I was not there long, for I was all of a fright when I was there.

Was there any other person there?—I saw no other besides himself; he let me in, and I went by myself.

Who advised you to go to him?—A great

many of my neighbours; one gave me six-pence, and another three-pence, till I got a shilling, and then I went directly.

What are their names who gave you the money?—I can't recollect any of them. I believe, a gentlewoman that lived cook or chambermaid, who lodges at a house over the way, her name is Mrs. Jobanna, being out of place; I was wringing my hands and tearing about, and she advised me to go to the cunning man. There were a crowd of people about the door, like a fair about me.

You advertised her as lost or strayed: why did not you advertise your suspicions of her being murdered?—I never did.

Do you remember your saying, that you had prayed to God, and had an answer to your prayers, so as to assure you that your daughter would return?—I never had no answer. I prayed by myself, and gave up bills in the church, both at Aldermanbury and Cripplegate, and at the meetings and Mr. Wesley's. I did not leave a meeting or a place where I could put up a bill in.

Of what religion are you?—I am of the church of England, and was baptized at Cripplegate.

Did you not, about a quarter of an hour before your daughter returned, mention to the apprentice, you had prayed for your daughter's return, and that she would return presently?—I said to James, the last thing you do, pray for her: he said, he never went to prayer but what he did. This was just before she came in. I bid him every night pray for her, and I repeated it.

Did you mention, that you believed your daughter would be at home that night?—No, I did not.

Where has this apprentice been ever since?—He has never laid a quarter of an hour out of my house since.

Has there been any care taken to prevent people seeing him, and his being asked questions?—Here was a young man came and said, He'd give half-a-crown to see him; I was told this was some scheme or skit, and thought it would not be convenient, and so it was concluded he should not be seen. There were about a dozen sawyers there.

Did they not impose another person upon him, instead of the apprentice?—Yes, they brought over another sawyer, instead of him, to the young man.

And so bilked him out of half-a-crown?—They did.

How soon after your daughter's coming in was it, that the apprentice was sent for these people?—He helped her into a chair, and went out directly; and immediately came in Mrs. Woodward, Mrs. Myers, and Polly Lyon; and in two minutes the house was full.

What things of the room at Wells's did your daughter mention that night?—She mentioned the chimney and the grate in the room, and said, she took the gown out of the gown.

Did she mention any thing of the jack-liar, or pulley, or broken casement?—No.

Or saddles, or chest of drawers?—No; she mentioned hay, and a pitcher.

Did she mention how much hay?—No.

Did she say she lay upon hay?—She said, she did now and then, or always, I don't know which.

Where did she say the hay was?—She said, it lay of a lump in a corner.

Did she mention it was spread out like a bed?—No.

Had your daughter had a stool, did she say?—It is a constant method with her to go a fortnight without a stool. I have another little girl at home now, that commonly goes sometimes ten and sometimes eleven days without a stool.

Did you ever mention this to any doctor before the 1st of January?—When she was little, I mentioned it to Dr. Catridge, who lived in Aldermanbury.

Did they use to give her glysters?—No; they used to give her physic; that was when she was ill.

Was any method used to occasion a stool before the 1st of January?—No.

Had she her health perfectly well?—She had; only she was troubled with pain in her head.

Had she a good stomach to her victuals?—She had a very little stomach always; that they know where she lived.

Was she very thirsty?—She drank very little, without it was a dish of tea; but not plentiful of that.

When your daughter came home, and told you this story, did you think it was a very strange one, or did you believe all she said?—No, I did not think it strange at all. I have known her, at home, to live upon half a roll a day, when things have gone hard with me.

Did she tell you in what manner she escaped?—Yes; out of a window, by pulling down a board.

Did she mention any thing of a pent-house?—No, she did not.

How did she look when she came home?—Her face was swelled, bloated, and black, and sodden, as if it had lain in water, and her arms black. She swallowed nothing hardly.

Did she eat any thing that night?—No, nothing but a little wine and water; that she could scarce get down.

Were her teeth loose?—No.

Nor no soreness in her mouth?—No.

Do you know Mr. Scarrat?—I have known him within this twelve-month.

Did Scarrat come the first night she came home?—He did.

How lately, before your daughter returned, had you seen him?—I never had any acquaintance with him before that. I don't know but I might see him go by a good many times; but I never spoke to him in my life before; but I hear since, he is a neighbour.

Did he tell you he had formerly been at mother Wells's?—No, never.

Did you never hear him say he had jumped out of the window himself?—No, I never did.

How many rooms have you got in your house?—I rented the house in my husband's time; and before he died, Mr. Roberts took the two garrets, the chamber, and a little room I had below, which he has put to his counting-house, for which he paid seven pounds per year, and after that I desired he'd pay that to my landlord. So I have but two rooms.

Was any thing mentioned of Enfield-Wash the night of your daughter's return?—I don't know when it was first mentioned. I believe it was when they came all together the next morning.

Was your apprentice a witness upon the former trial?—No, he was not.

Was he subpoena'd?—I don't know what a subpoena is.

How came you not to mention the grate, the pitcher, nor the bed-gown, on the trial?—Because it was not asked me.

Was Mr. Adamson present when your daughter mentioned the hay?—He did not see her the first night, nor till we went down to Enfield.

Was Scarrat there when hay was mentioned?—I don't know, the house was full of people.

Do you know one Mr. Dod, a surgeon?—I do not.

Did you ever hear your daughter say, she was afraid to lie on hay, fearing there should be a dead man under it?—I never heard her mention that, to my knowledge.

Did you never say so to any body?—No, not to my knowledge.

Can your daughter write?—She can a little; it is a sad hand.

Can she write a letter well enough for you to find out the meaning of it?—She can hardly write at all.

Can she write her name?—I believe she can; I have seen her write it.

How long was she at a writing-school?—About a quarter of a year.

When did you see any of her hand-writing?—I do not know that I have seen her hand-writing these six years.

Look at this paper (it was a notice of trial with her name to it, the name wrote by her:) Is this name her hand-writing?—I believe it is her scribbling like.

Do you think, when your daughter could write, she would only make her mark?—I do not know for that.

Mr. Davy. I ask this, my lord, because in her information before justice Fielding, there she only makes her mark, and by this paper I see she writes an exceeding good hand.—(To E. Can.) How was your daughter's head covered, when she came home?—With this rag upon her head, (holding the half handkerchief in her hand) and an old ragged handkerchief she had in her pocket tied over that (producing it.)

Whether did you not swear upon the trial of Mary Squires, that your daughter had a cap on when she came home?—No, not to my

knowledge; she had no cap on, to my knowledge.

Mr. Davy to Thomas Gurney. You hear the evidence this woman has given; look at your minutes, and give an account of what she said in her evidence on that trial, as to the state and condition in which her daughter came home, and particularly how she was dressed.

Gurney. She said, she had nothing on but a ragged bed-gown and a cap.

Mr. Davy. Read the account she gave to that.

Gurney. She said, after she was missing from New-year's day, she advertised her three times. She came back on the day before King Charles's Martyrdom, about a quarter of an hour after ten o'clock; she had nothing but a ragged bed-gown and cap on.

Mr. Davy. Were these her own words?

Gurney. I have here mentioned the person 'sbe,' where she said 'I.' I will not take upon me to say these are the very words she made use of, or that she made use of no more words; it is my method, if a question brings out an imperfect answer, and is obliged to be asked over again, and the answer comes more strong, I take that down as the proper evidence, and neglect the other: for instance, here have in the course of this trial been many questions asked, which have not brought out any satisfactory answer to the counsel, which, when asked in other words, and upon recollection, have produced more proper answers, which I have put down. It is not to be expected I should write every unintelligible word that is said by the evidence.

Mr. Davy. Are you certain the witness on that trial said, she had a cap on?

Gurney. She did, or I had not put it down; and had she said a handkerchief, I doubt not but I should have found it in my minutes.

Alice Colley again.

Mr. Morton. Look at this paper (which was the first advertisement sent to the Daily Advertiser): is this your hand-writing?—A. Col. I believe it is.

Here is the word 'scowerer' scratched out, and another word put for it over it; is that your hand-writing?—That other word is not my hand-writing, nor the 'P. S.' at the bottom is not my hand-writing.

Look at this other paper (which was the second advertisement).—I did not write that; I never saw it before.

Did you write the first of your own accord, or did any body dictate to you?—Her mother did; she told me what to write down.

Were you two alone then?—I believe there were several strangers by at the time.

Mary Northan sworn.

Mr. Nares. Do you remember carrying any papers to be printed in the Daily Advertiser?—M. Northan. I carried three.

Who wrote the second?—(She takes it in her hand.) I cannot remember indeed who wrote

it. I think Mrs. Canning sent me to the corner of Moor-lane, at the White-Lion, there it was wrote.

Who wrote the third?—I cannot justly remember that.

Cross-examined by Mr. Willes.

Did you go by yourself, or in company with any body?—I went by myself.

How came you to put in these words, 'any coachman'?—The mother gave directions to put in about the coach, because she was a sober body, and we thought she might be forced away in a coach.

How came the circumstance of the coachman to be inserted?—Because her mother had been informed by a gentlewoman in Bishopsgate-street, that she heard a coach drive in great haste, and a young person screaming out in it; and that she had nobody at home, or she would have sent and stopped the coach.

Was this writing on the backside one of the papers on it, when you carried it to the printer?—I do not know; if it was read to me, I could tell better. (It is read).

"Note, It is supposed she was forcibly taken away by some evil-disposed person, as she was heard to screech out in a hackney-coach in Bishopsgate-street. If the coachman remembers any thing of the affair, by giving an account as above, he shall be handsomely rewarded for his trouble."

Mr. Northan. This was wrote at Mrs. Canning's house, I believe, but I cannot tell by whom; I did not mention about the coachman at the White Lion.

Mr. Willes. During the time it was in Mrs. Canning's house, was there any thing wrote in it, or on the back of it, by any body there?—No, there was not.

Can you read?—I can hardly read at all. (She looks at it.) There was nothing on the back-side when I carried it. (It is read.)

"Elizabeth Canning went from her friends between nine and ten on Monday night, betwixt Houndsditch and Bishopsgate, fresh-colour'd, pitted with the small-pox, high forehead, light eyebrows, about five foot high, well-set, had on a purple masquerade-stuff gown, black-stuff petticoat, a white chip hat bound round with green, white apron and handkerchief, blue stockings, and leather shoes."

Is this all you mentioned to the person who wrote?—It is, I believe.

Do you know who scratched out these words? ("Any coachman, who remembers taking up such a person, and can give any account where she is, shall have two guineas reward, to be paid by Mrs. Canning, in Aldermanbury-Postern, sawyer, which will greatly satisfy her mother.")

Northan. The other is all I gave directions for; I don't know who scratched this out.

Mr. Nares. I dare venture to say this alteration was made by the printer, for I observe he has altered the English and spelling all the way through by the printed paper; he saw

there was some suspicion of a coachman put in in a stupid manner, and he began to alter it on the back-side, as it is put down.

Mr. Willes. Here is the third paper; do you know who wrote this?

Northan. I don't know; Mrs. Canning sent me to carry it to the printer.

Mr. Willes. Here are two lines scratched out in this; how came that?

Northan. The printer scratched them out, and said, they were of no use.

Mr. Willes. In the third letter here are two lines scratched out: were they so when you carried it? The words are, "Had in her pocket twelve shillings, nine-pence half-penny."

Northan. The printer read it, and scratched them out; he said, it was not material to name the money.

James Lord sworn.

J. Lord. I have been apprentice to Elizabeth Canning's mother between six and seven years. I remember her being missing upon New-year's day was twelve-month. Mr. Lyon came to our house first about nine o'clock, then about ten, to know whether mistress know'd whether Betty was come home to her house. Then I was sent directly to her uncle Colley's, at Saltpetre-Bank. They were all a-bed: Mrs. Colley answered and said, They had left her about half an hour after nine o'clock, upon the other side Aldgate church, in Houndsditch: then, after that, I came home and acquainted mistress with it. There was great inquiry about the neighbourhood all night long almost; I inquired of several neighbours that night.

Mr. Williams. When was the next time you saw her?—J. Lord. On the 29th of January, the night before king Charles's Martyrdom, about a quarter after ten o'clock, I was just going to make fast the door, going to bed; somebody lifted up the latch; it goes with a bit of string; mistress was down upon her knees a-praying to see her apparition, before she came in.

Did you see her down on her knees before Elizabeth Canning came in?—She was down on her knees some time before ever she lifted up the latch.

From the 1st of January to this time, did you ever see the mother on her knees?—Yes, I have several times, praying to God to hear somewhat of her, whether she was alive or dead.

This prayer that you mention, and the position of her being down on her knees on the 29th; was that any thing particular, or was it no more than what she had done before?—It was the same as she had several times done since she missed her daughter?

You were giving an account that Elizabeth Canning lifted up the latch, and you was going to make fast the door; go on, and give an account in what manner she came.—I had the candle in my hand, and was going to make fast the door, and she came in: mistress was praying: mistress asked who was there? I then

looked her up in the face, and thought it was somebody else came to enquire tidings after her: I did not know her at first: after I had looked her in the face again, she frightened me, because she looked in such a deplorable condition. I said to mistress, it was Betty: she said, What Betty? I said, Our Betty: upon that mistress fell in a fit directly, and continued so some minutes, I cannot say how long.

Upon your oath, do you think it was a real fit, or a sham fit?—I never saw her in a fit before; it was far from a sham fit. When Elizabeth Canning came in, she was e'en almost spent: I took her by the arms, and set her down in a chair: she was e'en almost dead, as black as the chimney-stock, black and blue: she was dressed up with an old bit of an handkerchief round her head, and an old dirty ragged bed-gown, what they properly call a jacket.

Did you see what was upon her head?—She had no cap, nor hat, nor stays on; her ear was out, and all bloody.

Did it bleed as if it had been fresh cut?—It was a-bleeding.

Was there any blood upon the handkerchief?—There was some blood upon the handkerchief that was about her head: she had an old handkerchief in her hand, and a bit of one upon her head.

What colour were the handkerchiefs of?—One was white, but I cannot say for the other.

What condition did she seem to be in with regard to her health?—She seemed to be almost spent, just gone; and if it had been much further, I believe she must have dropt down.

Who were in the room at that time?—There were none but my mistress and children in the room. As soon as my mistress recovered out of her fit, I was ordered by mistress to call Mrs. Woodward, Polly Lyon and Mrs. Myers: they came; she began to say where she had been confined; the woman was either named Wills or Wells, at Enfield-Wash.

Was this that night?—It was the same night. So many people came in, I was obliged to keep the door, to keep people out.

Who, asked her where she had been?—My mistress; and she said, she had been at Enfield-Wash, and heard the name of Wills or Wells, she did not know which; for she heard them go backwards and forwards in the house, and heard them call her by her name.

Did she say how she came to go there?—I was not much in the room all the time; I was obliged to keep the door.

Then you cannot give an account of what she said any further?—I know nothing further than that she is an honest, industrious, sober girl.

Upon your oath, do you, or do you not, know where Elizabeth Canning was from the 1st of January, to the day before King Charles's martyrdom, or any part of that time?—No; nor never set eyes on her, or heard any thing where she was, till she came home.

Cross-examined by Mr. Gascoyne.

What time was you sent to Colley's house to inquire for the girl?—It was between eleven and twelve at night when I got there.

How came you to sit up so late that night?—Mr. Lyon came to our house, as nigh as I can guess, between nine and ten, (which is generally about the time we go to bed) and asked mistress if she know'd any thing of her daughter: she said, No, she thought she had been come home to his house. The next morning mistress and I both went to Mr. Colley's to inquire.

Did you not go to Mr. Lyon's first?—I think I did not.

What time in the morning did you go to Mrs. Colley's?—I believe we went out about six o'clock.

What time did you get home again?—I believe about ten, and I went out to inquire after her again; I went one way, and mistress another, to the neighbours about.

To what places?—I cannot tell all the places; I did not go to any place in particular.

Where did your mistress go?—I cannot tell; she did not tell me; she was just like a mad woman.

Did she order you to go to any place?—I had no directions from her to go to any place in particular.

When did you go to your work?—I did not go to work till after dinner.

What time do you generally dine?—About one o'clock.

Was your mistress at home, when you came home from work?—I don't know.

Was the door open?—It always is.

Were you in the room when your mistress first kneeled down, the night the girl came home?—I was.

Did she not advise you to kneel down?—She did not.

What were you doing?—I was praying to God, in my heart, that she might hear of her.

What particular conversation passed between you and your mistress that night, before she kneeled down?—I cannot say; I did not take notice of all the words.

Did she say she had more reasons for praying that night, than at any other time?—No, she did not.

Upon your oath, whether she did, before the time she kneeled down, say she should see her?—No, she did not.

Did she say she had any reason to expect her that week?—No.

Did she say, she had some knowledge, or somebody had told her she would come home that week?—She did not expect her coming home that night, or that week, no more than any other.

Do you know any thing of your mistress's going to a cunning man?—I know nothing at all about it: she did not acquaint me with it.

What, not of going to a conjurer?—No; she does not acquaint me with all her affairs.

Did you never hear her mention she had gone, or would go, to a cunning man?—No.

Did you never hear your mistress relate a dream or vision she had had?—No, not to my knowledge.

Are you sure?—I might, or might not hear it; I cannot tell; the care of my mistress's business lies upon me, and I have other things to mind.

Give me a direct answer, whether you ever heard any such transaction concerning your mistress's going to a conjuror, or having been there?—There was some talk of a cunning man; but I did not know whether she had been with one.

What was said of the cunning man?—I do not know: I remember there was mention made of a cunning man that lived in the Old-Bailey.

What cunning man was that that lived in the Old-Bailey?—He used to tell fortunes.

How came this cunning man to be mentioned?—I believe mistress or somebody did go to him, but I do not know who.

For what did they go?—To hear somewhat of her daughter.

Did you hear this before or after she had been there?—I believe it was after.

Whom did you hear speak of it?—To the best of my remembrance, it was my mistress herself.

What conversation passed upon that, when your mistress first informed you of it?—I did not hear a word what he said to her; I heard no more than that she had been there.

Was any body by at that time?—I cannot say who were in the house at the time, or whether there was, or was not, any body there but ourselves.

Did you not inquire who the cunning man told her?—No.

Did you ever hear any body else in conversation speak of what was done at this cunning man's?—No, nor have I heard to this time; I always believed he could not tell.

Did you ever hear who your young mistress was with?—No, I never did.

Nor any thing about an old woman?—No.

Have you not heard your mistress say any thing about it?—I have heard her say, she feared some rakish young gentleman had caught her up, and so carried her away; and I have heard her say, she suspected she was murdered.

What was your own opinion?—I could not tell what to think.

Did you ever hear your mistress say she was taken away in a coach?—No, I never did.

As to the night she came in, you say the door was upon the latch, and your mistress fell into a fit: how came you not to be affrighted when she came in?—As soon as she came in, all the blood of my body was in my face; and when I recovered myself, I said, it was our Betty.

Were you ever affrighted at the thoughts of an apparition before?—No, I never was.

How did she appear as to her face?—She was black and blue on her face and arms, like the stock of a chimney.

Did she look as if she had been beat?—She did, just in the same manner; her face and hands would compare, for blackness, to a hat almost.

Had she black eyes?—I did not see that, any more than other persons are.

Did the black and blue seem to be bruises?—The colour of her flesh was next a-kin to the colour of beating.

How long did she continue so black and blue?—I was kept out of the room, and a doctor attended her; it was not so proper for me to go there.

Can you remember, the day she went to her uncle's to dinner, what time she was to have come back again?—Yes; towards the evening, and go with her mother and buy a cloak.

What time did she call at your house?—About eleven o'clock.

When she came home, what had she on as to clothes?—She had a piece of an old handkerchief about her head, and a black petticoat, I believe an upper one; I think it was the same she went away with. She had nothing over her but that jacket.

How many petticoats had she on?—I can't say that.

Did the petticoat look clean or dirty?—It looked as if it had been dragged in country dirt, with dirt and mud.

How do you know the difference between country dirt and London dirt?—Because London dirt is black, and the other lighter.

Did you see the ear was fresh bleeding?—It was.

Have you ever been examined before you came into this court?—No.

Did you ever make your affidavit before?—No; I never was examined upon oath before.

Look at this bed-gown.—This is the bed-gown she came home in, the day before king Charles's martyrdom.

Did you ever see it before you saw it upon her, the night she came home, on the 29th of January?—No; I never did.

Is it your mistress's?—No; I am positive it is not.

What reason have you to say that is the bed-gown?—It looks like it; I am almost positive to it.* I saw it the next day after it was pulled off.

* "Webs of cloth and wearing apparel are articles, the identity of which it is often difficult to establish. A remarkable instance of this occurred some years ago, in the trial of Webster, on the north circuit, for house breaking and theft. The girl, whose chest had been broken open, and whose clothes had been carried off, swore to the only article found in the prisoner's possession and produced, viz. a white gown, as being her property. She had previously described the colour, quality, and fashion of the gown, and they all seemed to

Did you make your inquiry any other day, after the second day she was missing?—No; I kept on with my mistress's business.

Upon your oath, do you believe your mistress did know where she was?—Upon my oath, I am positive, if my mistress had known where she was, she would have fetched her home, wherever she was.

Did your mistress say, she expected to see her on the Sunday night?—No, she did not.

In what position was she when the girl came in?—She was on her knees by the bed-side.

Did you ever hear she expected her home that night, or was told so by the cunning-man?—No.

Robert Scarrat sworn.

R. Scarrat. I heard Elizabeth Canning was come home on the 29th of January, at night; and as I had never seen her, or spoke to her in my life, to my knowledge, I went in out of curiosity to see her.

Mr. Morton. Had you heard before she was missing?—*R. Scarrat.* I had, the very next day after she was missing.

What passed after you went in?—I was there some time before she spoke a word. *Mr. Wintlebury* came in after me: he said, Bet, how do you do? she said, O Sir, you don't know what I have suffered. He asked her, where she had been? She said, she had been on the Hertfordshire road. He asked her, how she came to know that? She said, she saw the coachman, that used to drive her mistress into Hertfordshire, go by. She was asked, how far she might have been in the country? She said, it might be about nine or ten miles.

Did she give any reason for that?—I did not hear her. I asked her, if she knew the name of the person, and said, I'll lay a guinea to a farthing, she has been at mother Wells's, for that is as noted a house as any is: she said, her name is mother Wills or Wells.

correspond with the article produced. The house-breaking being clearly proved, and the goods as it was thought distinctly traced, the proof was about to be closed by the prosecutor, when it occurred to one of the jury to cause the girl put on the gown. This appeared rather a whimsical proposal, but it was agreed to by the Court, when, to the surprise of every one present, it turned out, that the gown which the girl had sworn was hers,—which corresponded with her description, and which she said she had used only a short time before, would not fit her person. She then examined it more minutely, and at length said, that it was not her gown, though almost in every respect resembling it. The prisoner was of course acquitted; and it turned out afterwards, that the gown produced belonged to another woman, whose house had been broken into about the same period, by the same person, but of which no evidence had at that time been obtained." *Burnett on the Criminal Law of Scotland*, n. 558.

Was that answer after you had said you would lay a guinea to a farthing she had been at mother Wells's house?—It was. I asked her about the house: she said, she had been confined in a longish, darkish room, and saw the coachman through the crack of the window, and that there were some boards nailed over it. I asked her, whether the window fronted the road? She said, it did not; and when she got out, she turned down a little lane, and then turned into the fields on her right hand. I asked her, if she took notice if any of those fields were ploughed up? She said, she believed there was. I asked her, when she was in them fields, on which hand was the road? She said, on the right hand coming to London. I asked her, when she came out of these fields, whether she observed coming over a little brook? She said, she did. I asked her, if she thought it was a tan-house? she said, she believed it was. I said, it was Mr. Neal's, a tanner, at Enfield-Wash.

Did you know that road?—I did very well; and that there was such a house, and what sort of a character it bore, that it was a very bad house. She said, she met a man, and asked her road to London. She said, she had been robbed, and described the person that cut her stays off to be a tall, black, swarthy woman.

Who asked that question?—It was asked, but I can't tell by whom. I said, I had seen mother Wells, and, to the best of my knowledge, that description did not answer to her.

Did she tell you any thing else?—She said, there were two young women, one with black hair and the other fair, stood laughing at her, while her stays were cutting off.

How did she appear to be for health?—She appeared to be very weak and feeble, sitting on a little stool: to the best of my knowledge, she had on a dirty bed-gown and black petticoat, and a foul cap of her mother's. I went down to Enfield-Wash with Mr. Wintlebury and Mr. Adamson on the 1st of February: the people were all taken into custody.

Did she give an account of any particular things where she had been confined?—She described a black jug, broken about the neck, that might hold about four or five quarts; and she said, she believed there might be about four quarts of water in it, and the jug was left in the room when she came away; that she had some bread, but it was so hard, she was forced to dip it in the water.

Who was the first that went into the room?—I believe several of her friends had been up in the room before she came down.

Upon your oath, when did you see the black pitcher first?—Upon my oath, I had never seen it, till I saw her fix upon it in the room.

Was you there when she was in the parlour?—She was brought into the parlour, supported by two men. I was in the parlour then. We made them all sit down, that is, the people that were taken up. The room was full of neighbours and people that went down: *Susannah*

Wells was on the left hand of the fire, and Mary Squires sitting by the fire, with her head and knees together. Canning looked very hard at her; and whether any body bid her look up, I cannot say; but she fixed upon her, and said, That is the woman that cut off my stays, and pointed to her. The gypsey got up, and said, Dear Madam, don't swear my precious life away. Canning said, I know you very well, I know you too well, to my sorrow. She was asked, if she knew any body else in the room, and if she knew a young man, which was George Squires? She said, she did not say she did. She pointed to the gypsey's daughter and Virtue Hall, and said, the young woman, meaning the gypsey's daughter, was leaning on the dresser when her stays were cut off, and Virtue Hall was standing by her, when she went into the room. She was then carried up the stairs that front the door. I saw her in one room, but did not in the first she went into; that was the last she went into there. Coming down stairs, she said, there was another room; when she came into the kitchen, the door was shut; she said, Through that door is the place where I was confined; then the door was opened and she went up.

Were you one of the first that went up?—No, I was not. I saw her there with a black jug in her hand. She said, that was in the room. She looked round, and found a tobacco-mould, and said, that was there when she was there. She said, an old cask and a saddle or two she left there.

Was she positive that was the place?—She pointed to the window, and said, she broke out at that window.

Did you go before justice Tashmaker? What account did she give there?—I did: she gave the same account there, to the best of my knowledge, as she did here. When the people were taken up, George Squires had a great-coat on, and a slouched hat; he pulled the coat and hat off; he was made to put them on again in the house, before he got into the cart to go before the justice; but Canning would not swear to him.

Had he the hat and coat on at the justice's?—He had.

Upon your oath, did you not, from the 1st of January to the 29th, know where she was?—I never saw her, to the best of my knowledge, till she came home.

Do you know, at this hour, any body that does know where she was?—No, I do not.

Juryman. Which window did she point to, where she said she got out at?—*Scarrat.* To the end window.

Cross-examined.

Mr. Davy. Do you know Wells's house?—*Scarrat.* I do, by passing and repassing.

Mr. Davy. Had you ever been in her house before January 1753?

Mr. Morton. Though you should stigmatize yourself, let not the truth go undiscovered.

Scarrat. I have been there.

VOL. XIX.

Mr. Morton. How long ago is it that you was in her house?—*Scarrat.* It is some years ago.

By *Mr. Davy.*

Were you ever in the hay-loft?—I never was.

Are you very certain of that?—I am.

Did you never jump out at a window in that room?—No, I never did; I don't like jumping so well.

Where did you live when you went there?—I was then servant to Mr. Snee.

How often was you there, and when?—I was there once or twice, about four or five years ago.

With whom?—With two or three friends.

Men or women?—Men.

Were there no women?—No.

Did you never take a girl there?—No, never in my life.

Were you never there with a woman?—No.

When was the first time you was in the hay-loft?—I never was in it, till the time I went down with the girl and them.

What rooms in the house had you been in before?—The kitchen and parlour, and no other.

Were you never above stairs?—No, never before in my life till I went down with them, and they were taken in custody. I never knowed there was such a room as the place where the prisoner was, till then.

Were there a good many people in the room, when the girl told you this?—Yes.

How came you to pitch upon the house of mother Wells?—I judged it might be that house, because I did not know any other house on that road so likely.

Did you make that reply before you asked any questions?—I said that, when she said she had been on the Hertfordshire road.

And would you then have laid so much odds?—Though I said it, I don't know that I should have laid it.

What name did she say she heard mentioned?—She said, she heard the mistress of the house called Wills or Wells.

Was the apprentice by when she mentioned this?—I don't know that he was. Mr. Wintlebury was the first person that she spoke to, as I heard. I was in the room some time, and some people spoke to her; but she spoke to none, before she did to him.

Had you any acquaintance with Mrs. Canning, or her daughter?—No, I had not.

What led you to go to Canning's house, having no acquaintance?—A maid-servant came into the house where I bedded and boarded, and said, Betty Canning is come home, Betty Canning is come home! which was the cause of my going there.

Then you mentioned several things to her very familiarly?—I did.

What were her answers to them?—Her answers were,—yes,—she believed,—or, she was sure, or to that effect.

2 K

Did you, in the examination of this girl, recollect as many particulars of the house, and about it, as possibly you could?—I did.

Were you able to describe the house, the road, the pond, &c.—I did not mention the pond, nor nothing in the house. I mentioned the tanner's house, and a little bridge that crosses the brook; and asked her about the road and the field, whether it was ploughed up.

Did you mention one single particular, to which she answered in the negative?—That question is answered; she said the road was so, and the fields so.

Did it never occur to you to ask her about any thing that you knew was not there, in order to be better satisfied, whether she had been there?—I don't know I thought of such a thing.

How soon after she was taken out of the chaise was it, that you saw her at Enfield-Wash?—It was in the room where the prisoners were.

When she came into the kitchen, did she immediately fix upon that door, and say, This is the door of the room wherein I was confined?—She said that herself; nobody spoke a word to her.

Suppose she had been in the kitchen, and the door open, might she not be more positive than if it was shut?—More positive, to be sure she must be.

If you had been with her in the kitchen before, and the door had been open, and she had not fixed upon the room, and after that had been carried to all the other rooms in the house, should you not have doubted of her veracity?—I don't doubt, but she would have fixed upon that room at first.

Attend to the question. Supposing it had happened, as I have put it, whether that would have led you to doubt her sincerity?—I should.

Did you hear what she said before Mr. Alderman Chitty?—I did.

Did she give the same account on the trial of Squires, she did there?—She did, to the best of my knowledge; but I cannot remember in particular.

Did she, before the alderman, mention any thing of passing through Bishopsgate-street?—No, not to my remembrance.

Do you remember she told him of four, five, or six pieces of bread, or twenty-four?—I don't remember any particular pieces of bread.

Do you remember any question of an old stool?—Not to my knowledge.

Nor an old table?—No.

Nor old pictures over the chimney?—No.

Nor hay?—No, not to my knowledge.

Can you remember all the particulars of her making her escape?—No, I cannot.

Were you examined as a witness on the trial of Mary Squires?—I was.

In the evidence you gave, did you not swear, you had heard her examined before the alderman and that before him she had the same account as on that trial?—It

corroborated to the best of my knowledge. I swore, to the best of my knowledge, she did.

Did you do that, in order to make her whole story the better to be believed?—I spoke to the best of my knowledge, and so I do now.

Did you soften your evidence, by saying you believed?—I don't remember that I spoke generally to it. I cannot keep such things in my head now.

Did you ever hear her mention any hay in your life?—I never did.

Did you not hear her say upon the trial, there was hay in the room?—I don't remember she did.

Were you in court the whole time of the trial?—I was.

Have you read the Sessions-paper since?—No, I have not.

Did you hear her say before the alderman, how she made her escape?—I did; in getting out through a window.

As you were in court all the time, you must hear what she said of the manner of making her escape.—She gave the same account then as before the alderman, to the best of my knowledge. Then I remembered her evidence before the alderman a great deal better than I can now.

Do you think you could then have repeated every particular?—I cannot say I could; it corroborated, to the best of my knowledge.

Was not the evidence she gave on the trial contradictory to what she gave before the sitting alderman?—I cannot exactly remember it.

Did you, or did you not, tell Mr. Alderman Chitty, the person she described could not be mother Wells?—I did not mention such a thing to him.

Did she take the person that cut her stays off to be the mistress of the house?—She did.

Did she know who was the mistress of the house?—No, she did not.

Did you know there was a warrant granted?—I did.

Against whom was it granted?—Against Mrs. Wells in particular, for cutting off her stays.

Were you not sure it could not be mother Wells, according to Canning's description?—No, I was not. I said, it might not be her.

How came you to remember every particular of what was said at the house of Canning, and forget what passed before the alderman?—We were a great while before the alderman, and I could not contain it in my head.

Did you know the outside of Wells's house?—I did.

Did you not know whether there was a pent-house, before you went down?—I did not.

Did you, or did you not, before Mr. Alderman Chitty, hear her say she lay on bare boards?—She said, she had no bed to lie upon: I don't remember hearing her say she did lie down.

Do you remember you heard her say there was a grate in the room?—I do not remember that.

Did you hear her mention a saddle?—To the best of my knowledge, she described a saddle and an old cask; but I cannot say.

How did she describe the room, when you went down with her?—To the best of my knowledge, she said it was a long, darkish room, but I am not positive; but I am positive she said it was a long, darkish room, before she went down.

Where did she say that?—I believe, before alderman Chitty; if she did not there, it was in her mother's house.

Are you positive to all the questions you asked her at her mother's, and her answers?—I am.

Did you write any of it down?—No, I never did.

Did she describe the jug before the alderman?—I believe she did.

And the bread?—I believe she did.

How many pieces of bread?—I do not remember how many pieces; but it was about a quarter loaf.

Are you still in the service of Mr. Snee?—No; I have left it three years this month, Old Baile.

In what employment are you now?—I work for Mrs. Waller in the Old-Change. I am a hartshorn-rasper, and live at Mr. Carlton's, a potter, in Aldermanbury-Postern.

How long have you lived there?—I have boarded in that house about a year and half: I boarded there before I lodged there.

Have you boarded or lodged at any other house, since this affair at Enfield-Wash?—No, I have not.

How far is Mr. Carlton's from Mr. Lyon's house?—Mr. Lyon lives in Aldermanbury, and the other is in Aldermanbury-Postern; they are about seven or eight hundred yards distance.

How far is Mr. Carlton's from Mrs. Canning's house?—It is next door but one.

Whose servant came and told you Elizabeth Canning was come home?—It was the apothecary's maid.

Did you lodge there then?—I did; and believe I had bedded and boarded there a year before.

Did you lodge there the whole month of January?—I did, and did not lie out of the house one night.

And work'd for Mrs. Waller then?—I did.

Did you work every day?—No, I did not; but I did that month from the 5th to the 27th, to the best of my knowledge.

Where were you from the 1st to the 5th of January 1753?—I was backwards and forwards at Mr. Carlton's; I eat and drank there.

Are you certain you dined at home from the 1st to the 5th?—No, I am not, it being holiday-time.

Where did you dine the 1st?—At Mr. Carlton's.

What did you do after dinner?—I went to see a play in Covent-Garden house; but being

too late, the house was full, we returned home between nine and ten at night.

Who were with you?—Mr. Knowles, a coal-merchant, and his wife. We tried to get in at Covent-Garden, then at Drury-lane. When we found we could not, we made the best of our way to Mr. Knowles's house, and there I stayed.

How long did you stay there?—I might stay there till almost nine o'clock; and then I went home with Mr. Carlton's daughter, who is since my wife.

How long have you been married to her?—Better than eleven months.

I hope you had your health at that time?—I had, to the best of my knowledge.

Were you not under the care of any surgeon, or quack?—No, I was not.

Were you perfectly well at that time?—I cannot give an answer for a cold, or the like.

At what time of the day did you go out on the 1st of January after dinner?—I went out about three o'clock.

At what time were you at Mrs. Carlton's at night?—I was there before ten o'clock.

How did you dispose of yourself on the 2d of January?—I don't know whether I was at work, or not.

I thought you said you did not go to work till the 5th.---I carried work home on the 5th; on the 2d in the evening I was at a club in the Old-Bailey, and I can bring the club-book to satisfy you of that.

How came you to be so extremely particular at this distance of time, where you was on the 1st and 2nd of January?—By looking over Mrs. Waller's book.

What led you to be so particular in all these circumstances?—I don't know any thing in particular.

Did you expect to have been asked any thing about it in this cause?—I have heard that it should be alledged against me, that I took the girl away.

When was it at first so suggested?—I cannot remember that; it is since the time of finding the bills against the Abbotshury people; but I cannot say the time I did first hear it.

How long have you been acquainted with mother Wells?—It is four or five years ago.

Have you been in her house, since you left Mr. Snee's service?—No, not in her house nor near her house since; that is three years ago.

Had you never a quarrel with mother Wells?—No.

Upon your oath, did you never threaten that you would be revenged on her?—No; upon my oath, I never expressed any such words.

Where does Mr. Snee live?—He has a country-house at Edmonton.

How often have you been in the house of mother Wells?—I have once or twice.

Will you venture to swear, that you have not been there oftener than twice?—I may have been there two or three times.

Have you been there no more than three times, upon your oath?—I cannot say, whe-

ther I have or have not : I have called, may-be, three or four times, I don't know.

Upon your oath, have you not been there five times?—I don't know; I cannot say how many times.

Will you take upon you to say, you have not been there six times?—No.

Upon your oath, will you take upon you to say, you never was there ten times in your life?—No, I never was.

Will you swear you have not been there eight times?—I believe I have not.

Are you positive of that?—I believe, I could swear I never was there eight times in my life.

Were you at Edmonton before the 1st of January was twelve-month?—Yes; I was, in the Christmas week.

What was your business there then?—I went to see some acquaintance and friends for my pleasure, and, I believe, I lay at Mr. Hubbard's, a shoe-maker, two nights.

Had you any women there?—No.

How did you divert yourself, while you was there?—I did not divert myself there.

When did you dance there last?—I don't know how long it is ago: I was dancing at the farther Bell at Edmonton, last Edmonton statute.

Who was your partner?—She that now is my wife.

When you came into Mrs. Canning's house, what made you be so particular in asking questions?—There were others asked a great many questions besides me.

Where had you used to ride your master's horse to water, when you lived at Edmonton?—Sometimes to one place, and sometimes to another.

Did you never water your horse near Mrs. Wells's?—I have at the brook on this side her house.

Did you ever put your horse up there?—I once did; I believe he was hung at the door; I don't remember any of my master's horses being put in the stable.

By Mr. Morton.

Did you ever ride your horse in at the window, where the girl jumped out at?—No, Sir.

Are you sure, that between the hours of nine and ten on the 1st of January, you did not go to see Bedlam?—No, Sir; I am positive of that.

Tell me the truth, or perhaps half Bedlam will be called to contradict you.—No, I did not, Sir.

Were you in Moorfields that night?—No, I was not.

Did you take away Betty Canning that night up to Houndsditch?—No, Sir.

Did you see that door to the room open, where Betty Canning was confined, when you was there with her?—No, I did not, Sir.

—The door had been open, and she had not she had not fixed upon the room, we believed her story?—I verily believe not.

—In such, that it was ex-

pected of you to be more particular than other people?—No; there were a great number of people there. I did not regard any more than any body else.

Had you any thing to do, to direct Mr. Alderman Chitty against whom he should make out a warrant?—No, Sir.

Recorder. Was there any lock upon that door leading to the hay-loft?—Scarret. I believe there was none at all; but I did not take notice of that.

Mary Myers sworn.

Myers. I live in the neighbourhood, and know the mother and daughter.

Mr. Nares. How long have you known the daughter?—Myers. About eleven years. She is a very sober, honest girl, as any in England; she always behaved very handsome to every body.

Do you remember her being missing on the 1st of January?—I do.

When was the first time you saw her after?—On the 29th at night, at her mother's house. There were her mother, Mrs. Woodward, and Mary Lyon there. Elizabeth Canning was sitting by the fire-side in a very black, dirty, bad condition; her face, arms, and hands were black; I took it to be a cold, or numbness occasioned by cold; her nails were as black as my bonnet, and her fingers stood crooked.

How was she dressed?—She had a black quilted petticoat on, all torn about the knees; she had a bed-gown on, and a rag about her head, I believe it was a muslin half-handkerchief; she was very low in her spirits. I kneeled down on my knees, to ask her what was the cause of her being in that condition? She told me, she went on the 1st of January to see an aunt and uncle, and stayed with them till night, and they saw her into Houndsditch; and how she was robbed and stripped in Moorfields by two men, and they gave her a blow on her head, and deprived her of her senses, and was carried into a house by these two men; and when she came in, there were an elderly woman and two young ones; the old woman took hold of her arm, and asked her if she would go their way; and she said, No; that then she went and took a knife out of a drawer, and cut the lacing of her stays, and took them off, and gave her a great slap on the face, and told her she should suffer in the flesh; and opened a door, and shoved her up a pair of stairs into a room; and after she was in, she damned her, and said, if she moved or stirred, or made any resistance, she would come and cut her throat.

What time did she say she was carried in there?—About four in the morning, as she reckoned.

Were there any other people in the room, besides what you have mentioned?—There were several others.

Did you see Scarret there?—I did not know he was there, till I got off my knees from talking to her.

What did she tell you was in the room?—She told me there was hay there, and a pitcher with water in it, she believed about a gallon of it; and that there was a fire-place in it, and about the value of a quatern loaf of bread in pieces.

Did she say there was a grate in the room?—She did; and that she took the bed-gown and rag out of the grate in the room.

Did she give any description of the size of the room, whether long, round, or square?—No; I cannot say she did. She said she got out at the window at the end, by pulling down two boards, and put her head and shoulders out, and took out some part of the window, and pulled out her legs, and so dropped down; and that she tore her ear in coming out. I looked at her ear, and it appeared to be a great scratch; there was a great deal of blood appeared to be fresh, and dropped of blood (while I was there) upon her shoulder. She was asked, how far the house was off? She said, about ten miles out of town. She said, while she was in the room, there was a stair-case lay close to the room, and she heard people run up and down in the nights, and she heard the name of mother Wills, or mother Wells, mentioned. I was close by her, and heard every word she said; she spoke very low.

Had Scarrat spoke to her before she said mother Wills, or Wells?—I don't know that he had.

If he had spoke to her, should you have known it?—I should: I did not hear him speak to her at all then.

Tell the Court what she said further.—She said, she escaped about four in the afternoon, and asked her way to London. She was so low, that I could scarce hear what she said.

Did you go before Mr. Alderman Chitty?—No, I did not.

Did you go down to Enfield-Wash afterwards?—I did on the Thursday after her return. There were in the chaise with me, the mother and daughter, and Mrs. Garrat; and several other people went down, some on horseback. Mr. Adamson was one on horseback. We met him as we were going. He had been there. He spoke to the coachman, and asked him what made him so long in coming; and said they were out of patience in waiting.

Did he say any thing to the girl?—He said to her, Bet, what sort of a room was you in? She said, Sir, it is an odd sort of a room, there is hay, and a fire-place in it. He said again, What do you say? Is there hay in it, Bet? That is all he said, and went away directly.

When he spoke to the girl in this manner, did he tell her there was hay?—He did not. We then proceeded on, and came to the house at Enfield-Wash; and Bet was carried into the kitchen, and from thence into the parlour. The gentlemen desired her there to be very cautious and careful what she said, and take time; and after that up stairs. After she had looked about, she pointed to Mary Squires, and said, That is the old woman that cut my stays off.

Was she sitting or standing then?—I cannot say; there were a great crowd of people; I could not get to the sight of her.

Did the description she had given of the old woman she told you of on the 29th at night, tally with the old woman, when you saw her?—Indeed, it did. She then said, these two young women were in the room (that was Virtue Hall, and the gypsey's daughter). The old gypsey-woman said, she never saw her in her life before, and hoped she was not come to take her life away, or something to that purpose.

Was the day mentioned, when Elizabeth Canning said she was robbed?—I don't know that.

Did you hear the old woman say she had been any distance from Enfield Wash?—No, I did not; but I heard the old woman say she had lain there but three nights, and George said so too. After that they carried Elizabeth Canning up one pair of stairs, and into two rooms; one of them was locked, and the key sent for; she said, none of them were the room in which she was confined: then she was carried through the kitchen and up into another room; then she said, Gentlemen, this is the room that I was in; but here is more hay in it, than there was when I was here.

Were you in the room then?—I was. She took her foot, and put the hay away, and shewed the gentlemen two holes; and said, they were in the floor, when she was in it before.

Had you heard her mention them two holes before?—No, I never did. Mr. Adamson set his back against a window, and asked her what she had ever observed out of that window? She said, hills at a distance.

Which window was this?—That next to the fire-place. She had told us there was a pewter bason there, and a saddle; but when we came there, there were two saddles.

Did you look out at the window?—I cannot say I did.

When he put his back to the window, could she have seen what was to be seen there?—No, she was not so high up to it.

Did you find the pewter bason there?—We did.

Did she mention what colour the pitcher was of, at her first mentioning it?—I cannot say she did; but said it would hold a gallon of water.

Where did you first see the pitcher?—In the kitchen.

Did you go to justice Tashmaker's?—No, I did not. The other woman and I were a-cold, so we went over to a public-house.

Cross-examined by Mr. Willes.

Was her linen dirty when you was with her on the 29th of January?—I looked all about the neck and shoulders; it was not very dirty, but it was dirty, it was soiled from her body.

Were you by when she was undressed?—No, I was not.

Do you know what number of petticoats she had on?—No, I do not.

Pray, did any of you know Mr. Scarrat?—I knew him.

Do you believe old Mrs. Canning had any knowledge of him?—I believe she might.

Did you hear her call him by his name?—No, I did not.

Why do you think she might know him?—Because he lived in the neighbourhood, next door to her but one.

By Mr. Nares.

Who was there when you was there?—There was Mrs. Woodward, Mrs. Lyon, and Elizabeth Canning's mother.

Did you hear Scarrat examine Elizabeth Canning where she had been?—No, I did not.

Did you observe the blood to drop very fast from her ear?—No; it had dropped upon her shoulder, and another drop was then at her ear.

Was the handkerchief then on her head?—It was.

Was there much blood on the handkerchief?—There was a pretty deal upon it.

Were you at Enfield-Wash, when Canning was carried into the kitchen?—I was.

Do you remember the door to be open that leads up into the hay-loft, when she was there?—I don't remember it was.

Upon her being carried into the kitchen, did she say, she had been there before?—No, I did not hear any thing of that.

When Mr. Adamson asked, what prospect there was out of the window, did not she say, there were trees near it?—Not as I heard.

I think you say, she described the elderly woman?—I heard her describe the two girls that were by; one was a black girl, the other a fair one, and the old woman, a tall, black, swarthy woman.

Mary Woodward sworn.

M. Woodward. Elizabeth Canning's mother sent for me the night she came home. I went there about half an hour after ten, and stayed till about one. There came Mr. Scarrat, Mr. Wintlebury, and others, after I was there. Mrs. Canning asked me, who she should send for? I said, Send for her best friends. I mentioned Mr. Lyon and his wife, and others. She sent the apprentice; he returned, and said, he was gone to-bed. There came Mrs. Myers and Polly Lyon; the latter lives servant with Mr. Roberts.

Mr. Williams. Had you any conversation with Elizabeth Canning?—Woodward. I had: the first word she said to me was, Mrs. Woodward, I am almost starved to death. (She was sitting in the chimney-corner, and lifted up her head, and put her hands together.) I have had nothing, said she, but bread and water since New-year's day at night, and I have had no bread ever since Friday. I asked her, where she had been? She said, she had been confined in a room in a house on the Hertfordshire road. Was this before any body came in?—Upon my oath, this she said before any body came

in. I knowing nothing of the Hertford road, asked her no more of it.

Do you remember her mentioning any body's name?—I did not observe, through the whole time I was there, that she mentioned any body's name. I mulled her a little wine, but was never out of the room. I asked her what was become of her clothes?

Go on; you need not give a particular account of the first robbery in Moorfields.—She said, about half an hour after she came to her senses she came to a house where she was confined; there were three women took hold of her; the old woman asked her, if she would go their way? She answered, No. Upon that she went to a dresser or dresser-drawer, and took a knife, and ripped the lacing of her stays, and after that took up her petticoats, and looked at them, and took her a slap on the face, and said, Damn you, you bitch, I'll give you that; and turned her up a pair of stairs into this place, where she was confined, with threatening oaths to cut her throat if she heard her cry out. I asked her, what sort of an old woman this was? She said, she was a tall, black, swarthy woman; and the young women did nothing but laugh at her. I was there with her best part of half an hour before the others came in.

Was there any thing from your examination, that could possibly lead her to give her answer?—No; nor her mother never spoke to her during the whole time I was talking to her.

Did she tell you this of her own accord?—She began and went on, after I asked her where she had been confined.

Did she say, during her whole confinement, that she saw any body?—Not as I remember. She was in a most deplorable condition; she had an old ragged bed-gown on, and a bit of an handkerchief.

Look at this bed-gown: is this the same?—I do really believe this to be it; but I will not take upon me to swear it.

Had you ever seen it before that night?—No, never.

Upon your oath, do you know whether that is her mother's?—Her mother never had such a thing on her back in her life.

Look upon this half-handkerchief.—This I know is the same she came home in.

You say you mulled her some wine; did she drink much?—I gave her about half a tea-cup full, and about the value of a nutmeg in quantity of bread soaked in wine; she rolled it about in her mouth, and said, Mrs. Woodward, I cannot swallow it, and spit it out. She spoke very faint and low.

Do you believe she was really in that bad state of health in which she appeared to be?—I believe she was as bad as she appeared to be; I am sensible of that. She supped about a spoonful of the wine; whether she swallowed it all or not, I don't know. She gave an account of having no stools in that time, and the apothecary did all he could to assist her in that case.

When was she able to go abroad?—On the Tuesday se'nnight after she came home (which was on a Monday) she came to my house, and was there almost three weeks; she was ill all the time, and the doctor and apothecary came to her; during part of the time she was at my house, she was dangerously ill. She was brought in a man's arms, and put in a chair to go to Mr. Fielding's the day after she came to my house.

Cross-examined by Mr. Gascoyne.

Did you observe her ear at all?—I did not that night she came home, but the apothecary's man did; the handkerchief was all bloody; it bled so, that it shocked me, I could not look at it: it was very cold weather, and the blood had congealed, and was thick upon her ear; and sitting by the fire, I fancy, that made her bleed afresh.

Do you remember Mrs. Mayle enquiring for the shift that she came home in?—Yes, she saw it; her mother shewed it her.

Do you know it was the shift she came home in?—I do.

Do you remember Mrs. Mayle's observation?—I do; that was, that she would take her oath that no man ever lay with her, for if there had, there would have been nature on one side or other.

Do you remember whether she observed whether it was clean or dirty?—Upon my oath, she did not observe any thing else in my hearing.

Was the shift dirty?—It was; but not so dirty, as if she had been at hard work in it.

What did you think of it?—It was dirty.

Was it as dirty as if it had been worn by a person that was dragged from London to Enfield-Wash, and lay upon hay so long afterwards?—Yes, it was.

Did you ever express yourself to the contrary to any body?—No, I never did.

Whether you ever expressed you were surprised that the shift was no more dirty, upon being worn so long?—No, I never said such a thing.

Did you observe any splashes of dirt on it?—I did not; if there had been any, I must have seen them.

Were there no spots on it at all?—There were no spots of any kind in the world.

Take care, you are upon your oath.—I am so.

Did you think the shift was not so dirty as it might have been, if she had worked in it all the time?—I think it might have been as dirty in a week, if she had worked in it all the time.

By Mr. Recorder.

Did you see Mrs. Mayle there?—I did.

Did not she say, it could not have been worn above a week?—No, I never heard her.

Whether Mrs. Mayle and Mrs. Canning did not quarrel?—No, not in my hearing.

Was she there above once?—I never knew she was.

John Wintlebury sworn.

Wintlebury. I have known Elizabeth Canning the mother about fourteen or fifteen years; she lives in Aldermanbury-Postern, and bears as good a character as any in the parish. I have known the daughter, I believe, twelve years; she is a very sober girl as any I know; and I believe the whole neighbourhood will say so. She lived with me about eighteen months, about three or four months before this happened. She always behaved herself in a very sober manner. I keep a public-house. I have a back room, where she would commonly be. She very seldom came forward.

Mr. Morton. Did she shew a disposition to be forward or gay?—Wintlebury. Quite different. I don't believe she went out once in a quarter of a year. When she went away from me, many of the neighbours would have had her.

Do you remember her being missing on the 1st of January?—I do; and her coming home on the 29th. I saw her that night at her mother's house, sitting by the fire.

How came you to go there?—A neighbour came and told me, she was come home.

Do you know who that neighbour was?—I do not.

Was it Mr. Scarrat?—No, it was not. I went; and when I came into the room, I met with ten or a dozen people: there was the girl, in a very bad condition, with a handkerchief wrapped about her head, and, I think, it was bloody on one side. She was very weak. I took hold of her hand, and said, Bet. She said, O Lord, Sir, you don't know what I have gone through! or something to that effect. Said I, You are at home now; and, it is to be hoped, you have friends to assist you if you have been used ill. I asked her where she had been? she said, On the Hertfordshire road. I said, How do you know that? she said, she remembered seeing (through some cracks, when she was in the room) the coachman that used to carry things for me.

What coachman had you used to send things by?—By the Royston or Hertford coach. I asked her, how far she was from London? She said, about ten or eleven miles. Then I said, Pray can you tell whose house you were at? She said, I cannot; but I heard the name Wills, or Wells, by people below stairs.

Do you know Robert Scarrat?—I do.

Was he in the room, when she mentioned the name Wills or Wells?—He might be; I did not see him then.

Do you recollect that Scarrat mentioned Wills or Wells to her?—To the best of my knowledge, he did not.

Did you see Mary Myers there?—I can't remember.

Did you see a woman kneeling by the side of her?—I don't know, indeed. I stayed there but about three or four minutes, and there were a great many people in the room.

Were you before Mr. Alderman Chitty?—I

was; but that is quite out of my memory. I don't know the particulars that passed.

Were you at Enfield-Wash?—I was, with Mr. Colley, Mr. Sparham, Mr. Adamson, Mr. Lyon, and Mr. Hague. I got down before the chaise came down, and went to the Sun. The headborough went with a warrant to Wells's before me some time: after that I went into the house, the parlour, and kitchen, and up stairs, and into another room out of the kitchen; it is a long room, it goes up about four or five steps: I observed there was a great deal of hay there; it seemed as if it had been tossed up a-fresh, it laid very light.

Did Mr. Nash go in with you?—I was in before him an hour. He and Mr. Lyon, Mr. Hague, and Mr. Aldridge, came all down together: we were there an hour before them.

Who went down with you?—Mr. Adamson and Mr. Scarrat did. We put up at the Sun; and another or two went down on foot.

Who was in the room with you?—Mr. Adamson was, and them.

What did you observe in the room?—There was an old chest of drawers, a saddle, and a place where somebody had laid on, and a rug upon them: I did not disturb it much: I can't tell what was under the rug; it seemed to be a parcel of old sacks. I observed a broken pitcher.

Did she tell you, the night of her coming home, of a pitcher?—She did, of a broken one. She described it by being a broken one, and which would hold about a gallon, or something like that: and when I saw it in this room, I thought it was the same she described.

Look at this pitcher; do you think this is it?—I believe it may be it.

Whether or no you know of any of your friends carrying that pitcher up into the workshop?—I believe I was the first person of us that went into the room.

Are you sure there was a broken pitcher in the room, when you went in first?—I am sure there was.

How long did you stay in the room then?—I stayed but a little time, and then came down again.

Did you see any thing of a man that obstructed any body from going into this hay-loft?—No. This was about half an hour before Elizabeth Canning was come. Mr. Nash, Mr. Aldridge, Mr. Hague, and Mr. Lyon, were not come then. When they came, they desired me to go and desire them to make haste; then I took my horse, and went and met the coach. After this, Canning came down, and was brought into the kitchen, and set upon the dresser, and after that into the parlour; there she was desired to fix upon the person that cut her stays off: she fixed upon Mary Squires.

Were you near Elizabeth Canning then?—I was; and so were a great many more.

Did she see Squires's face before she fixed upon her?—She saw a little of her face, I suppose. There were about eight or nine people round the fire. The old gypsy had a little

pipe in her hand, sitting crouching, with her head and her knees together; and as Canning looked round, she said, That is the woman that cut my stays off.

Had Elizabeth Canning given you any description of the person, that cut off her stays, before?—I can't say she had.

What was done after Canning had charged her?—Squires got up, and said, What, I, Madam! did I cut your stays off? Canning said, Yes; you cut my stays off in such a place in the kitchen. Then she went and sat down again.

Did Mary Squires say where she was at the time those stays were cut off?—No; she did not mention any thing, as I heard.

Did she mention how long she had been at Wells's house?—No, not at that time.

What do you mean by saying, at that time? Did she at any other time?—She did not at any other time to my knowledge.

Did she desire Canning not to swear her life away?—Indeed, I don't know that she did.

What was done after this?—Then Canning was carried up stairs, and did not fix upon any of the rooms: I think there are three of them: they were going to carry her farther, and she said, I was not carried so high; I did not go up above four, five, or six steps at the most.

Whom did she say so to?—She said so to me. Upon this she was brought into the kitchen again, and the hay-loft door was open, and she went up there and looked about her, and said, This is the room in which I was confined.

Where was she, when she said this?—This she said as she was going up stairs. I believe I then had hold of her hand. When she was in the room, Mr. Adamson put his back against a window, and asked her, if she could mention any thing that she could see out at that window.

Could she at that time see any thing out at it?—Then, I know, she could not.

But could she before he had put his back to it?—He was up stairs before her.

Was Mr. Nash in the room then?—Very likely he was; but I don't know that.

What was her answer to Mr. Adamson?—She said there were some hills a pretty way off; and one, two, or three houses on the left-hand side.

Did she give a true description of the prospect?—She did.

Which window was this?—This was the window nearest the fire-place, in the east. After this Mr. Adamson opened the window: the girl said, That window was nailed up when I was here. I looked at the north window, where she got out at. That was a little casement, about 9 by 18, or 10 by 20: there were boards nailed over this north window: it seemed to be fresh done, and in a very cobbling way: the nails were not drove home, but bent double; it did not seem to be done by a man; and, I think, Mr. Adamson made the same observation.

Did you make that observation to any body then?—No, I did not. We all went away to justice Tashmaker.

Did Elizabeth Canning see George Squires, when she was first brought in?—No.

When did she first see him?—I believe she first saw him when she went into the parlour, when we went in first; then George was in a very great hurry, and seemed much perplexed, and ran up stairs, and was going to go away; he was bundling up some stockings: some people, two or three, went in, and said, Where are you going? you must not go away. And they would not let him go; and brought him into the parlour again. Then he had a large great-coat on.

Who were there, two or three people?—There was one Ball; he is since dead. George Squires grew obstreperous, and wanted to get out at the window, and Ball called out for more help; and then, I think, another person went in.

Were you then in the room?—I was not. When Canning was brought in, she was asked, if she knew that person? meaning George. She said, she could not say it was the man, but it looked very much like him. He had before this pulled his great-coat off; then they made him put the great-coat on. She said, He looks very much like the man, but I will not positively swear to him.

Where was this?—In the parlour. She said also, there were two girls in the room when her stays were cut off. We had her out into the kitchen, and brought them in one by one, and she pitched upon Virtue Hall and Lucy Squires. Then we went before justice Tashmaker; there Canning was examined.

Did she give the same account there, as she gave to you?—I don't know that she varied in her account at all.

Was it the same she gave before Mr. Alderman Chitty?—I will not be positive to what she gave before the alderman; I can remember but a little of that, about how she was robbed.

Were you present at the trial of Mary Squires?—I was.

Did you hear her give her evidence in this court?—I did.

Could you observe any material difference between that and what she did before justice Tashmaker?—No, I could not.

Had you any reason at all to doubt her story?—No, I had none at all.

Did Mr. Nash say, as he was going home, he was not satisfied with Canning's account?—He did not appear to be dissatisfied.

Nor Mr. Hague?—No.

Nor Mr. Aldridge neither?—No, Sir.

Did you dine at Newington?—No, I did not.

Cross-examined by Mr. Willes.

Don't you subscribe towards the support of Canning?—No, Sir.

Is yours a tavern or ale-house?—An ale-house.

VOL. XIX.

At the time Canning lived with you, was she at all fond of men?—No, she was not.

How old was she, when she came first?—She might be about seventeen years of age.

What was the reason she left your service?—Because she got a better place; that was the only reason.

Was she employed in your house in serving customers?—Sometimes; very seldom. She very seldom came into our outward room amongst the customers.

How came you, on the trial of Mary Squires, to say she had a bed-gown and a cap on?—I say now, I did not know whether it was a cap.

Did you call it a cap or handkerchief upon that trial?—I don't know which I then said.

Do you know Robert Scarrat?—I do.

How long have you known him?—May-be a year and a half, or two years. He is a hart-horn-rasper.

Has he used to use your house?—Yes, he has as a customer.

Did he use to use your house when Canning was your servant?—No; he may once or so, but I don't believe he did.

Did you know him before this accident happened?—I hardly did.

How came you on Squires's trial, to give no account of what passed at Enfield?—I believe I did not.

How came you to omit so many material circumstances?—I believe the gentlemen did ask me no more then.

Was White in, when you first came down?—No, he was not.

When she was carried into the kitchen, and set upon the dresser, did she say she had been in that room before?—No, I never heard her say so.

Did she say there were trees grew against that window, when Mr. Adamson had his back against it?—No, I don't remember it. I remember Mr. Adamson turned about and opened the window, and looked out: she said then, that casement was nailed up when she was there.

Did you make any remarks, whether there had been nails to fasten it?—No, I did not inspect into it.

Can't you recollect what she said before alderman Chitty?—I remember but little of what passed there.

Mr. Willes to T. Gurney.

Turn to your notes of what this evidence said on the trial of Squires, concerning what passed before Mr. Alderman Chitty. Can you swear to them?—To the substance of the evidence I can; though not always to the exact words.

Do you ever put down any thing you don't hear?—No, never.

Give the Court an account what you have there put down. On that trial this evidence was asked, if he had heard the evidence Canning had then given? To which he answered,

§ L

He had; and that she gave the same account the night she came home; but not quite so fully that night, as she did before the sitting alderman on the Wednesday after.

What did he say passed the night she came home?—He said, he saw her the night she came home, at her mother's house; she appeared in a very bad condition, and had a dirty bed-gown and cap on. He asked her how she did? She answered, Very bad; and that she had been somewhere on the Hertfordshire road, which she knew by seeing the Hertfordshire coach go backwards and forwards. After which he was asked, if he had heard Canning's evidence then given, as mentioned before?

Mr. Willes to Wintlebury.

How long was she before alderman Chitty?—I don't know.

How did she get there?—I believe she went in a coach.

What day did she go to Enfield?—On the Thursday after she came home.

How did she go down?—I believe, in a chaise and pair. The chaise would hold four people, and four people were in it.

How far is it there?—It is about eleven miles.

Did you see her set out?—No, I did not.

What time did she get down there?—At about ten or eleven o'clock in the morning.

Had she any refreshment there?—There was a little wine brought her there. I believe she did not drink a spoonful of it.

Did she go over to Cantril's?—I don't know whether she did or not.

How far is justice Tashmaker's from Enfield-Wash?—It may be three miles.

How far is it out of the way to London from Enfield-Wash?—It may be an hundred and fifty yards.

When did she return to town?—She returned the same night.

Was Scarrat your customer when Canning lived with you?—He was not, as I know of. I did not know him then.

Was there any intrigue betwixt Scarrat and her?—No; she would hardly go to the door to speak to any body. I believe her quite different from an intriguing person.

How long have you known Scarrat?—I have known him about a year and a half.

Did you hear any part of what passed before Mr. Alderman Chitty?—I heard a little, but did not take much observation of it; and she talked so low. I heard her say two men met her and robbed her in Moorfields.

Did what you heard vary from what you heard on Squires's trial?—No, it did not.

Recorder. You have heard the note-taker say, you said she was more full before the sitting alderman than in the account she had given before; and here you say you took little notice of it.

Wint. I may forget things. If I said so then, I might forget since.

Joseph Adamson sworn.

J. Adamson. I have known E. Canning eleven or twelve years, ever since she was big enough to play about her mother's door. I am one of the persons that went down to Enfield-Wash. I had not seen her for three months before that day. Mr. Wintlebury and one Scarrat went down with me; the last was a stranger to me: we were the only men that had horses. We had been there an hour and a half. They told me, I must go back and prevent the chaise from stopping. I said, I took the horse without leave, and I would not go back. I took the horse and went back.

Mr. Morton. Did you tell Canning there was hay in the room?—*Adamson.* I did not, either directly or indirectly, from first to last; nor have I asked her a question since, only when we were in the room. After I had spoke to the coachman to make what haste he could, they asked me, if we had taken any people up? I said, we had; and some of the people were uneasy to be gone. Then I asked, what sort of a place she was confined in? She said, an odd, or a wild sort of a place; some hay, and something else which I can't remember: I think it was a chimney in the corner.

Did you mention hay to her?—I never did, to my knowledge. I then rode on; and as her master Mr. Lyon and others were going from the ale-house to mother Wells's, I ballooned to them, and told them what the girl had told me, that is, that there was some hay in the room, and a fire-place, or a chimney, I can't tell which. When she came down, I took her out of the chaise, and set her on a dresser; she sat there six, seven, or eight minutes.

Did she make any observations there?—She did not. Then we took her into the room where they all were (there was a room full of people;) she turned herself round by the door, till she came to where Mary Squires sat, and said, That is the woman that cut my stays off.

Did any body give her any intelligence which was Mrs. Wells?—I dare say nobody did; because her master gave her a very strict charge to take care who she charged.

Do you remember Mrs. Wells's saying any thing?—I do not. After this, she was carried up the great stairs, and at the bottom, she said, I believe this is the stair-case. (This was just as we came out of the room.) We went up stairs into every room (I believe there are four of them.) She said, None of them is the room. Then she was brought down again, and we took her through the kitchen and up the stairs into the hay-loft. She paused a little before she spoke; and the first word that I remember she said, was, There is more hay than there was (as I remember) in the room. Then I cautioned her to be careful, and let go her arm, and went up towards the hay, and felt it; and it was quite light, as though it had not lain there a long time. Some people said, they thought there had been some put lately in. I said, I thought there was not; for I went round

the house to make observation, and did not think there had been any brought in; because, if there had, there must have been some scattered. Then they had got the jug and bason, and some other things that she knew; but I can't say how she came to pitch upon them, because I was making observations on the hay. I walked then directly between her and the casement, and turned round, and set my back against the casement, and said, If you have been confined in this room so long, you will be able to give a very good account of it, and I expect you will. She said, That was nailed up when I was here. What, boarded up? said I. No, said she, but I tried to open it, and could not. She described fields, and a hill at a distance, and some trees; but the most remarkable thing was, some houses to be seen on the left-hand side the lane.

Are you sure she said so?—I am.

Are you sure she could not see them when she spoke?—I stood so, that I am sure she could not, I stood so betwixt them and her. After the gentlemen had all looked out to see how the description answered, I asked her, where she had looked out to see the Hertfordshire coach? She pointed to the window which was boarded up, and said, That is the window; and that also is the window that I made my escape out at.

Did you look to see whether there was any reason to think any body had got out?—I helped Colley, her uncle, to pull the boards down. I called all the gentlemen to see that it was not in the same condition with the rest of the things in the room, with cobwebs, as other places had. The wood was fresh split with driving a great nail through it, and appeared as fresh as it could be; that is, the crack seemed quite fresh.

Was the crack before you pulled them down, or done by pulling them down?—That was before we attempted to pull them down.

A *Jurymen*. Was it boarded all over the window?—*Adamson*. It was boarded like a little shutter. It was one piece of wainscot that went clear across, and covered it all pretty near to the top. There was a casement on the right-hand side, and the other side had nothing in it.

By Mr. Morton (continued.)

Did you make any observations on the outside of this window, whether there was the least appearance of any thing, as though any body had got out there?—Colley and I went out; there we saw the surface of the plaister was scratched off, and we shewed it to several people.

What were their names?—I don't know them; but there were a great many people looked at it, and the fresh pieces of the mortar on the ground, then below the window. Just on the edge, between the plaistering and brick-work, it was broke.

Do you remember seeing Mr. Hague and Mr. Aldridge there?—I do. Mr. Aldridge and

I both made observations on the girl's pausing a little.

Did Mr. Aldridge seem to shew any dissatisfaction upon that then?—No. I observed a large pitcher in the parlour, when we first went in. There were six or eight of us went in, two-and-two; and when there was no resistance, I and Mr. Colley went behind the house.

Did you see a pitcher in the hay-loft or workshop?—I did.

Look at this pitcher; do you know it?—I suppose that is it, it is like it; I saw it since at the mansion-house before my lord-mayor; it was broken as this is.

Did you carry the pitcher there?—No, Sir;

Do you know any body that did?—No, I do not.

Did Canning make any observation on the pitcher, whether it was, or was not the pitcher, that was in the room when she was there?—I did not hear that; I was making observations on the hay then.

Cross-examined by Mr. Dazy.

Was the door that leads up into the workshop open or shut, when she went into the kitchen the first time?—I really cannot tell.

When she was gone from the kitchen to the stair-case of the house, what did she say there?—She said at the bottom of it, she believed that was it.

How many stairs were there?—I cannot tell; there is a hatch or door on the top-stair.

Upon your oath could she not see the whole flight of stairs up from the bottom, where she then stood?—Upon my oath, I cannot tell whether she could or not.

Was that stair-case any thing like the few little steps that lead up into the hay-loft?—There is a very great deal of difference.

Did you ask her, how she could make that mistake?—I did; and said, You see you was once mistaken in the stair-case.

What was this in answer to?—She had said, That was the corner where the girl stood and laughed at me, when my stays were cut off; which she said afterwards was Virtue Hall.

When you stand at the bottom of the stairs leading up into the workshop, don't you see there are but few steps?—I cannot tell whether the steps are without the door, or after the door is open?

How long was she in the kitchen the second time, before she fixed upon the room she was confined in?—I believe she was led up into the room directly.

Was the door open then, when she came from the other stairs?—I believe it was, and some people going up.

Did she say, when she was in the kitchen, (pointing to the door) That is the door that leads to the room I was confined in?—I do not remember that.

Who shook up the hay?—I do not know.

Upon your oath, did not you, when you was up there, put your hand into the hay?—Yes; I did, to shew it was light; I set my foot upon it first.

Were Mr. Nash, Mr. Aldridge, and Mr. Hague, in the room then?—I cannot tell whether they were or not; I believe they were not. They might be all there, or none of them, for aught I know.

How much hay was there in the room?—I think there might be about half a load, or more; I cannot tell hay by the bulk of it.

How came Scarrat and you to toss up, which should go back to Canning?—It was an indifferent person said, To end dispute, you had better toss up. We had some words after that; and I went at last, but against my will.

How came you to have words after it was decided by lot?—After Scarrat had won, I said, he was to go.

Had any body observed at that time, that she had not mentioned any hay being in the room?—I had not heard any body mention any thing about it; but when I went, she told me there was some.

What did you mean, when you came back, in saying, We are all right, shaking your hat?—Going through the Wash, my horse got away from me. (I believe I had my hat in my hand.)

Were you rejoiced, when she said there was hay?—No, Sir.

Were you surprised?—No, Sir.

Why did you tell them there was hay in it?—Because she said so.

Why should you come back to tell them she said there was hay in it, if she had never observed there was hay?—I don't remember any body observed she had not mentioned hay.

Had you heard she had described the particulars of the room?—I had never heard she had given a description of the room.

Then why did you go to Enfield-Wash?—I went with Mr. Wintlebury for company; he desired I would go with him. The warrant was gone down before, and we went with an intent to meet them.

Had you been before the sitting alderman? No, I had not.

Did you go down to assist in taking the people up?—I did not know any body would be taken up.

Did you go down to see whether the room answered the description?—I had not heard her describe any.

Do you remember your saying these words, What hay, Bet?—I don't remember, that I ever mentioned the word hay. I remember she said hay, and something else; and I said, And what? then she told me a fire-place.

Whether, before you put your back to the window, had you not heard she had given an account of some particulars in the room?—No, I had not. I did it to see whether she could give an account of the prospect or no.

Should not you think it more advisable for the people to be satisfied with the account she could give of the things in the room first?—She was in the room.

Upon your oath, did she tell you there were

trees to be seen out of the window?—Yes, she did, upon my oath.

Where did she stand then?—She was just by the casement.

Did you fill the window so that she could not possibly see trees?—I stood so near her, that I believe she could not see out at the window.

Are you sure she could not see trees?—I believe she could not.

Were you close to the window?—No, not close to that, but close before her; which I think would answer the end, to prevent her looking out, better.

How far was she from the window?—She might be two yards from it, and I a yard and a half.

Was the window boarded?—It was not. I asked her the question; she said, it had not been boarded up.

Did you ever see a window in the country, where there have been no hills to be seen out of it?—Yes, I have, upon the sea-coast.

How long had she been in the room before you tried this experiment?—About five or six minutes.

Had she not time enough to look out there?—I don't think she had.

By Mr. Morton.

When did you hear she was come home?—I never heard she was, till the night before we went down.

Did you go down voluntarily, as a friend of the girl, or upon request?—No; it was upon the request of Mr. Wintlebury, and others. I was just come off a journey, and took a friend's horse without leave.

Did you tell Mr. Lyon there was a fire-place or chimney, as well as hay?—Yes, I mentioned both to him.

Did Mr. Lyon hear your observations on the hay?—No; he then was engaged in the right-hand corner of the room; there they had got the jug, a basin, and tobacco-mould.

Supposing she could see the trees, could she see the houses on the left-hand side the way?—No; then she could not see, till we looked.

What is the character of Elizabeth Canning?—I never heard a bad character of her before this in my life. I always looked upon her to be a girl of a good character.

By Baron Legge.

At the time you stood there, and asked what could be seen out of the window, and she said trees, and hills at a distance, did she tell you what was betwixt the trees and the window?—I don't remember any thing she said besides.

Did she mention any foot-way near there?—No, not as I remember.

Were the boards pulled down from the window before the girl came there, or after?—They were not pulled down till after she came. I asked her, which was the window from whence she had seen the Hertfordshire coach? She said, That; and pointed to it. Then I said,

Let's see whether we can see the road out at it or not: then I went to pull the board down, and the man who said he was her uncle helped; we wrenched it off.

Could you have seen the Hertfordshire coach go by as the board was then up?—I might, as it was light over the board, had I looked over it.

Were there any cracks big enough in the board to look through?—I cannot say there were.

Sutherton Bakler sworn.

Bakler. I live at Aldermanbury Postern, I was applied to on the 30th of January, the day after Elizabeth Canning's coming home, to come to her. I attended her, and found her in a very low and weak condition. She was so extremely low, that I could scarcely hear her speak. She was in bed, with cold clammy sweats upon her. She complained of being very faint and sick at times, with a pain in her bowels; and complained of having been constipated all the time of her confinement. I ordered her a purging medicine; but her stomach was too weak, and could not bear the medicine she took. Finding that, I ordered a glyster to be administered on the 30th in the evening.

Mr. Nares. Did they give it her?—*Bakler.* They did, I think. I also ordered opening medicines the same day. She had no more medicines till the 3d of February: then I ordered another glyster, that had some little effect, and brought away some small quantity, but did not answer the end. I ordered her another on the 5th, that had no effect at all. She continued still bad. Dr. Eaton was sent for upon the 6th. He wrote proper prescriptions for her for 14 days.

How long was she before she had her health tolerably?—He prescribed diuretic medicines and gentle cathartics; and after a fortnight he did not come past three or four days, and she was tolerably well in about a month. Her face appeared very wan. Her face used to be of a remarkable red complexion; but her colour was quite gone, and her arms of a livid colour, spotted. I had known her some years.

Had you ever attended her with medicines before this?—No, never.

How came she to go to Enfield, when the glysters had not had the effect?—I thought she was very unable to bear it, and wondered that she did: I thought it extremely improper. I thought she could not bear the fatigue.

What may you imagine those symptoms you saw upon her to be owing to?—I don't know that: she was very much emaciated and wasted, from what she was when I saw her before.

Do you think the confinement you have heard of would not occasion it?—To be sure, by living upon what she says, she must be very much wasted. Dr. Eaton was called in, because they thought her in a very dangerous way.

From the appearance of her at the time that

you saw her, was there any appearance of her having been in a salivation?—She was very much emaciated and wasted, to be sure; but I never did see a person as soon as they came out of a salivation in my life, or attended one in it.

Had she any appearance of a woman that had been brought to bed?—She looked like a person half-starved, in a weak, wasting, decaying way: but what was the cause of it, I do not know.

Cross-examined by Mr. Willes.

When she complained she had no stool, what did she say about making water?—I believe she did not make water till the doctor had attended her, which was not till the sixth day, by giving her diuretics.

How long did she say she had been without a stool?—She said, she had not had any during the time of her confinement; but did not say she had not made water.

Did she say she had made water?—I do not remember she said she had made water.

Mr. Morton. Do you believe, that a person that is half-starved is not so fat as a person that is full fed?—*Bakler.* No, to be sure, Sir, he cannot.

Mr. Willes. What colour were her nails?—*Bakler.* Her arms were black and livid, and her nails looked of a sort of a blueish cast.

Dr. Eaton sworn.

Dr. Eaton. I am a physician. The first of my attending Elizabeth Canning was at her mother's request, on the 6th of February: hearing it was a compassionate case, I attended her. I found her in a very weak condition, and was very apprehensive she would die: she appeared to me to be in very great danger for a few days. She complained of colics and pains in her bowels, and could scarce keep any thing upon her stomach. I cannot say she entirely kept her bed. She took a little chicken broth.

Mr. Williams. Did you see any signs of an imposture?—*Dr. Eaton.* No, I saw none at all.

Had you heard she had been away from her friends?—I had. I was very full of business: I only attended to her: I did not ask questions about her confinement. I found she was constipated to a very great degree. She had had one stool before I came. I happened to see the apothecary, and he was relating this case to me: he was saying what he intended to give her. I said, mild things, after so long fasting, would be better; and he gave it her, and it had had some effect. It was seven or eight days before the danger began to be over.

How long did you attend her?—I attended her from the 6th to the 20th of February, the 20th included, every day; and after that every other day, for a few days; the last time was on the 4th of March: when she was well enough to go abroad in the neighbourhood; and I believe she had been abroad a day or two before that.

Have you not had objects under your care in salivations?—I have.

Whether that does not leave very remarkable symptoms in the mouth, throat, and breath?—Yes; it does for some time after.

Was there the least symptom of this?—Oh! nothing like it, nothing like it, I'll assure you, nothing like it in the world: it was nothing like coming out of a salivation.

Did you observe her arms or legs?—I did not take so much notice of them.

If you had not been told the real case, what should you have imagined it to have been?—I can't but say, the case corresponded with a person that had suffered hunger, thirst, and cold, and great hardship.

Cross-examined by Mr. Davy.

Did you observe her hands and legs?—Nobody desired me to take notice of her hands and legs.

When had she her first evacuation?—She had the first, the day before I came, which was the 6th; then I heard that she had had one the day before; and I believe she had the next day after.

Was there any difficulty after that?—There was; and medicines ordered pretty commonly, to the 90th. I gave her diuretics a pretty deal.

Had you any conversation with her?—I had none at all. I was very full of business at that time, and I did my business as well as I could.

Did you examine any outward appearance?—No, I did not. They complained she had too little evacuation by urine.

How was her pulse?—She had a singular pulse: I was afraid of her falling into a fever, and I ordered that which was material for a fever.

Had you never a patient in this condition before?—Many.

Did all their disorders proceed from hunger, thirst, and cold?—No. She was weak and emaciated, and her stomach weak. When we prescribe for a person, we attend to all the circumstances, and ask all the questions necessary to let us into the concomitant symptoms. I formed my opinion from what I found, a low, flashing pulse, and fluttering. Every thing corresponded to what they said; and therefore I had no reason to disbelieve the story.

Whether all the symptoms you observed in the defendant, might not arise from another cause than that which is now assigned?—I'll give you the best account of that I can. It might possibly in part arise from other causes, and it might not.

May not a person be reduced to a low state by a fever?—To be sure, they may: if I am sent for to a patient, and they tell me they have suffered with hunger or thirst, I never doubt it.

That is not the question: is it not possible a person may be reduced to the condition she was, by some other ailment?—I think it is possible.

Might not she be in the condition you saw and yet her whole story a great lye?—

All I can say, it might proceed from another cause: but I must beg leave to mention one thing, and that is, it may proceed from another cause, as when in a fever a person's stomach is taken away, then that cause of hunger comes not by force, but because they can't eat; but the consequence was such, it must proceed from her having lost her appetite some way or other. A person may lose their appetite by a fever, or by force. It is plain she had not eat for some time.

If they had not told you that this girl had been half-starved, and kept from meat, drink, and exposed to cold, should you have concluded, upon your own observations, that she had been so used?—I should have concluded she had either by disemper lost her appetites, or by some other accident.

By Mr. Nares.

Is it possible for one to live twenty-eight days without any more subsistence than she mentions?—There is no doubt of the possibility of a person's subsisting twenty-eight days, as in this case.

Did you observe the defendant's ear?—There was a disorder behind her ear. After I had attended her seven or eight days, the surgeon was taken ill, and they had not mentioned that to me till then; upon which I looked upon it: it had inflamed her face, and threatened it something like a St. Anthony's fire, and I ordered a fomentation for it.

What might cause it to be so bad?—I take it, her bad habit of body, concurring with this sore upon her ear, occasioned that like a St. Anthony's fire upon her face.

Mr. Morton. We are now coming to Enfield-Wash.

Robert Beals sworn.

Beals. I was ill last Christmas was twelve-month. I attend Stamford-Hill turnpike in Tottenham road, towards Enfield, betwixt Tottenham and London: about the middle of February I heard of this story, about a girl being forced away from her friends near Moorfields, to a bad house at Enfield-Wash, and had been kept there a month on a pitcher of water and some mouldy crusts.

Mr. Morton. How did you hear of it?—Beals. My little children, about eight or nine years old, brought the account from school. I said, upon hearing this, I believed I was at this gate when the poor girl came by.

Give an account of what you saw.---About the fore-end of January, I was standing at the gate between ten and eleven, or near eleven at night; it was a very calm still night; I heard something of a sobbing, crying voice; it came from towards Newington, going towards Tottenham; and first I saw nobody; I stood still; it came nearer me.

How far off do you imagine it to be, when you heard the sobbing at first?—It may be two or three hundred yards. At last I per-

ceived there were more than one. As they came near, I saw there were two men, and a young person, seemingly by her voice. I had a large candle burning (the stile is at the end of the turnpike over the way). As soon as they got up to the light, I saw them more plain. One man was taller than the other. They went towards the stile; one, the foremost, began to say, Come along, you bitch, you are drunk; that was said when the candle began to shine upon them. I put myself a little farther out without-side the posts, that they might see me. The woman seemed not willing to go along with them, by her crying and sobbing, but never spoke a word. The man behind made a sort of a laugh, and said, Damn the bitch, how drunk she is! When they came up to the stile, the tall one got over first, and the hindmost lifted her over by either one leg or both legs; she came down upright on the other side; then she hung back, and fell on her breech upon the step, and cried bitterly. I thought she would go no farther. As I thought they could see me, I expected she would have said something to me; but she did not speak a word. He before plucked her up by the hands at full length, and said, Damn you, you bitch, come along, you are drunk; the other came on the other side of her, and they went away together; he laughed, and said, Damn the bitch, how drunk she is! he that came over last jostled her along. I could see them some way after they got over the stile. One of them never let go her hand all the time I saw them.

From what you heard, did you think that she was a person in distress?—I did; she burst out a-fresh with sobbing, going off. They were out of my sight presently.

Did you see her face?—I can't say I did: I might see one side of her face.

How was she dressed?—She had something of light-coloured clothes on.

About what size?—She did not seem to be tall; they both of them stood above her.

Had the two men great coats on?—I can't tell whether they had or not.

What reason have you to believe this was the beginning of January?—I think it was, to the best of my knowledge. I was not well then: I attended some nights for my partner, and fell ill about three weeks after; and from that, when I came to recollect it, I thought it was about the beginning of January.

Do you know Moses Holloway?—I do.

Was he well or ill then?—I don't know whether he was well or not. Sometimes I have done duty for him, and he for me.

Recorder. Are you sure it was the beginning of January?—Beals. I really believe it was.

Mr. Morton. Why did you not attempt to give her your assistance?—Beals. There were two men with her, and we are fearful in our business; except they ask us any questions, we never meddle with such; and I was then alone.

Mr. Morton. When did you give informa-

tion of what you heard and saw?—Beals. I never did till about six weeks after. At first, I thought it might have been one of the men's wives, or sister, or some drunken girl.

Mr. Morton. Is it a common thing to see a drunken woman along with two men?—Beals. I never saw one so particular as this.

Cross-examined by Mr. Willes.

When was you first taken ill?—It was in the beginning of February. I was much troubled with the rheumatism.

Do you always attend your duty?—Sometimes I do, and sometimes I do not.

How far is your turnpike from Moorfields?—It is about three miles.

How far is it from Stamford-Hill turnpike to Enfield-Wash?—It is seven miles.

Is it possible for a woman to walk to, or be carried by two men from your turnpike to Enfield-Wash in a quarter of an hour?—No, Sir, it is not possible.

Was she walking on her feet?—She was, and went pretty fast.

Did you imagine she was in a fit of convulsions?—No, Sir, I took her to be in liquor.

Was you near enough for her to have seen you?—I was.

What did the men say?—One said, Come along, you bitch, you are drunk; and the other said, How drunk the bitch is!

What was the colour of her gown?—It was a lightish one, it looked so.

Had she a gown on?—I think she had, I durst to say she had, or else I should have taken more notice of it.

Did she keep crying all the time?—She did.

Was it crying or screaming?—It was only sobbing and crying.

Was she near enough that she might have cried out to you for help?—Yes, that she was.

How came you not to tell this to any of your neighbours before?—I did not, till I mentioned it to my children innocently, not thinking to hear any thing more of it.

Was it a dark or light night?—It was a dark night.

Could you distinguish whether she had a hat or bonnet on?—I can't say what, she had something on her head.

Had she a cap on her head?—I can't say whether she had or not; I believe she had; she appeared to be a young person with light-coloured clothes on.

Had she an apron on?—I don't remember whether she had or not; I rather believe she had.

Don't you keep Christmas?—Yes, Sir.

Don't you know New-year's day?—We don't keep that.

Were you garnished out on this day with rosemary, or an orange on a skewer?—We don't do no such thing.

Is it not a custom in your parish, on New-year's day, to wish one another a happy New-year?—Yes, Sir, it is.

Do you remember this morning you had

wished any of your neighbours such?—No, I do not: indeed I don't remember what day it was.

Don't you remember any thing to distinguish this to be New-year's day?—No, I do not; I made no remark at all, being very ill at the time.

By Mr. Morton.

Do you remember at what time you begun to attend the turnpike?—Mine began on the Sunday in the evening, when we come in our turns; but we often come out of turn.

Was there any moon?—I am sure there was no moon, and a very still night, and it rained a little.

Mr. Willes. How far may your road be over?—*Beak.* It is about eight or ten yards over.

Mr. Morton. Did you see her go any part of the way without a man holding her by the hand?—*Beals.* No, I did not.

Mr. Morton. My lord, I only mention this as circumstantial: grant me the woman was at this turnpike, I'll not call another witness. We are now going to call a person that saw a person in the situation that Canning returned in on the 29th.

Thomas Bennet sworn.

Bennet. I live at Enfield, at the ten-mile stone: I was coming home from my shop near Mrs. Wells's house, on the 29th of January 1753; between her house and the ten-mile stone, between four and five in the afternoon, there was a miserable poor wretch to look to, in the gravel-pit gate-way, a five-acre field near the ten-mile stone, betwixt two little houses, Richard Wright's and widow Jenge's.

Mr. Nares. Describe her dress.—*Bennet.* She had neither gown, nor stays, nor cap nor hat on, only a ragged dirty thing, a half-handkerchief like, and a bit of something that reached down below her waist, and no apron on, and her hands lay before her: she was coming in at that five-acre field gate-way.

How far is this beyond the ten-mile stone?—It is but the breadth of the five-acre field, and twenty or thirty pole on the other side, and about a quarter of a mile on this side Mrs. Wells's. She asked me the way to London; I told her; she said she was affrighted by the tanner's dog. I bid her turn on the right hand, and then on the left, and that would bring her to London. She was going to turn out of the great road into the foot way.

Whereabouts is the tanner's house?—That is a little farther nearer London.

Which way did she come?—I can't tell which way she came; I saw her first coming in there; but she went for London: if she had not spoke to me, she would have gone the wrong way for London.

How far was she from the tanner's house?—She was about half a quarter of a mile from it.

How came you to know this was the 29th of my?—On the 29th of January, (which

was the day after I met her) a man came to me about taking my son apprentice: I met him according to appointment on the next day, which was on a Wednesday, at Waltham-Cross, in order to put my son out apprentice, but we did not agree; and the day after, which was on a Thursday, I came to London; and on the Friday, which was the next day, I met Mrs. Kimpston near the ten-mile stone, coming by this very gate-way; she told me what had happened at Mrs. Wells's; then I said, I will be hanged if I did not meet the young woman near this place, and told her the way to London.

Cross-examined by Mr. Gascoyne.

Which way was she going?—Out of the high road into the fields.

Where did you gather up the word 'half-handkerchief,' upon your oath?—I never gathered it up at all; it is what I said at first, and always took it so.

How do you know she had no stays on?—I saw her shift-sleeves, and she had no gown on.

Which way was she coming from?—I can't tell that; she met me just coming in at the gate-way.

Which is nearest London, that gate-way or the tanner's house?—The tanner's house is.

Which way did you direct her?—I directed her in the foot-way by the road-side.

Where was you the day the people were taken up?—That very day I was at Hodsdon, at Mr. Pierce's, to put my son apprentice to a butcher.

David Dyer sworn.

D. Dyer. I live at Enfield-Wash, about a quarter of a mile on this side mother Wells's, right against the ten-mile stone. I was at my door three evenings before Mrs. Wells and her family were taken up; I was chopping some rotten bushes; about four in the evening I saw a poor distressed creature come by me out of the common field, from Mrs. Wells's-ward, for London.

Mr. Nares. Describe how she was dressed.—*D. Dyer.* Upon my word, I can't give any account of her clothing; she had a thing tied over her head like a white handkerchief, with her hands before her; she walked very weakly. She was a shortish sort of a woman, and had a shortish sort of a thing about her, it did not come very low about her. I looked at her face as she came by me: I said, Sweetheart, do you want a husband? She did not speak to me.

How soon after this did you see her again?—It was a considerable time after that; when I saw her, I took her to be the same; when I saw her, I believed her to be the same.

Stand up, Elizabeth Canning. Look upon her, is that the same person?—I have seen her betwixt that time and this; this is the young woman, I think, that passed by me at the gate-way; I do believe this is she.

Have you seen the place she got out at, at Mrs. Wells's?—I have many a time.

Might she come that way from her house, where you met with her?—Yes, she might, from either the back or fore part of her house, that way.

Cross-examined by Mr. Davy.

Was she a likely girl in the face?—The girl was a likely girl enough to look at, but her clothes were not; she looked as if she wanted some victuals.

You did not mistake her for a blackmoor?—No, I did not.

Was she not black in the face?—No, she was not.

Was she fresh-coloured?—No, I did not see any red in her face; she looked thin and weakly; she had not much colour.

Did she look pale in the face?—She looked whitely.

Then she was not red?—No.

Nor yet black?—No.

Then she was white?—Yes.

Was it pretty late at this time?—It was not dark; I saw her face very plain.

Did you take particular notice of her face?—I did; I took particular notice of her, I looked at her very wishfully.

If she had had black eyes, should you have seen them?—Yes, I should.

If she had had a bruised face, should you have seen it?—I can't say whether she was or was not bruised.

How long did that shortish thing come down?—I can't say.

Did she walk fast or slow?—She walked very slowly.

Of what colour were her clothes?—I can't say as to that.

What was the colour of that short thing you mention?—I can't say.

What the colour of her petticoat?—I can't say.

Was it a red one?—Indeed, I can't tell.

Did you see a coloured handkerchief, tied over the white handkerchief on her head?—I did not.

Are you sure the prisoner is she?—I am pretty sure; I am partly positive; I will not be punctual.

You say, she had her hands before her?—She had.

Had she a pretty hand?—I did not handle them; they were as other people's are.

A white hand?—Yes.

How soon after this did you see her again?—I can't tell; it was after I heard there had been people taken up at mother Wells's, for confining such a girl; then I spoke of this.

Recorder. How do you live?—Dyer. I get my living by my daily labour.

Mary Cobb sworn.

M. Cobb. I live in Silver-street, at Edmonton; I was going home from Tanners-End; I was in Ducks-fields, just at the setting-in of day-light (as much as I can remember) on the 29th of January. On a Monday night, I met

a person; she had a handkerchief pinned over her head, it almost hid her face; she had a black petticoat, and an old bed-gown on; it was either a quilted thing, or it was a printed or flowered thing; the flowers seemed to be faded. She wrapped her arms in it. The first sight I had of her, she was getting over a stile, and looked at me, and made a slip, but did not fall: she came up directly towards me, and looked at me, and I at her: I was afraid, and moved slowly. I turned about, as she came up to me, and looked at her: I thought she would have asked me charity; I put my hand in my pocket, and had no half-pence. I had a mind to have spoke to her; but having nothing to give her, I did not. I perceived her to have a young face. She appeared to be in a very wretched, miserable condition, as ever I saw a person in all my life. She walked creeping along. I could not tell what to make of it, whether she was afraid of me, or what.

Mr. Williams. You say, you had a mind to have spoke to her; what would you have said?—M. Cobb. I wanted to ask her, why she walked so?

How do you recollect it was the 29th of January?—When I heard the affair, it came into my head, that this was the person that came down to justice Tashmaker's; then I heard it was on a Thursday night she got away, and I thought from that it was impossible; but when it came to be published in the papers, I found it to be on the same day of the month, by looking back.

What size did she appear to be?—Much about a head shorter than myself.

Have you ever seen her since?—No, I have not.

Look at Elizabeth Canning now, there she stands.—The size answers: I firmly believe this to be the same person, by the tip of her nose; that bears some resemblance to the person I saw.

Have you any reason to believe this is not she?—No, I have not.

Cross-examined by Mr. Willes.

How many fields are there, called Ducks-fields?—There are three of them.

How far is that part of the foot-way, where you met this strange creature, from the great road?—There is nothing but a ditch parts it.

What time does the day shut in on the 29th of January?—I can't say I have made remarks on that.

Where were you going to?—To my own house.

What time was it when you came home?—Then the children had lighted a candle.

Where had you been?—I had been at Tanner's-End to Mrs. Carter's house, to carry home a child's vest that I had made.

What time did you set out from home?—About three in the evening.

How far is your house from Mrs. Carter's?—About a mile.

How long did you stay at Mrs. Carter's?—2 M

There was nobody at home there, and I left my errand, and I never stopped or stayed, but came away.

Did you call any where coming back?—No. I had another place to go to, and I was afraid of being too late; so did not go, but returned home. I met several people, and stopped a little on the return.

How long in all might you be detained, after you went from Mrs. Carter's?—It might be a quarter of an hour.

How many times might you stop?—I am in a public way of business, and met several people?—I think I stopped three or four times.

From the time you left Mrs. Carter's house, to the time you met this girl, how long might that be?—It might be about a quarter of an hour.

Then you met this woman at three quarters after three o'clock?—It was later than that.

How long might you be in going from your own house to Mrs. Carter's?—I do think, by the length of the way, I might be about a quarter of an hour in going.

Were you stopped in going?—I don't remember I was.

Were you above an hour from your own house, before you met this girl?—Yes, Sir, to be sure, I was about two hours.

How far from your own house did you meet her?—It was about a quarter of a mile from it.

Tell me how you account for having spent two hours in only going a mile and three quarters?—I proposed to be at home in two hours, and I exceeded it about a quarter of an hour. I really think it was about five o'clock.

Where is your house?—In Church-street, Edmonton; but I met her between the five and six-mile stones from London. The six-mile stone stands near the Nether Bell; but the house I lived at then, was beyond the seven mile stone.

Was her face brown or white?—I observed the tip of her nose; it was a young face; she looked very dismal and black, in a dirty way.

Did you see her hands?—I did not; they were wrapped up.

Did no words pass?—I did not speak a word to her, or she to me. I thought she wanted charity by her deplorable condition.

What are you?—I am a widow.

Any family?—The eldest of my children is at home with me; she is in the 12th year of her age.

When did you first mention meeting such a creature?—That very night I heard of the affair of Elizabeth Canning's confinement; which was the Friday night following.

Who told you of it?—I can't tell who; but several of my neighbours did.

Who first spoke to you to come here to be an evidence?—Justice Tashmaker did; that was after the trial of Squires.

How long after that?—I can't tell; it was the week after; but what day of the week, I not.

in manner did he apply to you?—He

came to my house, and asked me, if I met such a person?—I told him, as I have told you before.

Did he describe any person to you?—No, none at all, any more than it was talked on. I told him, I could not take an oath to swear to her.

When were you subpoenaed?—On Monday was a fortnight.

Who served you with it?—I don't know the gentleman; he is pretty much pitted with the small-pox.

Were you ever examined on your oath before?—No, I never was.

How long have you been in town?—Ever since Monday morning.

By Mr. Nares.

Can you recollect what time it was when you met this girl?—I know it was pretty near dusk.

What is your business?—I am a mantua-maker.

How many children have you?—I have but two at home with me; I maintain them with my own labour.

Mr. Nares. My lord, we have closed the account of a person's being seen going and coming. We shall next begin our defence to the *alibi* of Mary Squires.

MONDAY, May 6.

(Here Mary Squires, George her son, and Lucy and Mary her two daughters, were brought into Court, to be seen by the Witnesses as they were called.)

William Howard sworn.

Mr. Nares. Do you know Mr. Edward Aldridge?—Howard. I do.

Do you remember any thing about his coming down to you about Elizabeth Canning?—The two Edward Aldridges came both together twice; the first time of their coming, I can't say positively to the day, it was about three or four days after the people were taken up at Mrs. Wells's, as near as I can remember.

What are these two Edward Aldridges?—One of them is a silversmith in Foster-lane; the other is my neighbour.

A Jurymen. What is your employment?—Howard. I live upon a small fortune, and a little employment under the government.

Mr. Nares. What account did they come upon?

Howard. They brought me a printed Case of Elizabeth Canning, and recommended a contribution on her behalf.

Whether this was Edward Aldridge of Foster-lane?—Yes, it was; and the other with him. The second time of coming was about six or seven days after the first.

Did he say, he was dissatisfied with the story, or that he believed it?—There was not a syllable of his disbelief; but I understood him, as

though it was a thing he believed. The printed Case they brought each time of coming; there were two initial letters at the bottom of it, and an account that Virtue Hall had impeached. We were talking about the girl's being confined: I said, What do you think of it? He said, There was one thing, I think, the girl is not clear in, and that is the description of the room.

Recorder. What did he say upon the whole?—*Howard.* He said, he thought the girl had been used ill, and he did believe she was there; but he was not quite clear in her description of the room.

Mr. Nares. In both the times, did he express any dissatisfaction, or could you understand him, that he thought the girl was an impostor?—*Howard.* He said nothing at all in contradiction to the girl.

Cross-examined by *Mr. Willes.*

Where do you live?—I live right against Wells's house.

Tell us what particular words the silversmith made use of to recommend a contribution to you.—I don't remember any more than what I said.

Then the only means was, by bringing a printed Case?—And the little conversation we had about it.

The first time you saw him, did he mention any disbelief of her story?—No, Sir.

Could you collect, he either believed or disbelieved her story?—Every thing that passed the first time was in favour of the girl.

But it was not so the second?—There was that single objection made.

How far is your house from mother Wells's?—About fifty or sixty yards.

Did you live at Enfield during the month of January that year?—I did; and have seen all Wells's family pass and repass about their private affairs.

What time in the month of January did you first see Squires's family about the house?—Really, I used to take but very little regard of any thing in Mrs. Wells's house. I can't recollect the time positively; if I mention a time, I must guess at it.

Look at this black pitcher; do you know it?—I know nothing of it. I can't swear particularly to a broken pitcher.

Have you seen them carry such a black jug as that to your pump?—I can't recollect any such thing; I give all my neighbours privilege to come for water.

Mr. Nares. What character does Mrs. Wells's house bear?—*Howard.* As bad as can be.

Recorder. Do you remember your first time of seeing the gypsey?—*Howard.* I never used to take notice of them.

Mr. Just. Clive. Did you ever know there were gypsies there, before the time you saw them?—*Howard.* I never did. I know there used to be bad people.

Mrs. Howard sworn.

Mrs. Howard. The last evidence is my husband. I know the two Aldridges; one lives in London, the other by us.

Mr. Nares. When did you see them both at your house?—*Mrs. Howard.* The first time that I call to mind was, I believe, on the Saturday or Monday after Wells and the people were taken up. I remember, I came down stairs, and they were both in the parlour. The country Aldridge said, they were come to us; the London Aldridge said, it was with a desire that I and my husband would contribute. I asked him, whether or no he was of opinion, the girl had been used as she had said? He asked the country Aldridge, whether he had any of the Cases? and said, he would shew me one; then I might judge better: he took it out of his pocket, and the country Aldridge gave it to me.

Did he say any thing to you, from which you could conclude, that he believed or disbelieved her story?—When he gave it me in my hand, I asked Mr. Aldridge, what he thought of it? The answer he made was, as sure as he was alive, he was assured the girl had been used as she had said in the Case; and that Mr. Say printed them gratis for the use of the girl, and he should have more to give away.

Which Aldridge was this?—This was the London Aldridge.

Was this all the conversation?—He was with me almost half an hour; and he recommended it to me and my husband to subscribe, and desired me to get my friends to do the same: I said, my acquaintance were chiefly in London.

When did he come again?—Within eight or ten days after he came again, and brought me another printed Case; and there was wrote at bottom, that Virtue Hall had made an information. He said, it was to raise money for the girl; and if we did not assist, the gentlemen in London would not think we wanted to get rid of the bad company we had about us.

What did he say about the girl's being in the room?—Upon my word, I don't remember he mentioned any thing to me about it then. I never sent for him, or spoke to him; till he came to me in my own parlour.

Look at the woman there (meaning Mary Squires); do you know her?—That is the woman, I think, I have seen pass and repass; but never was nigh her to speak to her.

When was the first time you saw her, can you recollect?—The first time, to be positive, was the Sunday was se'nnight before she was taken up. I saw her, the son, and two daughters, at Mrs. Wells's door: I do think they are the same. It is a great while since; there may be an alteration; her daughter Mary used to come to our pump for water: the first time I took notice of them, my servants told me they were gypsies; then I bid them not to unbolt the door.

Recorder. The Sunday was se'nnight before they were taken up was the 21st of January.

Mr. Justice *Clive*. How do you know it was the Sunday was se'nnight before?

Mrs. *Howard*. I'll tell your lordship why I know it was that day; because on the Friday my servant told me she was there; and she called me out, when the girl was taking some linen off the hedges at Wells's; she was in a brown stuff gown and a speckled hat; and when she came up to the frame of my pump on the Saturday, she turned about and made me a curtsy, and I bowed to her as she went out at the gate: this was the Saturday before the Sunday of my first seeing the old woman, and son, and two daughters.

Recorder. What time of the Sunday was it you saw them?—Mrs. *Howard*. It was in the afternoon: I was told they were her son and two daughters, and I looked wishfully at them.

By Mr. *Nares*.

Did you see the old woman after this?—I did; I saw her put into the cart after she was taken up.

When you saw her put into the cart, so soon after you saw them at the door, did you believe it to be the same person you saw at the door?—Yes, I did believe it then.

You say, you were told there were gypsies there before; did you ever see gypsies there before that time?—No, not to my knowledge. That was the reason I cautioned my servants to have nothing to say to them; but let them come as the rest of the neighbours for water; for we refuse none, unless they give offence: But I cautioned my servants not to let her into the house.

Cross-examined by Mr. *Willes*.

How far might they be off at the time you saw them first?—As nigh as I can guess, not above fifty or sixty yards: I was within my own gate, which faces it exactly.

Are you short-sighted?—Yes, I am.

When did you first see one of the gypsy's girls come for water to your pump?—It was that Saturday morning.

Which daughter was it?—I do think it was Mary.

Which parish-church did you go to on the Sunday morning?—We go to Enfield church.

Have you service all days of the week?—I believe we have; but I am not able to walk so far.

Do you keep king Charles's martyrdom?—No; but I keep my son's birth-day; as the stile is altered, that comes to be the 29th of January.

Was that the Monday immediately after the Sunday you saw her, or not?—No, it was the Monday was se'nnight.

What did the daughter fetch the water in?—I have seen her several times at the pump in that time; and I have seen them come with a pail and a large pitcher: one time in particular she was met by another, and they took it and carried it for her: one morning I saw her with a very little black pitcher.

Can you speak of its being broke about the neck?—I don't know.

Are you a church-woman or a dissenter?—I am a church-woman.

By Mr. *Nares*.

How near were you to the girl when you observed her?—As near as I am to that gentleman (pointing to a person about three or four yards off).

Then you were near enough to distinguish the girl?—I was. She made me a curtsy, and looked me full in the face, and I her: I think she looked fatter in the face than she does now.

Did you think it was a gypsy's face?—I thought as other people did.

Were you near enough to know Mary Squires as she passed and repassed?—Yes, I was. She was in the foot-way, and I within my gate.

From what you observed of her then, do you think her to be the same person?—I do; but can't be positive.

By Mr. *Recorder*.

Are you positive?—No, I am not: I never conversed with her, or she with me.

Was your husband with you that Sunday?—No, he was not; he was gone to church.

Did you tell him when he came from church?—I think I did.

Can you be positive to your sight forty or fifty yards off?—I was more positive when I saw her pass and repass, than I was on that Sunday.

Can you be particular to the days you saw her pass and repass?—No; I can't, my lord.

William Headland sworn.

Mr. *Nares*. Where did you live last Christmas was twelve-month?—*W. Headland*. I can't really say where I was then; I believe I was at Enfield, because my father lives there.

How old are you?—I was twenty years of age the 30th of last month.

Do you remember being at your father's about a year and a half ago?—I know I was there when I came out of place: I had not been in place these two years till last Christmas: I did live at Henham Hall, with Henry Headland, my cousin; that is 38 miles from London.

During the time you was there, was there any talk about Canning and the gypsy?—Yes; that was in last January was twelve-month: I remember Wells being taken up; I was at home then.

How far is your father's from Mrs. Wells's house?—There is only a lane and two fields part us.

Do you know the window where it is supposed the girl got out at? What does that window front?—It is by the corner of the lane; you may see into the road.

Where does the other side look to?—There is only a little window which looks into the field.

Did you find any thing, and when, near that place?—One day I was going to the shop, and there were a parcel of people come about Wells's house: I went there and found a piece of lead, just at the corner of the window that joins to the house; it looked as if it came out of some window.

How near to the house did you take it up?—Within a yard, or thereabouts, under the window that fronts the road: I doubled it up as soon as I found it, because I thought I would carry it home.

What made you take such notice of it?—Because it was bloody; and I heard Bet Canning had torn her ear.

For God's sake tell me the true reason, upon oath, why you took notice of that lead?—Because I heard the young woman had torn her ear against the casement, or something.

Was it bloody when you picked it up?—It was all bloody; I believe it was blood. I carried it home, and gave it to my mother.

Did you tell your mother why you brought it home?—I did.

By Mr. Recorder.

When did you hear Elizabeth Canning had torn her ear?—I do not know.

What day did you pick up this lead?—I cannot tell.

By Mr. Nares.

Whether ever you saw Mary Squires the gypsey?—Yes, Sir.

Look about the court.—That is the woman (pointing to her); I know her from a thousand.

Did you see that gypsey woman at any time before you took up the lead?—Yes, Sir.

How long before?—Indeed I cannot say how long before; but I saw her on the 9th of January, I know.

Why do you think it was the 9th of January?—Because it was on a Tuesday, Waltham market day.

Had you ever seen her before?—That was the first day.

Where did you see her?—I saw her under Mr. Loomworth Dane's back wall, telling a young man his fortune.

Where does Mr. Dane live?—At the sign of the Bell, at Enfield highway. A young man came from a coachman; he was in a silver-laced hat; I stood looking at her; she said, Go along, boy, lest your master should want you. I stood leaning against a tree, and then went a little farther; and could not hear what they said.

How could you tell she was telling his fortune?—Because I saw her lay hold of his hand.

Are you sure it was so early in January as the 9th?—I am.

Did you see her any day after?—Yes, I saw her on the 12th, in Mrs. Wells's house: I went there to carry two pails of water; there were the gypsey's two daughters; one of them had a pair of pumps on, and was buckling them up.

Look about the court, and see if you see her.—That is the girl (pointing to Mary Squires); I am sure it is one. If you were in your brown camblet gown, I should know you better; I then could swear to it.

Do you believe this is she?—I do really believe it is.

What did you carry that water for?—It was two pails of wash for a sow that was big with pigs.

Where did you carry it from?—From my mother's.

How do you know it to be the 12th?—Because it is Epping market-day.

What day of the week is that on?—It is on a Friday.

Did you see her any time after this?—Yes; I was in madam Johnson's walk, and saw her coming down a field. I spoke to her, and said, You are ganging home, it is very cold. She said, So it is.

Did you see her after that?—Yes; I saw her getting into the cart, when she was taken up.

Was she the first or last that got into the cart?—She was the first, I believe; but I am not sure.

Were you in court when Mrs. Howard was examined?—No, Sir.

From what you observed of her before, and from what you observed since, are you sure this is the same person?—I am sure it is the same.

Cross-examined by Mr. Willes.

What business is your father?—He is a gardener.

Where had you lived before you came home to your father, before January was a twelvemonth?—I worked at several farm houses.

By Mr. Justice Clive.

Had you been a hired servant, or worked by the day?—I worked with one man a matter of two years.

Before you came home to your father, who did you work with then?—I can't tell indeed; I might be out of place, for what I know.

What time of the year is Christmas in? What month is it in?—I do not know what month in particular.

Mr. Just. Clive. There are twelve months; pick out which Christmas is in.—*Headland.* Indeed I cannot rightly say what month it is in.

By Mr. Willes.

How many days are there in a week? There are seven, if you put Sunday in.

What, is not Sunday one of your days?—Yes; but some people make but six days in the week.

Who are they?—The Jews do not.

By Mr. Nares.

You say you worked with one man two years before you came home to your father; how long did you live in one place together?—

I have lived half a year, and three quarters of a year together.

Tell whom you lived with three quarters of a year.—I cannot rightly tell.

Can you tell any master you lived with two years?—I worked for one Mr. Long for half a year together; he lives at Freezy-Water. I worked for farmer Allen, at Enfield highway, right against the Black Horse; I have worked many times for him.

Mr. Just. Clive. How long together?—

Headland. It might be a quarter of a year together, or less.

By Mr. Nares.

Whom did you work with first?—Mr. Allen.

Did you ever live as a hired servant in a family with any body?—Yes; I lived in Featherstone-street at squire Feast's brew-house, with one Mr. King, ten or eleven weeks.

Did this master you lived with keep Christmas?—I reckon he does.

Cannot you tell what month Christmas is in?—I can hardly tell.

Tell as well as you can.—I cannot tell.

Is it in winter or summer?—It is in winter.

Is it before or after January?—I cannot tell.

A Jurymen. Can you read and write?—

Headland. I can read and write too a little.

Mr. Just. Clive. Where did you find this lead?—Headland. I found it at the end of the wall, by the window fronting the road.

Mr. Just. Clive. What sort of a bit of lead was it?—Headland. It was a piece of window lead.

Lord Mayor. Explain what you mean by window lead.—Headland. It was such as they put the glass into.

Mr. Just. Clive. Was it one single piece?—

Headland. No; there were two or three pieces of it, all joined together; so I bent it together, and put it into my pocket, and gave it my mother.

Mr. Just. Clive. What did you say to her at the time you gave it her?—Headland. I bid her take it, because, they say, Bet Canning had tore her ear at the window; but it is lost since.

Mr. Willes. How long before Squires was taken up, and put into the cart, was it that you first saw her?—Headland. She was taken up on a Thursday, and if she had stayed till Friday, it would have been three weeks.

A Jurymen. Whether you shewed this piece of lead to any body after you picked it up, besides your mother?—Headland. No, I shewed it to nobody.

Elizabeth Headland sworn.

Mr. Nares. Did your son at any time bring any thing home to you, which he said he found?—E. Headland. Yes, Sir, it was a piece of window lead; there was a piece of solder on it. It was a small time after the people were taken up.

What account did he give you of it?—I looked at it; there was some blood upon it; he

said, he picked it up a little way off from Mrs. Wells's window, where it was supposed the girl got out at; I wrapped it up in a piece of paper, and laid it on a shelf.

How came it not to be here?—I brought it to London with me at Michaelmas time, and carried it down again before Christmas; I laid it in a table-drawer; and when I went to look for it last Friday was a week, I could not find it, but I found the piece of paper it was wrapped in. This is really truth.

Cross-examined by Mr. Willes.

Was it two or three days after they were taken up?—Indeed I cannot tell.

Was it the day they were taken up?—No, it was not; it was some time after.

Was the blood wet or dry upon the lead?—It was dry.

This son of your's, how has he spent his time, where has he lived? He says he is 21 years of age.—He is. He has lived in service some part of his time; and sometimes he has lived at home; he has gone to drive plough, and to day-labouring work.

Has he been a dutiful sort of a boy, or one that you can say much in his favour?—I have no occasion to give the boy an ill word.

By Mr. Just. Clive.

When did he come home from service?—He has not been out these three years, till within this half year; he has been at home a year and half, I believe; but used to be out at hay making and harvest-work.

How long had he lived at home with you, before the people were taken up at Wells's?—He had been at home all the winter long, and I believe from the Michaelmas before.

Where was the last hired service he was in before January was twelve-month?—Upon my word, I can't tell; he was two years ago with a gentleman at Hackney; but he did not live there above two months.

Samuel Story sworn.

Mr. Nares. Are you of any business?—Story. I live upon my fortune, at Waltham-Abbey, in Essex.

Look at that old woman (meaning Mary Squires): Did you ever see her before?—I have divers times: that is the gypsy. I do not know her by name.

Tell us, when you think you first saw her?

—I have seen her several times at a house in White-Webbs-lane, that is since pulled down, going to the Chace; that used to be my constant road to ride out, two or three times a week. Then I lived in Turkey-street, Enfield-Wash. I have been moved from thence about a year and half. I have seen her both before and since I removed. The last time I saw her was on the 23rd of December, 1752, except the time I saw her in Newgate.

Where did you see her?—She was standing within the door of Mrs. Wells's house.

What reason have you to think it was on

that day?—It was the Saturday before Christmas day, a very fine frosty morning; which induced me to take a walk to see Mr. Howard, who lives directly over-against Mrs. Wells's. I walked the horse-pad, because it was better beaten; and my feet are a little tender. When I came over-against Mrs. Wells's house, I saw the gypsey at the door. Curiosity led me a little out of the path, to see if it was the same gypsey I had seen in the house in White-Webbs-lane.

Did you go close to her?—Not very close; I might go, perhaps, within ten yards of her.

Were you so near her, as to form any judgment whether it was the same person?—I was; I was certain it was the same person.

Did you see her after that?—No; I never saw her afterwards, till I saw her in Newgate, about the 14th or 15th of March.

Recorder. Upon the oath you have taken, is this the same person?—*Story.* Upon my oath, it is. When I came to see her in Newgate, it was on a Friday. I was denied admittance then, but I went to alderman Glynn, and begged the favour of an order; and then I saw her.

Mr. Nares. Who denied you?—*Story.* The keeper did.

Were you then satisfied it was the same woman?—I was then, and am now, well satisfied, that this is the same woman.

Have you any other reason, so as to be certain it was the 23rd of December you saw her?—I have. I observed it was a hard frost in the morning; and the weather altered about noon to sleet and rain, by which it was very wet, and the wind and weather drove on my right side, as I was going home; and I being subject to the rheumatism, was taken with it; and the St. Anthony's fire seized me about the Monday or Tuesday following; then I sent for an apothecary, and he attended me afterwards. So I am very positive as to the day, for I never went out after that Saturday, when I came home, for near two months after.

Cross-examined by Mr. Willes.

Did you find Mr. Howard at home?—I did. How long did you stay there?—I believe I might stay best part of an hour there.

While you were there, did you hear there were any gypsies at that time there?—No: we had no talk about them, as I remember.

Was it in your going there, or return, that you saw her?—It was in my going there.

Was she standing without the door, or within?—She was just within, at the threshold of the door.

Did you look fronting or side-ways?—The door is opposite to Mr. Howard's. I went a little farther out of my way, to see whether it was the same gypsey that I had seen in White-Webbs-lane.

How long was it before this, that you had seen her before?—I saw her when I lived in Turkey-street, and I moved from thence on the Michaelmas before. I had seen her at times for three years together.

Can you name any particular time before this?—I remember I had seen her in the spring of the year.

Did you ever converse with her?—No, I never did, Sir.

Were you ever in the same room with her?—No.

At this time you went a little out of your way, did you say any thing to her, or she to you?—I did not.

What did she appear to be doing?—Nothing at all.

Had she a pipe in her mouth?—No, she had not. She had a dirty clout or handkerchief over her head.

Who used to be with her in White-Webbs-lane?—There used to be two younger women with her at times, which, I have heard since, are her daughters.

Was there a man?—Yes, there was.

At this time, at Wells's, did you see any of these young people with her?—I did see a young girl with her.

Look at these two young people, and see whether either of these are them.—I cannot swear to their faces. The girl's back was towards me then, talking to the old woman; she stood without the house. I cannot swear to the girl.

When was it you first recollected these circumstances of having seen her there?—In my illness the apothecary told me what had happened at Mrs. Wells's house.

Can you tell what day it was?—That I cannot, to two or three days; it was after they were taken up.

Mr. Nares. It comes out now, which I did not know before, that you had seen this woman two or three years before that?—*Story.* I had, and took notice of them as a parcel of gypsies. They used to have two asses and a little horse: I have seen the horse grazing in White-Webbs-lane, as I have rode through there; and the two asses, I have met with them on the road, and the two young women and a man; but their dress is so altered now, that I could not know them. They used to have a perfect gypsey's dress, with blankets over their shoulders, and handkerchiefs over their heads (you might see their black locks through them), following the two asses. The last time I met them, I believe, might be at the beginning of December, just against Durant's house.

Mr. Nares. I believe, you were rather too ill to go out, to be a witness when the trial of Squires came on?—*Story.* I was; I thought I should have died.

Recorder. Were you ever of any business?—*Story.* I was a finisher of clock dial-plates.

Recorder. Were you acquainted with Mr. Lyon before?—*Story.* I have seen him before at Newington-Green; I rented a house that he built.

William Smith sworn.

Mr. Nares. Where do you live?—*Smith.* I live in Ranton-row, at Enfield; I am a farmer.

What do you rent per year?—An hundred and five pounds per year, and have these twenty years; it belongs to the duke of Portland.

Look, if you see Mary Squires in court.—Yes, Sir; I see her.

Did you ever see her before?—Yes, I have.

Tell us where you remember to have seen her about a year and a half ago.—I saw her in my cow-house on the 15th of December 1752.

Had she been about the country some time?—She had a pretty while; I saw her several times.

Have you seen her before that time?—I have.

How came she in your cow-house?—They came to ask for lodgings; I was not at home.

Who do you mean by they?—The company that was with her.

Who did they ask?—My housekeeper; her name is Swain.

When did you first see them about your house?—The next day in the morning, which was the 15th of December.

Had you any conversation with them?—I had none at all.

Are you sure this is the woman?—I am, that was in my cow-house; there were two men and two women with her; she called them her sons and daughters.

Do you see any man in court that is like her son?—I did not take so much notice of them, as I did of her; because I have seen her often.

What reason have you to think it was the 15th of December?—I was out the day before at Dr. Crow's, stamping of apples; and when I came home, my people told me, the people that had laid there before, came to ask for lodging again. They had lodged in our cow-house and barn before that.

Are you sure of that?—They have asked me before this; and used commonly to come about once a year, for a pretty many years together.

Has this woman herself asked you for lodging?—She has. I have known her a pretty many years, and have seen them about the country; they lost their horse the while they were at my house; I think, they said it was a little black one; the son asked my people, in my hearing, whether they saw him or no.

How long did you see them afterwards?—They lay at my house till the Sunday after. They were there three nights and two days, and lay in my cow-house; they came on the 14th, but then I was not at home.

How long, from that time, was it before you saw them again?—I was at home once when the son came, as they called him, to ask for the horse.

Were you examined on the trial of Mary Squires?—Yes, Sir.

Did you then swear she was the same woman?—Yes.

Do you now believe she is the same woman?—I do.

Cross-examined by Mr. Willes.

Were you examined when Mary Squires 'Mannah Wells were tried?—I was.

How long after Wells was taken up?—It was soon after.

How soon?—Within a fortnight or three weeks after.

Were you examined in this place, where you are now?—I don't know.

Where was it?—I don't know where; but I am sure I was examined.

Had you any conversation with the gypsey on the 16th of December, in the morning?—No, I only went and looked at them; she did not speak to me.

Then you cannot say you know the faces of the two men, and two young women?—No, I do not.

How long before that December might it be, when they were there before?—May-be it was a twelvemonth before.

Did you ever see them at Mrs. Wells's house in your life?—No, Sir.

How far is your house from Mrs. Wells's?—It is near two miles distance.

What had you been doing the day they came to your house?—I had been stamping apples to make cyder with, at Dr. Crow's.

Were the apples your own apples?—They were. I went there for the use of his press; he gave me leave.

How long had these apples been gathered?—I believe, about two months.

Do you keep your apples so long before you grind them?—Yes, and longer too.

When did they go away?—On the Sunday morning, the third day.

Did you know where they were going?—No, I did not.

Did you see her, after that time, till you saw her in Newgate?—No, Sir.

Were you any time in January at Mrs. Wells's?—No, Sir; I seldom go by there.

Had they any thing to sell?—No, not as I saw.

Did you ask Dr. Crow leave to use his press?—He was then dead, I believe; I asked his gardener; the family were not in the country then.

Why do you fix upon that day, you stamped your apples on, to be the 14th of December? Did you make any minute of the day?—I know it was that day; I did make a minute; I sold some corn that week, and delivered it the same week, and I set it down in my book.

Don't you sell corn almost every week?—I do.

What day of that week did you sell your corn?—It was on the Saturday.

Where is that book?—It is at home.

Why is it not here?—I did not know I should have occasion for that here.

Is your house farther from London than Mrs. Wells's?—Much about a like for that.

Is it in the way to Mrs. Wells's?—No, it is out of the way, on the left hand.

Is it in the road to Basingstoke?—I know nothing of the place.

By Mr. Nares.

You say you were not examined in the

place you are now in, at the other trial ; do you know whether it was in this court or no, you were examined ?---I was examined.

Was it when Squires and Wells were tried, or at any other time ?---I think it was then.

By Mr. Justice Clive.

Were you ever examined in this court ?---I never was, but once.

Were you ever examined in a court of justice, at any time, but when you was examined about the gypsy and Wells ?---No.

Where were you examined ?---Some gentlemen examined me about it.

Was it in this court, or at Hicks's-Hall ?---I don't know Hicks's-Hall.

Mr. Nares. Was the old gypsy in court at the time ?---Smith. No, she was then in Newgate.

Court. This must be before the grand jury at Hicks's-Hall, when the bill was found.

Loomworth Dane sworn.

L. Dane. I keep the Bell at Enfield-Wash ; I have lived there two years and a-half ; but I have lived near there about twelve years and a-half.

Mr. Nares. Do you remember ever seeing Mary Squires there ? Look, and see if you see her in court.---L. Dane. That is the woman, I am sure (pointing to her.) I cannot say I ever saw her before winter was twelve-month.

What part of the winter did you see her ?---I cannot remember the first time ; but I am sure I saw her on old Christmas-Day, and, I believe, I saw her before.

What reason have you to remember the day ?---My man came to me, and I promised him a holiday on the old Christmas-Day.

When did you promise him that ?---I promised it him on New Christmas-Day.

Had he one on the new ?---Yes, Sir. On the old Christmas-Day I went up to my shop (I keep a collar-maker's shop ;) while I was there, farmer Norton came and asked me, if I had ever a collar that would fit his horse ; I measured his horse, and put it down in my book ; he said, he would come and settle with me on the Sunday following. I fitted it, and carried it home, and left it that very day, as I went to dinner.

What book did you set it down in ?---In my day-book ; it is a piece of paper sewed together.

Could you have remembered it without that circumstance ?---I cannot say I could.

Where is that book ?---I believe I can produce it ; it is not here ; but I am sure it was old Christmas-Day.

Did you take particular notice of her that day ?---Yes, Sir, I did. I was filling a barrow of gravel, from a heap at my door, to lay down in the yard ; I stood resting myself ; she came by me, and I looked very wishfully at her. As she went by me, the wind blew up her gown, and there was a great hole in the heel of

VOL. XIX.

her stocking. I saw her till she got into the field.

Did you see her when she was in confinement ?---I did, and when she was taken up, and saw her go into the cart.

From what you observed on her going by, did you believe it was the same person ?---Yes, Sir, I am sure of it.

Are you sure now this is the same person ?---Yes, Sir, I am. I saw her in Newgate, and was sure of it then.

Cross-examined by Mr. Willes.

Did you ever converse with her ?---No, never at all.

How near was she to you when she walked by ?---I believe it might be two or three yards off.

Have you a coach-road goes by your house ?---Yes, Sir, the York-road.

Do you know William Headland, that has been examined ?---I do.

Did you see any body with her ?---No, I saw nobody with her.

Was that the only time ?---I believe I saw her several times, but cannot fix upon the days.

Did you see any young people with her ?---I saw her son several times.

How long after ?---I cannot say how long.

Did you ever see her daughters with her ?---No, only when they were taken up.

Was it a very high wind that day ?---It was.

What had she on her head ?---I cannot tell.

Was her face covered over ?---No, it was not.

How did she walk ?---She went crouching and cringing.

Which way was her face ?---It was then towards the town ; I looked at her very wishfully.

Then you cannot say you saw her before ?---I believe I did.

Do you know Elizabeth Headland ? What is her character, a good or bad one, in the neighbourhood ?---I never heard she robbed any body.

Is it as good as the rest of her neighbours ?---I cannot say that ; her's is not so clear as some people's are ; but I never heard she was a thief.

What is her son's character ?---I know no ill of him.

Do you know David Dyer ?---Yes, Sir, I do.

What is his character ?---He is a very honest man.

By Mr. Nares.

I own the boy has given a strange account ; but did you ever hear any harm by him ?---No, never in my life.

In what particular is the mother's character supposed to be bad ?---I do not know, not I.

How far does David Dyer live from you ?---He lives opposite me.

What is his business ?---He is a shepherd.

Did you ever hear any harm of him ?---No, never in my life ; he has a good character.

3 N

Samuel Arnot sworn.

S. Arnot. I live at White-Webbs, on Enfield chace; and have lived there these fourteen years.

Mr. Nares. What are you?—*S. Arnot.* I am a labouring man.

Do you know such a person as Mary Squires?—Yes, Sir.

Look, and see if you see her.—That is the woman (pointing to her).

How long have you known her?—The first of my seeing her was on a Friday morning: she asked me, if I saw a little brown horse? This was, as near as I can guess, about nine or ten days before new Christmas-day.

How came you to fix upon that time?—I had been at a place called Clay-hill, and met her in the bushes: she asked me if I saw this horse, and said his legs were tied, and he had a clog upon him: then I turned back again, and asked, what sort of a clog? She said, her name was Squires.

For what reason did she tell you that?—Because I might give her an account of the horse, if I light of him.

Upon your oath, are you sure this is the woman?—Upon my oath, I am, Sir.

Did you ever see her any time but that?—I never saw her after that time till I saw her in Newgate; but do not know the particular day I saw her there.

How long was it after you had seen her before?—It was, I believe, a quarter or half a year after.

Were you certain then it was the same person?—I was, Sir; and, to the best of my knowledge, I believe now it is the same.

Cross-examined by Mr. Willes.

What is your employ?—I follow labouring work: I work sometimes at Cheshunt, and sometimes at other places.

Have you any family?—I have a wife and three children.

Why are you positive as to the time?—Because it was on a Friday morning that I saw her; and on the Sunday following I met her again, and asked her if she had found her horse; and she said, No.

Why do you apprehend it was nine or ten days before new Christmas you had this conversation with the gypsey?—I think new Christmas was the Sunday se'nnight following.

Are you sure Christmas-day was on a Sunday that year?—No; it was on a Monday. I say, it was the Sunday was se'nnight before new Christmas that I saw her.

Was there any body with her at that time?—There were a man, two women, and two children with her, the second time; there was nobody with her the first time.

Had she either of the times a horse or ass with her?—No, neither.

Mr. Just. Clive. Who carried the children?—*S. Arnot.* They walked on foot.

By Mr. Willes.

How old might they be?—Four, or five, or six, or seven years old.

What was the colour of the horse she enquired after?—A little brown one, with his legs tied together.

Do you know farmer Smith?—I do; his house stands about two or three pole from mine.

Did these two children seem to be gypsey children?—I did not observe their colour; they seemed to belong to that gang.

Do you know of their lying in farmer Smith's cow-house?—I do; they did, to the best of my knowledge.

If those people had lain there, do you think he would not have remembered there being two children with them?—His remembrance is nothing to me.

Mr. Nares. Did you see them at farmer Smith's?—*S. Arnot.* I never saw them in the cow-house: I know no otherwise than as I met them on the Chace, and heard they lay there; and it being so near my house, I could hear them talk in the cow-house. On the Sunday morning I met her betwixt Clay-hill and White-Webbs: I asked her, whether she had found the horse or not? She said, she had not.

Mr. Just. Clive. Was it then that the man, two women, and two children, were with her?—*S. Arnot.* It was.

Mr. Just. Clive. Look about the court, and see if you see the two women that were with her.—*S. Arnot.* I cannot swear to any person besides her, really: I did not take notice of the two women; I did not converse with them.

Mr. Nares. Did the notice you took of her, the first time you saw her, give you such an idea of her person, as to ask her, of your own accord, whether she had found her horse?—*S. Arnot.* I did.

Recorder. What particular reason have you to imagine that these two children were with them at farmer Smith's?—*S. Arnot.* I don't know that: I heard a noise of the voices of small people; I cannot say they were children, young or old.

Recorder. Could you distinguish the voices of children?—*S. Arnot.* I could, to be sure; but I did not see the old woman.

Mr. Baron Legge. You say, you first of all saw the old woman on a Friday; when was it you saw her next?—*S. Arnot.* On the Sunday after the Friday.

Mr. Baron Legge. Did you see her the next Sunday after that Sunday again?—*S. Arnot.* No.

Elizabeth Arnot sworn.

E. Arnot. I am wife to Samuel Arnot: we have lived where we do fourteen years.

Mr. Nares. Do you know Mary Squires?—*E. Arnot.* Yes, Sir.

Look about the court, and see if you can see her.—There she is; I am sure it is her.

When was the first time you remember to

have seen her?—It was about a week before New Christmas.

How came you to fix upon that time?—To the best of my knowledge, it was: I know it was about a week before the first New Christmas.

Where did you see her?—I saw her lying in farmer Smith's cow-house, close to my house: I saw her come out of the cow-house into the lane on the Chace. She asked me, if I saw a little horse of her's? I said, I had not. This is the truth.

Was your husband with you at that time?—He was not.

Did you see any others in company with her?—I saw several more, but I did not take notice of them: I saw her son on the Chace, whistling for his horse.

Did you see her after that?—No, never, only in Newgate, till now.

What time was that you saw her in Newgate?—I don't know the time; I never kept the account of that.

Was it before or after her trial?—It was after her trial.

Mr. Just. Clive. Should you know the son if you was to see him?—E. Arnot. I took so little account of him, I can't say whether I should know him or not.

Mr. Nares. Did you ever see a woman like the old woman in your life?—E. Arnot. No, never before I saw her.

Did you think the woman you saw in Newgate, was the same person you saw enquiring for her horse?—The very same person.

Do you think this is the same person here, you saw there, and in Newgate?—The very same.

Cross-examined by Mr. Willes.

How long was she with you enquiring for her horse?—It might be some minutes before she turned her back, and went to look for him.

Did you see her in the cow-house?—No, I did not; I saw her coming out of it.

Did she mention the colour of the horse?—She did not.

What did you say to her?—I told her I had not seen him.

Was this the only space of time you had to see her face, till you saw her in Newgate?—It was.

How long were you talking together?—It might be two or three minutes.

Do you swear absolutely that was the person?—I do, Sir.

By Mr. Nares.

Did you change a word with the son?—I did not.

Were you near the cow-house?—My house joins almost to it: she came out of the farmer's yard, and said, Good woman, did you see a little horse of mine?

Did she come towards you before she spoke to you?—No; I was going for a pail of water, and she came out to look for her horse.

Mr. Just. Clive. How came you to say that man was her son?—E. Arnot. She said, it was her son that was calling her horse.

Sarah Star sworn.

Mr. Nares. Do you know Mary Squices?—S. Star. I do; that is the gypsey (pointing to her). I live the next door to Mrs. Wells's house at Enfield-Wash: my husband rents a farm there.

How long have you lived there?—I have lived there three years this May.

When was the first time you saw the gypsey?—She was at my house on the 18th or 19th of January was twelve-month.

By what do you recollect the day?—My husband was gone to Hertford for a load of pease for a gentleman in town: the note is in court, as far as I know, with the date on it: Mr. Miles, the former attorney, had it of me.

Did you ever see her at any other time?—I never saw her before or after, till she was taken up.

Mr. Just. Clive. How near do you live to Mrs. Wells's house?—S. Star. My house is as near to her house, as it is across the sessions-house yard.

Mr. Nares. What conversation passed between you?—S. Star. At first she came and asked at the door, if I had any delft to mend or china? My man and boy were at dinner: I bid them give her an answer, because I was busy. Then she came into the kitchen to me, and asked to buy some pork of me, and brown bread: I said, I had but that piece of bread in the house, and more need to buy than to sell. Then she asked me to sell her some chitterlings, I having some, and black puddings, lying on the table: I gave her a good piece of chitterling to get rid of her.

How long might this conversation take up?—I had rather set a lesser time than it was. I do believe she was three quarters of an hour with my men and me, that is, in my sight and hearing. She offered to tell my servants their fortunes, and to tell me mine. She was some time in the porch with my servant; but I believe she was in my sight three quarters of an hour.

Did she tell any of them their fortunes?—After she found she could not tell me mine, she said, Don't be scared at me; for I have been before dukes, lords, and earls, and I hurt nobody, madam; I will not hurt you. She did not tell any of my servants their fortunes in my hearing. I wanted to get rid of her, for I was terribly scared, seeing such a strange gypsey woman; though I have seen hundreds of gypsies at one time or other: the man took her into the porch, then the boy bolted the door, so we got her out. I saw her when she was taken up and put into the cart; and I saw her in Newgate after that.

Are you sure this is the same person?—Yes, Sir.

Cross-examined by Mr. Willes.

How are you certain as to time, so as to fix

it to be the 18th or 19th of January?—Upon this account, my husband was gone for a load of pease, and the note was dated the 18th or 19th of January.

Where is that note?—It was delivered into Mr. Miles the attorney's hands, and I have not seen it since.

How long is it ago since you delivered it to him?—I believe it may be above a twelvemonth ago.

What did you look upon him to be at that time?—I took him to be a lawyer concerned for Elizabeth Canning.

Where was your husband when you gave him that note?—I can't tell.

Mr. Just. *Clive*. When did you deliver this note to Mr. Miles?—*S. Star*. Indeed I can't tell. I know my husband took the pease up one day, and delivered them the next; that is the reason I say the 18th or 19th of January.

Mr. *Nares*. We have not got the paper to produce.

Mr. Baron *Legge*. Did you deliver that before or after the trial of Mary Squires?—*S. Star*. After, a great while.

Mr. *Willes*. How came you not to appear here on Squires's trial?—*S. Star*. They did not require it.

Daniel Vass sworn.

D. Vass. I am a day-labouring man; and live in Turkey-street in Enfield parish, and have lived there almost fourteen years.

Mr. *Nares*. How near is that to mother Wells's?—*D. Vass*. About a quarter of a mile, as near as I can guess.

Have you ever seen Mary Squires?—I have seen that woman that was in Newgate; I don't know her name.

Look about you, and see if you can see her.—There she is (pointing to her): she is remarkable enough: she has now a red cloak on.

Where did you see her first?—The first time I saw her going along the causeway behind my house; it was on old Christmas-day, by the new stile the 5th of January 1753. I was then in my own yard.

How near were you to her?—Perhaps I might be four or five yards from her.

Had you any conversation with her?—I never said any thing to her, or she to me.

How came you to take such notice of her? By reason she stopped; and I thought she would have come into the yard, but she did not; if she had, I should have told her there was nobody in the house.

Was there any body in the house then?—No, Sir.

Had you a full sight of her face at that time?—I had, certainly.

Was she alone?—She was, without she had got any body under her cloak: I saw nobody with her.

Did you see her any time else?—Only in Newgate.

Did these observations you made of her, fur-

nish you with a sufficient remembrance of her person, to recollect she was the same?—I am sure she is the same; now I am sure of it, Sir. It is the same person, but not the same clothes.

Mr. Just. *Clive*. What coloured clothes had she on then?—*Vass*. She had a brick-coloured gown on, an old red cloak, and a whitish coloured one over that, and an old black beaver hat; it was not a black hat as women commonly wear.

Mr. *Nares*. What reason have you to fix upon Old Christmas day?—*Vass*. By reason I went to work with a master I have worked for almost eleven years, and he did not chuse I should work on that day.

Why did he not chuse you should work?—By reason he thought it was Christmas-day, and ought to be kept.

Are you certain that was the same day you saw this woman?—I am, Sir; that was the same day; my door was locked when I came home, and I did not know where my wife was gone with the key, and at that time the woman came by.

Cross-examined by Mr. *Willes*.

Did you ever see her before?—No, Sir; nor never saw her again, till I saw her in Newgate.

How long did she stop there?—Perhaps a minute, or half a minute.

When you went into Newgate, did you go by yourself, or with other persons?—I did not go by myself; if I had, I should not have found her; but we went but one at a time up to her.

Was she brought out among a number of other persons, or was she singled out?—She sat upon the bed, but I knew her long before I came at her.

Were there any other prisoners there?—I did not know who were the prisoners.

Was she sitting by herself?—She sat by herself on one side of the bed.

Were there any other people shewed to you in that corner of the room, besides the gypsey herself?—There was no other person sitting on the bed, nigh her, as I know of.

Were there any other people in the room? There were a great many; but I knew the woman when I saw her, and should from a thousand.

By Mr. Justice *Clive*.

Who desired you to go into the room?—I don't know who it was; it was by the gentlemen.

Did any body come up from the country with you?—Yes, there were nine or ten of us came up in a coach together.

By Mr. *Willes*.

Did you all go into Newgate together?—I don't know how many did when I did, or how many went in together.

Was not the purpose of your going up, to

see if you could find out the gipsy?—No, no; I was carried up to see if I could find out the same woman that I had seen before. A blind man can't see her; but a man, if he has but half an eye, might know that woman if he sees her again.

By Mr. Nares.

Upon your oath, did any body point out to you that this was the gypsy?—No, no; I did not want them to do that.

Did any body tell you how she was dressed?—No, certainly.

Was there any other woman there?—There were in the room.

Did you, of your own accord, say which was the woman?—Certainly.

By Mr. Justice Clive.

How near do you live to mother Wells's?—As near as I can guess, about a quarter of a mile off.

Have you ever been in her house?—I have several times.

Were you there the beginning of January?—No, nor I had not been in the house above two years, till they were taken up.

Mr. Willes. Had you used to go there at any time?—*Vass*. I have been in the house divers times formerly; then she sold beer; then a poor man might take a pint of beer there, as well as at another house.

Recorder. Who was the first person that applied to you to go to Newgate?—*Vass*. I am sure I don't know the gentlemen's names one from another.

Recorder. Have you heard their names?—*Vass*. I have heard a good many of the gentlemen's names that are on the girl's behalf; if I were to hear their names, perhaps I might know them.

By Mr. Justice Clive.

Do you know farmer Smith?—I do, very well.

Do you know his cow-house?—I never was in his yard.

Jane Dadwell sworn.

J. Dadwell. I live in Turkey-street at Enfield Wash.

Mr. Nares. How long have you lived there?—*Dadwell*. I have lived there two years.

What is your business?—I keep a shop; I sell butter, cheese, coffee and tea, and those sort of things.

Do you know Mary Squires?—I do; this is the woman (pointing to her.)

When did you first see her?—The first time was at our shop; the time I can't tell; but I can tell one day in particular, that was the Thursday in Christmas week.

Which Christmas?—The new Christmas week.

Upon what account did she come to your shop?—She came for coffee, tea, and butter; but I can't tell what particular weight she had any one day.

Had she been at your shop before that?—She had several times before that.

Why do you fix upon that day?—We dressed a piece of meat for our customers, as I usually do at Christmas: this was dressed on Christmas day; the customers came on Tuesday night and Wednesday night; and this of her coming was after my customers had been there.

What reason have you to think it was after they had been there?—I was in my back house washing my dishes (that had been used when my customers were there) when she came in.

Did you see her any time after that?—I can't say particularly whether she was or not at my house after that.

From her coming so often to your shop, can you be certain of her face?—I know it very well.

Did you see her in Newgate?—I did.

Was she shewn you there, or did you know her of yourself?—I knew her immediately, and then she owned she had been at my shop.

Recorder. Did she own she had been at your shop that Thursday?—*Dadwell*. No: she knew me, and owned she had been at my shop, but did not fix upon any time.

Mr. Nares. I need not ask you any more as to your certainty of the person then: are you sure now this is the person?—*Dadwell*. Yes, Sir, I am.

Cross-examined by Mr. Willes.

Were you ever examined before?—I was.

By what person was you examined?—I don't know the gentleman.

How long is it ago?—It is a twelve-month ago last Christmas.

How long is it since you was examined before the grand jury?—I don't know.

Were you ever examined upon oath?—I was, but not upon such things as these.

Was it upon the Abbotsbury men for perjury?—I don't know what it was about; it was about this affair.

When did you recollect any of these circumstances, about your washing your dishes?—I gave this account to the grand jury, and told the same as I have now.

Mr. Nares. Is the account you tell now true?—*Dadwell*. I am sure it is.

By Mr. Willes.

When was it you first recollected it, to tell those circumstances of her being there?—I can't recollect the day of the month; after they were taken up, the lawyer came to me, and I told it him.

Don't you wash your dishes every day?—No, I do not; but I know in particular it was that day: one of my neighbours came in, and asked me, what strange woman that was?

Did she stay any time in your shop?—She sat down and smoked a pipe there.

At the time you saw her in Newgate, what day did Squires say it was that she was at your shop?—She did not say what day, but she said

she knew me: I asked her whether she knew me.

By Mr. Nares.

Then this affair had made a great deal of noise in the country?—Yes, it had.

And the lawyer desired you to recollect the time, did he not?—Yes, he did.

You say she smoked a pipe; where did she sit?—She sat down by the fire.

Who is that neighbour that came in, and asked about the strange woman?—She was one of the witnesses, but is since dead.

Was she examined when you was before?—She was; her name was Anne Parsley.

Mr. Willes. Were you by when she was examined?—*Dadwell*. No, I was not; there was but one examined at a time.

By Mr. Recorder.

How old are you?—I am threescore years of age.

Are you no more?—I am not.

Have you seen gypsies at Enfield-Wash before this?—I have, such as are called gypsies.

Had any of them used to come to your shop?—No, none of them.

Mr. Willes. Were they and this woman alike that you had seen before?—*Dadwell*. No.

By Mr. Recorder.

What was her errand the first time she came to your shop?—She came and asked if we had any china to mend.

Had she any body with her?—I never saw any body with her.

Did she tell you where she lived?—She said she lived up yonder; and said no more.

Tobias Kellog sworn.

Kellog. I am a husbandman, and live at Enfield in a little house of my own.

Mr. Nares. How long have you lived there?

—*Kellog*. Twenty-six years, came Michaelmas.

Do you know Mary Squires?—I have seen her.

Look about, and see if you see her now.—I see her, Sir.

When was the first time you saw her?—The first time was in January, something better than three weeks in January was twelve-month.

What day in January?—I cannot say to the day.

Have you any reason to say you saw her before?—I have not.

Where did you see her?—She was on the other side of the way where I was at work in Mr. Fletcher's barn, at Bull's-cross; she was walking up Turkey-street green, in the foot-path.

What have you to charge your memory with, as to the day?—I can't say but it may be a day or two before Old Christmas-day.

Was it before Old Christmas, or after?—It was rather before Old Christmas.

Are you certain of it?—Yes, I am.

What day of the month was Old Christmas-day on?—It was on a Friday, and I believe I saw her on the Thursday; but I can't say to the day of the month.

Are you sure it was three weeks in January?—I mean so, and better.

By Mr. Baron Legge.

From what period, or time, do you reckon your three weeks in January?—I say, near a month.

Was it the beginning of January?—No, there were two or three days past the beginning.

Mr. Nares. What do you mean by three weeks in January?—*Kellog*. I said three weeks, very near a month in January.

Mr. Baron Legge. How long was it before Squires was taken up?—*Kellog*. I reckon it about a month before the time she was taken up.

By Mr. Nares.

When you say better than three weeks, or near a month, do you mean before Squires was taken up?—I mean so.

Are you sure you saw her then?—I am sure.

How far is Mr. Fletcher's barn from mother Wells's?—His house is very near a mile from it; but the barn is about a quarter of a mile.

Did you see her face then?—I did.

Did you see her after that?—I did, twice, walk by my barn-door. She asked me for a bit of tobacco; I said, I used none, and away she went: I saw her four times in all, with the time she was taken up. She was at my barn-door the day before she was taken up, about one o'clock, and asked the man that was in the barn with me (whose name is John Rowley) for a bit of tobacco: then she came into the barn, and said to him, Young man, I'll tell you your fortune; and told him, there is one young man has a very great enmity to him, and asked him to cross her hand with four half-pence to tell him his fortune: he said, If I do, I must go on the highway for it: then she turned her leg over the board, and away she went.

Is John Rowley here?—No, he is not.

Where does he live?—At Enfield highway.

Are you sure this is the woman that asked you for tobacco, and that afterwards offered to tell Rowley his fortune?—It is the same.

Have you seen her since that time?—No, I have not till now; but she is a very remarkable woman.

What makes you fix it to be the day before Old Christmas day?—I have no particular reason.

Cross-examined by Mr. Willes.

Had you any conversation with her the first time?—No, I had none at all.

Had you ever in your life seen her before?—No, Sir.

Did she continue walking when you saw her?—She was walking along.

Did you see any gang of gypsies about the town, besides her?—No, I did not see any.

How long was the second time after the first?—It was about a week after.

Had you seen any gypsies with her at any time?—No, Sir.

Should you have recollected the person of that gypsy, if it had not been for that of coming into the barn, and asking for tobacco?—Yes; if I had not seen her a second time, I should have remembered her face.

Recorder. Were you in Newgate to see her?—*Kellog.* I was not.

Mr. Willes. How long is New Christmas day before the Old?—*Kellog.* Eleven days.

John Frame sworn.

J. Frame. I lived with 'squire Parsons, and have a year and a half; but I am out of place at present.

Mr. Nares. Where does he live?—*Frame.* He lives in James's-street, Grosvenor-square, but he lived in Turkey-street, Enfield, in the country; and I lived with him there as a footman and gardener.

During the time you were there, did you see Mary Squires there?—Yes, Sir.

Do you think you should know her now?—There she is, I am sure (pointing to her.)

When did you first see her?—On the 11th of January was twelvemonth.

Where did you see her?—I was at work in master's garden, and she came and talked with me through the palisadoes, pretending to tell me my fortune.

How came you to think it was the 11th of January?—Because my master and mistress went to town on the 9th of January, and this was after they went.

Tell us the conversation as well as you can.—She said a great many things to me. She told me, I little thought of coming into that country once; and she wanted me to give her three-pence: I gave her three-half-pence; but she did not tell me what she would have told me if I had given her more. When I gave her the three-half-pence, she bid me put it in my hand, and put it through the pales. She took it out and went away.

How long might you converse with her at this time?—It might be four or five minutes.

Was your fortune good or bad?—She told me it would be good fortune.

Are you sure this is the woman?—I am sure it is.

Did you ever see her before?—I had seen her about a year before: I lived then at one Mr. Woodcock's at Enfield Clay-hill; he is since dead: I had then but very little talk with her; master was at dinner, and I could not stay.

Did you ever see her at any other time?—Not to take much notice of her: I saw her two or three times between that and seeing her in Newgate.

Are you sure the woman you saw at Mr. Woodcock's, is the same woman that told you your fortune at Mr. Parsons's?—I am very sure of it.

And are you sure this is the same woman, that is here?—I am very sure of it: I saw her several times after the time I mentioned, but not to take notice of her, any farther than seeing her walking in the street: I knew she was in that part of the country from that time, to the time she was taken up.

You say you saw her in Newgate?—I did. Were you certain of her then?—I was very certain, and I am sure this is the same now.

Were you before the grand jury?—I was. How long is that ago?—I can't tell; it was about this time twelvemonth, I think.

Did you give the same account before the grand jury, as you have now?—I did.

Was that true?—It was, and so is this.

Cross-examined by Mr. Willes.

Were there any other gypsies with her?—No, Sir.

When you saw her about a twelvemonth before, were there any others with her?—No, none as I saw; she then only just opened the gate.

Was she in company with any others in Newgate, or shewed by herself?—By herself.

How long had your master and mistress been down at that time?—I cannot tell; they were up and down very often.

If they have been up and down very often, how can you fix upon their going up this time, more than any other?—By reason my master and mistress gave me and my fellow-servant leave to go out on the 1st of January.

Had not your master and mistress been in town between the 1st of January and the 9th?—Yes, they had.

Have you reason to believe it, because your master and mistress were down at Christmas?—Yes, Sir.

How long had they been there at that time?—I believe a month; and I am sure they gave me leave to go out on the 1st of January.

Recorder. How was the gypsy dressed?—*Frame.* She had a reddish sort of a gown on, I think, to the best of my remembrance.

Mr. Just. Clive. What other clothes?—*Frame.* A lightish-coloured cloak.

Mr. Just. Clive. Do you know Mary Jewel?—*Frame.* She saw her something before me the same day; her fortune was told her; she gave her some boiled beef: she is gone away from thence.

Joseph Gould sworn.

Mr. Nares. Where do you live?—*J. Gould.* I live in Turkey-street, in the parish of Enfield: I am a day-labouring man.

How long have you lived there?—Thirty-seven years.

Tell me whether you know Mary Squires?—That is the woman that sits there.

Are you sure of it?—I am.

When did you first see her?—To the best of my knowledge, it was the 8th or 9th of January 1753, that is, a year ago last January.

Where did you see her?—I saw her in a walk we call Trout-Walk, leading up to Bulls-Cross, about a quarter of a mile from Mrs. Wells's house, or something better.

Had you any conversation with her?—No: I took notice of her; I thought I never saw such a woman in my life before for features.

Had you heard mother Wells had gypsies lodged at her house?—I had.

Did you see her after that?—Yes, I saw her twice afterwards.

About what time?—As nigh as I can guess, about eight or nine days before she was taken up; and another time, about four or five days before she was taken up.

Are you sure the prisoner is the same person you saw on the 8th or 9th of January, and the other times after that?—I am, Sir.

By what do you remember the time?—Mr. Parsons and his lady went to town on the 9th, (I live next door to him) and my wife was at work there on the Monday.

What day of the week was the 9th?—It was on a Tuesday; I knew of their going.

By what did you know of that?—It was the time they went away after Christmas.

Did you see the old woman in Newgate after this?—I did.

Was she shewed you, or did you find her out?—She was shewed me: there were a great many people in the room; she was by the fire-side.

Do you mean any body pointed at her, and said, that was the woman?—No, Sir; on the first sight, at coming into the room, I knew her again, without being told.

Are you sure the woman you saw in Newgate, is the same you see now?—Yes, Sir.

Cross-examined by Mr. Willes.

How far were you off from her when you saw her on the 8th or 9th of January?—Close by her.

Was it the same day that Mr. and Mrs. Parsons went to town?—I cannot tell whether it was the same day or no.

Was any body with her at that time?—No, Sir.

Had you any conversation with her?—No, Sir.

When was you told that mother Wells had got gypsies lodged at her house?—That was before I saw her the first time.

Who told you so?—To the best of my remembrance, Virtue Hall did: I heard her tell other people so.

What day was this?—I cannot tell the very day.

When did you first recollect this of Mr. Parsons's going to town, in order to assist your memory?—After I had seen the old gypsey in Newgate.

When you saw her there, were there no other people in that part of the room but her?

—Upon my word, I don't remember there were any, besides the people that went with me.

When you saw her, four or five days before she was taken up, were there any body with her then?—She came into a public-house where I was.

By Mr. Justice Clive.

Where did you see Virtue Hall, when she was relating this?—At a place called the Two Bridges; there were several people there then.

Can you tell any of their names?—I cannot: then they told me that person was Virtue Hall, and they called her by her name: I did not know her before.

Mr. Willes. How long was this before the people were taken up?—Gould. It was some time before.

Mr. Just. Clive. Did you use the house of mother Wells?—Gould. I never did use it; I have kept a farm fifteen years next door to it.

Mr. Nares. What is the Two Bridges? A house of that name, or what?—Gould. No, it is in the street.

Recorder. How was the gypsey dressed?—Gould. Upon my word, I cannot certainly tell: she had a cloak, and a hat tied over her head, and smoking a pipe.

Mr. Just. Clive. Was she brisk and nimble, or was she feeble?—Gould. No, not brisk.

Mr. Just. Clive. Was your wife with you when you saw Virtue Hall?—Gould. No.

Mary Gould sworn.

Mary Gould. I am wife to the last evidence, and live in Turkey-street.

Mr. Nares. Do you know Mary Squires?—M. Gould. I know the gypsey-woman. I did not know her name when I saw her.

Look about, and see if you see her?—Yes, Sir, there she sits; I am sure that is the woman.

When did you see her at Enfield?—I saw her on the 11th or 12th of January 1753, at my door in Turkey-street: I am not certain which day of the two; it was either on a Thursday or Friday, I am sure.

In what manner did she come?—My door was bolted: she called at it, and I opened it: she asked me, If I had any china to mend? I said, No. She said directly, you will not live long. I said, Mistress, I shall not give any thing, for I don't want to hear my fortune told. I shut the door, and watched her out at the window, and saw her go into Mr. Harrington's yard and out again. I was a little surprised at her, because I thought she was a very ordinary woman. I saw her another time before she was taken up, and that was as I sat at work at my own window; that was the week before she was taken up: she asked me, If I had any china to mend then? and I told her, No.

Are you sure it was the same person that spoke to you those two times?—I am very sure.

What reason have you to think the first was the 11th or 12th of January?—By reason 'squire Parsons went to town on the Tuesday

that week. I used to be there almost every day: I was there on the Monday, the day before they went, which was the 9th.

Upon your oath, was it in that week Mr. Parsons went to town?—I am sure it was, and I am sure this here is the same woman.

Did you ever see her before that time?—I don't particularly know that I have.

Cross-examined by Mr. Willes.

How do you know Mr. Parsons went to town on the 9th?—Because I was much there: I was there on New-year's day; they were to have gone on that day, but madam was not very well, so it was put off till Tuesday.

Recorder. Did you know Virtue Hall?—Gould. I had seen her, but I had but little knowledge of her.

Mr. Willes. Were you ever in mother Wells's house?—M. Gould. I have.

Mr. Willes. Did you ever see the old gypsey there?—M. Gould. No, I never did.

Mr. Just. Clive. Do you remember when your husband saw Virtue Hall near the Two Bridges?—M. Gould. I told him, I had been affrighted by a gypsey; and he made answer and said, Virtue Hall told him, there were gypsies at mother Wells's house.

Mr. Just. Clive. How was she dressed when you saw her?—M. Gould. She was dressed in the very same dress as she was when I saw her in Newgate, with a clout about her head, and a plain cap under it; a brown sort of a gown, I cannot tell the colour of it, but it was not a snuff colour; it was a yellowish sort of a gown; she was in a very tight sort of a dress, considering her trade.

Humphrey Holding sworn.

Mr. Nares. Where do you live?—Holding. I live in Turkey-street, and have these 18 years: I am a gardener.

Do you know Mary Squires, the gypsey?—I do.

Look about, and see if you can see her.—There she is.

When was the first time you saw her?—It was on the 8th of January 1753.

Why do you think it was on that day?—Because a gentleman, whom I work for, came home on the 9th.

What gentleman is that?—That is Mr. Parsons: the gypsey came and asked me, if the family was at home? I said, Aye.

Had you any other conversation with her?—No, I had not.

Did you see her any other time after this?—I saw her on the 11th of January, that was on a Thursday, in the same week; then I was nailing up vines for Dr. Harrington.

What conversation passed?—She asked me, if there was any china to mend? I told her to ask at the door. She asked at the door, and somebody said, No; I cannot say who, but I heard the words very plain; I was then at the end of the house.

By what do you remember this to be the
VOL. XIX.

day?—I remember it, because I was not paid for that work, and it was set down in my book.

Did you see her after this?—I saw her again, when she was carried away to justice Tashmaker's.

Are you sure this is the same woman you saw before?—It is the very same woman, I am certain of it; I could pick her out of a thousand.

Cross-examined by Mr. Willes.

What did you set that work down in?—In my pocket-book.

How came you not to bring your book here?—I had not presence of mind to bring it with me.

Did you work for 'squire Parsons then?—No, I did not, because he had hired a person in the house.

Are you sure Mr. Parsons went away on the 9th?—I live, as it were, on the spot; I know he went away on the morrow after I saw her.

How long might the gypsey be in asking those questions?—She was not long with me.

How near might you be to 'her, when you was nailing up the vines, on the 11th?—About half the length of this court.

Was there any fence parted you?—No, none but the gate, and I believe that was open.

Before that time had you heard of any other gypsies being at mother Wells's?—As to that, I cannot say, for I never was at mother Wells's in my life.

Was there any body with her then?—No, there were not.

How long had 'squire Parsons been in the country that Christmas?—I don't know; but I know when he came out of the country.

How come you to remember the day of going out of the country, better than when they went down?—By reason they are very good to the poor people when they are in the country.

Are you used to work for Dr. Harrington? What is his method of paying?—He pays sometimes in a quarter of a year, and sometimes in half a year.

Don't he pay you the day you do his work?—He very seldom does; and if I am not, I book it.

How come you to remember this particular minute of the 11th, more than any other minute? Was this any uncommon thing?—No, it is what I did always, when I was not paid.

Were you ever examined upon oath before?—Yes; but I could not fully give an account, because then I could not resolve myself of the time.

How long after this time did you work for Dr. Harrington?—Not for a considerable time.

Did you work there the next day, or the day before?—No, I did not.

How many months after this time was it that you was examined, and could not recollect yourself?—I cannot justly say how long it was after.

Cannot you tell the day of the month you was examined at the Mansion-house?—I cannot tell the month, if I was to die.

Were you ever examined upon oath any where else?—I was at the Fleece in Edmon-ton, by the justices.

Can you remember the day you was examined there?—I cannot.

Had you any friend with you, when you was at the Mansion-house?—I had a scrub-lawyer with me, and, I believe, there are a great many of them in town.

What was his name?—The man is dead.

In what way do you make your minutes in your book?—I write so much per day.

Tell us the little line you made on the 11th of January?—I put down the day of the month, so much per day; that is, my wife puts it down, as soon as I come home: I can read, but I cannot write.

Were there any other persons with you when you was examined at the Mansion-house?—There were, may-be, half a dozen.

By Mr. Nares.

Upon your oath, was it the 11th of January you worked for Dr. Harrington?—Upon my oath, it was put down that very night.

Does your wife always set down your work in the book?—She always does.

When you were examined before my lord-mayor at the Mansion-house, had you seen your book to refresh your memory?—I told them there, I could not recollect it till I saw my book.

Were you desired to recollect, the day you was examined before my lord-mayor?—No.

Nor before the commissioners neither?—No, Sir.

By Mr. Baron Legge.

When you could not recollect that, for want of your book, at that time, how came you not to bring it now?—Upon my oath, I had no presence of mind to bring it: I did not know it would be looked into.

Do you remember how this woman was dressed, when you saw her?—I cannot say as to particulars; she was dressed very poorly.

Give the best account you can.—She had a hat on her head, and a sort of a darkish yellowish gown; but as to her face, I know it from five thousand.

What sort of a hat?—A straw hat.

Mr. Just. Clive. Was it a straw hat or a bonnet?—*Holding.* I cannot say which.

By Mr. Baron Legge.

Was it a black or white one?—Blackish it looked to be.

How near was you to her?—As near as I am to your honour.

Had she a cloak on?—She had a short one, but I cannot tell the colour.

What sort of health did she appear to be in? Did she appear to be a strong or weak

woman?—She did not appear to be very strong.

Did you see her in Newgate afterwards?—I did, and knew her again: she was sitting on the feet of the bed.

Were there any other women with her?—I saw none, but us that went from Enfield, as I remember. We were admitted in by order of sir Richard Glynn.

Sarah Vass sworn.

Sarah Vass. I am wife to Daniel Vass: I live at Enfield, in Turkey-street.

Mr. Nares. How long have you lived there?—*S. Vass.* Either thirteen or fourteen years, come Michaelmas.

Do you know Mary Squires?—I do; that is the woman (pointing to her).

When did you see her?—I saw her on the 11th of January was twelve-month.

Where did you see her?—At my own house.

What was her business there?—She came to tell me my fortune at the door.

Did she tell you your fortune?—No, I would not let her.

Did you see her at any other time?—Yes, several times.

How came you to think this was the 11th of January?—I can give you a good reason for it: I chare at 'squire Parsons's, in washing and ironing: they took coach and went to London on Tuesday the 9th of January, and I returned home directly when they took coach, and I saw the gypsey two days after that.

Are you sure of it?—I am certainly sure I did: after that I saw her several times.

Did she ever ask you to tell you your fortune after this?—Yes, she did the day before she was taken up: then she came into my house; I was drinking a dish of tea; she came in and sat down by me, and asked me for a pipe of tobacco; I went to my husband's mug in which he keeps his tobacco; she took hold of my hand, and asked me to tell me my fortune, but I refused her: then she asked me for a dish of tea, and I gave her two dishes of tea.

How long did she stay?—I believe she might stay about a quarter of an hour, she asked me, What gentleman's house that was over the way? I said, madam Gibson's. She asked me, whether they would admit her? I told her, I thought they would not.

Are you very certain that is the same woman you saw before, on the 11th of January?—I am sure she is the same.

Did you see her when she was taken up?—I did not, but I saw her in Newgate.

Are you certain this woman that sits here, is that woman?—I am certain that is the same woman, I am positive of it.

Cross-examined by Mr. Davy.

Did you ever see any gypsey at Enfield-Wash like her?—No.

Do you think it possible for any person, that has good eyes in his head, to mistake her

for another woman?—No, indeed, I should think not.

How often have you seen her?—Twice at my house, and several other times; I saw her twice sitting in a chandler's shop.

By what name was she called?—She went by the name of the gypsey-woman.

Where did they say she lodged?—At mother Wells's.

Did you hear she lodged there on the 11th of January?—No, not till afterwards.

How long afterwards?—As nigh as I can guess, it was three or four days after.

Were you at home when they were taken up? Before that time did you hear she lodged at mother Wells's?—Yes, before that.

Who told you where she lodged?—I went to a shop, and enquired of the woman (her name is Mrs. Dadwell) who she was, and where she lodged; they said at mother Wells's.

When did you hear this?—As nigh as I can guess, it was three or four days, or a week, after the first time I ever saw her.

What is squire Parsons?—He is a gentleman that took a country-house, and he was here all the summer to and fro; now he lives in town; he had lodgings in town, and used to be backwards and forwards pretty often in the summer; in the winter he was at London pretty much.

How long does he usually stay in the country?—He very seldom comes down in winter; sometimes, may-be, he'd stay a month or six weeks.

Whom does your husband work for?—He works for farmer Yarrow, and has a good many years.

Does he work for him every day of the week?—He does, except it happens to be a holiday.

Did you ever see the gypsey go in or out of Wells's house?—No, I never did.

Did you ever see any body with her?—No, Sir.

Did you ever see that young man or woman (meaning George and Lucy Squires)?—I saw them once since this.

Do you know Fortune Natus?—Yes.

Do you know Virtue Hall?—I do.

Did you ever see them going into Wells's house?—No, never.

Nor coming out?—No, Sir.

Did Natus and his wife lodge at mother Wells's?—I heard afterwards they did, but not before.

Did you see Natus and his wife in January?—I don't know that I did.

Nor in the December before?—No, Sir.

Then, when did you see them?—Since the great hurliburly.

Did you not say, you saw them often?—Yes, but never before that time.

Did you ever see Virtue Hall, before she was taken up?—No, I never did.

Did your husband work on old Christmas-day?—No, Sir, he went to work, and his master refused him, and would not let him work.

By Mr. Baron Legge.

How long have you known Natus and his wife?—Now I know them, but I did not before this thing happened.

How was Mary Squires dressed?—She was in a light-coloured cloak, a beaver hat, and a brick-coloured gown.

Anne Johnson sworn.

A. Johnson. I live at Enfield.

Mr. Nares. How long have you lived there?

—A. Johnson. Going on to twenty-seven years.

What do you do for your living?—I spin for my living, since my husband died.

What was his business?—He used to sell fish.

Do you know Mary Squires?—I do; I saw her at my door.

Look about, and see if you see her.—There she sits (pointing to her): I am sure that is she.

When did you first see her?—It was at my door, January was a twelve-month.

How came you to think it that time, more than any other time?—I am sure of it; it was the 18th of January.

How do you know it?—By carrying home my work; I carried it home two days before, which was the 18th.

Who do you work for?—Mr. Smitheram; I have worked for him many pounds.

How do you know by carrying home that work in particular?—That was the first I carried home in the new-year, which is the reason I remember when it was.

Where did you see Mary Squires on the 18th of January?—She came to my door, and asked me, if I had any china to mend?—I told her, I had not. Then she asked me, if I had any blue and white ware to mend? I said, I had none but what I could mend myself. Then she asked me for some victuals.

Was she alone?—Yes, I saw nobody with her.

Did you give her any victuals?—No, I did not.

Did you see her any time after this?—I saw her twice after; she was four times at my door in all.

Did you see her all the four times?—I saw her three of them; the next time she begged for some victuals, and to light her pipe; I gave her no victuals.

What, the next time?—She asked me the next time to let her light her pipe.

Are you sure this is the same person?—I am sure it is.

How soon was it you saw her after?—This was all in ten or eleven days; I think, the last time I saw her was two days before she was taken up to be brought away.

Did you see her when she was taken up?—No, I did not.

Did you see her in her confinement in Newgate?—I did.

Did you know her then?—I did, and I am sure she is the same woman.

Cross-examined by Mr. Willes.

How many years have you spun for Mr. Smithers?—Two years and a half.

How often in a year did you use to carry home your work?—I don't know; I spin for another man; sometimes him, and sometimes the other.

Do you always set it down?—No, but they set us down.

Is Mr. Smithers here?—I do not know.

Did you ever see his book?—Yes, I have: that day I am sure to be the 16th of January; and he set it down.

What day of the week do you carry home your work?—I don't know that; sometimes one day, and sometimes another.

Can you tell what day of the week this 16th of January was?—I can't say whether it was Tuesday or Wednesday, but it was a snowy day.

Have you ever heard there were gypsies at mother Wells's?—I have several times.

What sort of a dress was she in?—She had a light-coloured cloak on, and a red one over that, and an old black hat, and a thing pinned close to her face, (it was a clout or handkerchief) and an old brown gown.

Mr. Nares. Had you heard of gypsies being at Enfield, before she came to your house?—A. Johnson. I had; I had been asked if she had been at my house, and told my fortune.

Grace Kirby sworn.

Grace Kirby. I live at Enfield.

Mr. Nares. How long have you lived there?

—Kirby. I have lived a twelvemonth last Christmas, or a little after, about a week or a fortnight.

Do you know Mary Squires?—Yes, Sir.

Look about the Court, and see if you see her.—That is she, Sir (pointing to her.)

Do you remember seeing her there?—Yes, she came to my door about a fortnight before she was taken up at Mrs. Wells's.

Are you sure it is so long as a fortnight?—Thereabouts; it may be a day over or under: I believe it was no more than that either way.

What did she come to your door for?—She asked me if I sold potatoes? I told her, I had none, nor did not know where they were sold.

Did you take much notice of her?—I did; so much, that I knew her again when I saw her.

Where did you see her again?—The next time I saw her was in Newgate.

Did you know her then?—Then I was certain sure she was the same person.

And are you certain sure this is the same person here?—I am, Sir.

What reason have you to think it was about the time you have mentioned?—Because I had been but a very little time in my house: I had lived in the same parish about half a mile further.

What time did you come to that house?—It was some time after Christmas,

Was there any body with her?—No, there was none.

How was she dressed?—I don't know that.

Cross-examined by Mr. Davy.

How soon after your coming to that house did you see her?—I can't say to any time.

How soon after Christmas did you come to live there?—I cannot say; it might be a week, or it might be a fortnight.

Why do you believe this?—Because I have recollected my memory.

How soon after did you recollect your memory?—The next day.

Were you desired so to do?—I was considering with myself when it was that I saw that woman.

When did you consider?—I don't know: I did consider it.

How far do you live from Mrs. Wells's house?—About half a mile.

Are you sure, it was eight days before they were taken up, that you saw her?—I cannot tell.

By Mr. Nares.

Tell as near as you can.—As nigh as I can guess, it was a fortnight, within a day over or under.

How many days is a fortnight?—There are fourteen.

Do you believe what you have said, that about a fortnight was the time?—Yes, Sir.

Wise Basset sworn.

Mr. Nares. What is your husband's name?—Basset. It is John: we live in Green-street at Enfield, and have lived there twenty-one years.

Do you know Mary Squires?—I do; I have seen her twice.

Look about the Court, and see if you see her.—That is she.

When did you see her before?—She came to my house, and asked me to let her light a pipe, and I gave her a breakfast.

When was this?—It was either the 21st or 23d of January was twelvemonth.

What do you recollect the day by?—Because I killed a hog on the Thursday before New Christmas, and that day a young woman that lived with me went to service; and that day month I saw the gypsy.

What do you compute your time from?—I take the account day by day from the killing the hog.

What day of the week do you reckon it was?—It was of a Monday, to be sure; that I am very certain of.

Had you any conversation with Mary Squires?—She came and opened the door, then came in, and asked me to let her light her pipe: I gave her a penny for telling me my fortune.

Did she offer to tell you your fortune?—She began to tell me.

Recorder. Are you a married woman?—Basset. I am; it was a little foolishness that belongs to woman-kind.

By Mr. Nares.

Then she offered to tell you; you did not offer it?—I did not: she said, if I would cross her hand with a penny, she would tell me my fortune.

Upon my word, that is cheaper than she has done to any body else as we have heard of: did she tell you your fortune?—I had a little of her nonsense.

Was it good or bad?—I don't know; I cannot say for that.

How long was she about telling your fortune, and lighting her pipe?—I can't tell the exact time: I gave her some tea, and let her sit down and warm herself.

Did you take so much notice of her as to know her again?—I did; and this is the woman.

Did you see her after this?—I saw her in Newgate, and told her the same that I do now; and she said, What signifies that, did I wrong you of any thing?

Did you say to her, what time you saw her at your house?—Yes, I did; and she said it was not the right time: but I said it was, and I stood to that time.

Are you sure it was that day?—It was that day indeed.

Cross-examined by Mr. Willes.

Is that the only reason you have to remember it, because you killed a hog on the day you mention?—That is the only reason.

In what manner was you introduced into her presence in Newgate, and how was she sitting?—She was sitting smoking her pipe by the fire-side.

Recorder. Was it a month before you saw her at your house, that you killed a hog, or not?—Basset. I killed my hog on the Thursday before New Christmas, and that day my servant went to her place; and I saw the gypsy, a month after I killed my hog, at my house.

Mr. Willes. Was she alone, or in company, when you saw her in Newgate?—Basset. There were a great many people with her, her two daughters, and several people that were carried up to see if they knew her or not.

Recorder. Are you sure she told you it was not right, when you mentioned the day?—Basset. I am.

James Pratt sworn.

Pratt. I live at Cheshunt, about two miles from Enfield; but I did live at Enfield.

Mr. Nares. What are you?—Pratt. I am a day labouring man.

Have you seen Mary Squires?—Yes, Sir.

Look about, and see if you can see her.—Yes, that is she (pointing to her).

When was the first time you saw her?—The first time I saw her was in William Smith's cow-house, on a Thursday. When she came there, she asked me leave to lie there (I work there as a day-man); I told her to go to the

house, and ask leave there; she went up to the door.

Did you hear her ask leave?—No, I did not hear her, but she lay there.

How long did she continue there?—Three days; she went away on the Sunday.

Did you see her in the time?—I did several times.

What day of the month did she come there?—To the best of my remembrance (I cannot be positive no longer than as to the house I lived in; I went out of it three days before New Christmas), it was before I went out of the house to go to Cheshunt, where I now live; but I cannot recollect any day of the month.

Are you sure it was before you went to your new house?—I am sensible it was.

Had you ever any conversation with her?—I can't say but I had.

Were there any other persons with her?—There were a man and two woman-kind, one a young girl-like, and the other may be thirty, and better.

Recorder. Were there any children?—Pratt. I can't tell.

By Mr. Nares.

Can you tell the time of the day you had this conversation?—It was on a Friday, some time of the day, but can't tell the hour: she complained that she lost a horse, a little pony, and asked me, whether I saw it? but I had not seen him.

Did she any otherwise describe the horse but by a little one?—Yes, she did; but I have forgot: I remember she said, he had a clog on, and that her name was on the clog.

Did she tell you, upon your oath, what her name was?—Yes, she did; but I did not take much notice of it.

Should you know it when you hear it?—I believe I should; I think she said her name was Mary Squires, and that that name was on the clog.

Had you any other conversation with her?—Yes; on the same day she told me it was her belief I was the man that had the horse.

Why did she say so?—Because I worked in the yard, and the horse was missing, and I happened to speak a word to the man that was with her: I asked him, what he would give me to help him to his horse again? so he went and told her directly.

Do you think you should know that man?—I can't be positive.

Look about, and see if you see any body like him.

(He looks round; and as his eye passed over George Squires backwards and forwards, George held down his head.)

A Jurymen. I see George hold his face down, as the witness looks towards him.

Mr. Davy. George, when witnesses are ordered to look for you, hold up your head; I myself saw you this time; it does not look well.

Pratt. It is hard saying, I will not swear in that.

Mr. Nares. Had you any other talk with her?—*Pratt.* Yes, Sir. After she told me about having the horse, she said, she had got a very good friend not far off, and she would go to him; and if she wanted a guinea or two, she could have it; and she would go to the cunning man, and would have the horse, if he was above ground.

How came she to talk of going to a cunning man, when she would be looked upon to be a cunning woman herself?—I don't know that.

Did she ever undertake to tell you your fortune?—No, she did not.

Upon your oath, is this the woman you saw at that time?—Upon my oath, that is the woman, that is the woman.

Did you ever see her after that, before you saw her in Newgate?—No. When I saw her in Newgate, I was turned up stairs; the door was opened; there were several people at the door; they bade me look in; I knew her immediately, the very same moment; I said, That is the woman that I came after.

Cross-examined by *Mr. Davy.*

Was there any other woman in Newgate but her?—Not that I saw: I said, That is the woman, and so it was, certainly.

Were there other people at Enfield with her, when you saw her there?—There were.

Were any of them like her in the face?—No, none of them.

Something like her?—No.

Were you ever in a court of justice before?—No.

Were you ever upon your oath before?—No, Sir.

Will you venture to say, as you are upon your oath, that this is the woman, and no other, and you are not mistaken?—Upon my oath, this is the woman, I am positive in my conscience, and I am sure that was no other woman; this is the woman I saw at that blessed time.

Did you ever see a woman like her in your life?—No, never in my days.

How came she to tell you her name was upon the clog?—Because she had lost the horse; and she desired me, if I should see the horse, or find the clog, to let her know; and told me, her name was Mary Squires, and that it was upon the clog.

Do you know how large the clog was?—No, I never saw it.

Do you remember she told you the name was Mary Squires?—I am certain of it.

Was it not Sarah?—I am sure it was Mary Squires.

Lydia Farroway sworn.

Mr. Nares. Where do you live?—*L. Farroway.* I live at Eufield-Wash, with Mr. Howard.

How long have you lived there?—I came there on the 1st of August was twelve-month, and lived with them a year and a quarter, and upwards.

Were you there on Christmas was twelve-month?—I was.

Tell us, as near as you can, when you first saw the gypsey.—I saw her more than once or twice.

Tell us the first time.—I will, as near as I can; but I must begin with another time, not the first: as I was going with my young master to school about the latter part of January was twelve-month, I saw her at a gentleman's house, talking to the maid; to say to the day of the month, I cannot.

Do you know when the gypsey-woman was taken up?—That was on a Thursday, to the best of my remembrance; and the Tuesday was se'nnight before I saw her.

Name the gentleman's name that belongs to that house.—It was Mr. Mackhouse's a Quaker, just on this side the Bell.

Did you see her before that?—I saw her once or twice before; but how long before, I can't say.

Are you positive you saw her once or twice before?—Upon my oath, I am positive I saw her once or twice before.

Look about the court, and tell me if you see her any where here.—That is the woman, I am positive to her (pointing to her).

Did you see her after that?—I did; I saw her get into the cart when she was carried away, and I saw her after that in Newgate.

Did you think that was the same woman, when you saw her get into the cart?—I did; she was the first woman that got into the cart.

Are you sure the time you mention you saw her talking to a maid-servant, was in January?—It was, I am sure.

Are you sure that woman is the same which you saw in the cart?—I am sure of it.

Was that the same person which you saw in Newgate?—It was; and this is the woman sitting here.

How came you to fix upon the Tuesday was se'nnight before she was taken up?—Because I had been making some pyes against my young master's birth-day, which was the 29th of January; and we made them before the time, that they might be cold, to be heated again.

Did they come to your master's pump at all?—One of the daughters did; I saw her there two or three times.

About what time?—About the time I saw her mother.

Are you the person that went and told your mistress, that the gypsey-girl was in the yard?—I am, Sir; and my mistress went to the parlour window to see her.

What day of the month was this?—I can't tell that, nor I can't tell the week.

Cross-examined by *Mr. Willes.*

Are you sure your young master's birth-day is on the 29th of January?—I am sure it is.

What pyes were you making?—Mince-pies. Why did you make them so long before-hand?—I made them so long before-hand, that

we might warm them by the fire on his birth-day.

Mr. Nares. Had you ever seen Mary Squires in any body's shop at any time?—*L. Farroway*. I can't say I had.

By Mr. Willes.

When was the first time you saw her?—To say the first time, I can't; but the time I can be positive of, was the 23d of January.

Is the birth-day the 29th by Old-Style or New?—It was on a Monday, and by the New-Style.

Did you see the gypsey first, or her daughter come for water first?—To the best of my memory, I saw the gypsey first.

Which of her daughters was it that came to the pump?—I can't say which.

Mr. Nares. You say you saw the gypsey before you saw the daughter, but can't fix upon that time?—*L. Farroway*. No, I can't indeed.

Margaret Richardson sworn.

Mr. Nares. Where do you live?—*M. Richardson*. I live in Green-street now, but did live in Turkey street, Enfield.

How long have you lived in Green-street?—Ever since last Michaelmas; I lived in the other thirteen years.

Do you know Mary Squires?—I know this woman (pointing to Mary Squires).

Where did you see her?—I saw her at Mrs. Waterhouse's in Turkey-street, in the new Christmas week, as near as I can guess.

What is her business?—She sells butter, cheese, flour, and all manner of things for poor folks.

What did she go to buy there?—I can't say nothing to what she came to buy; she was smoking a pipe, when I went in there.

Are you sure this is the same woman?—I am sensible and certain sure this is the same woman.

Were you long in that shop?—I sat down there, I believe, a quarter of an hour; and I took particular notice of her, because I never saw the like before, and I was surprized.

Were you in the same room with her?—The shop and house is all one room; the fire-place is there; I left her there when I went away.

Did you ever see her at any other time?—I saw her come by my door in Turkey-street on Old Christmas day: my dog had like to have fell upon her; but my husband was in the yard and he prevented him.

Are you sure that was the same woman you saw in the shop?—I am positive it was.

Are you sure this was on Old Christmas day?—I am.

Did your husband work on Old Christmas day?—No; as he played the New Christmas day, he was resolved to make holiday on that; so he was at home.

Did you ever see her after?—Not till she was out of Wells's house, and put into the cart; then I shook hands with mother Wells, and told her she had done for herself: my husband

was the man that drove the cart: the gypsey was the first that got into it, and Wells the next, and Virtue Hall the next. I saw them all go off.

Did you ever see her in custody?—No, I did not.

Cross-examined by Mr. Willes.

So you told mother Wells she had done for herself; what was her reply?—She said, she should return again.

Then she and you are very good friends?—No.

How came you to insult her?—I never had a quarrel with her, upon my oath.

Then how came you to say so?—Because she had been in a great many broils and troubles, and nobody thought she would have got out of them.

Do you know which is Old Christmas-day, and which is New Christmas day?—You must tell me, my memory cannot be so good.

Which comes first?—Why, the New Christmas day.

How many days difference?—Some call it nine, but there may be more.

How old are you, good woman?—I don't know justly.

What day of the week was Old Christmas day?—It was of a Tuesday or Wednesday, I can't remember which.

Is Christmas day Holy Thursday or Good Friday?—I can't resolve no such thing; I am no scholar; I can't pretend to know such things.

What month is Christmas day in?—I can't say that neither, because you put me to a stop.

Is it the 25th of February?—I don't know justly, indeed.

Mr. Nares. You put the poor old woman in a hurry.

Recorder. Don't be affrighted: can you tell what month Christmas is in?—*Richardson*. I cannot.

Recorder. In what season of the year is it?—*Richardson*. To be sure I can tell that; it is in winter.

Recorder. Don't be terrified; you are come here to tell the whole truth, and nothing but the truth, and not to tell a particular story, but to answer all such questions that the Court shall think proper to ask you.

Mr. Willes. Pray, why do you keep Christmas holidays?—[No answer.]

George Clements sworn.

Mr. Nares. Where do you live?—*George Clements*. I live at Enfield highway with Mr. Hamilton; I entered yesterday after I went home.

Did you live with Mr. Star at any time?—Yes, Sir; I came away last Michaelmas; he lives down the Marsh-lane by Mrs. Wells's.

How long did you live with him?—About a year and a quarter.

Do you know Mary Squires?—I do; that is the woman that sits there in a red cloak.

Are you very sure of it?—I am sure.
Do you know Mrs. Wells?—I do; my master lives but about a hundred yards from her house.

Do you remember the time she was taken up?—I do.

How long had you seen Mary Squires, before Mrs. Wells was taken up?—I had seen her about a fortnight before that.

Where did you see her?—She came into my master's house, and wanted to tell my mistress her fortune.

Did she come in of her own accord?—She opened the door, and came in, as I was sitting at dinner. My mistress would not let her tell her fortune; she was afraid of her, and gave her a bit of black pudding to get rid of her. She asked my mistress to let her have a pound of pickled pork.

Did she want any thing else?—I don't remember any thing else.

How long did she stay in the kitchen?—I can't tell how long.

Did you see her after this?—I did, about two or three days after, as she was going up into the walk to Turkey-street; it was a very cold day.

Was any body with her?—No, nobody.

What do you call that walk?—There is no name to it, as I know of. I said to her, It is a very cold day. I remembered that was the woman I had seen at my mistress's.

Did you ever see her afterwards?—No, only when I saw her in Newgate, and then she knew me.

How do you know that?—I asked her whether she knew me? She said, she did.

Did you ask her that of your own accord?—I did; and she said to me, I asked your mistress to let me have a pound of pickled pork, and what harm did I do you if I was there?

Were you before the grand jury?—No, I was not.

Cross-examined by Mr. Willcs.

Why do you know it was a fortnight before they were taken up?—She came to our house on a Thursday: my master was gone to Hertford to fetch a load of pease, and he carried them to London on the Friday.

What day of the month?—I can't tell the day of the month. This Thursday fortnight before she was taken up, then I was spreading dung in the marsh.

Do you ever slide on the ice?—No, I never could slide in my life.

Have you seen boys slide on the ice?—I have.

Do you remember a pond near Mrs. Wells's house?—Yes, I used to water my horses there.

Morning and night?—Yes.

Do you know the window that they suppose Canning made her escape from?—I do.

Could you, by looking out of that window, see that pond?—I could, very plainly.

How many yards might it be from the window?—It may be about eight yards.

Do you recollect whether there was frosty weather that January?—Yes, there was.

Was that pond froze over then? It was; we were forced to break the ice for the horses to drink.

Have you ever seen the boys slide on the ice on that pond?—I have.

How many have you seen there sliding together?—Two or three at a time.

What day of the year is new Christmas-day of?—I can't say that.

What month is it in?—December.

The beginning or latter end?—The 25th.

What day is old Christmas-day of?—It is eleven days after.

Mr. Nares. Are you sure it was on the Thursday fortnight before Wells was taken up, that you saw Mary Squires?—Clements. I am sure it was; and that same day my master went to Hertford.

Mr. Willcs. Do you know William Headland?—Clements. I do.

Is he a sober youth, or not?—I know no harm of the boy.

Whether, amongst the boys of the same age, is his character a good or bad one? If he has a good character, upon your oath say so; if not, upon your oath say it.—I am sure I never heard any body give him a bad character.

Hannah Fensham sworn.

Mr. Williams. Where do you live?—H. Fensham. I live at Enfield.

Are you a married woman?—I am; my husband's name is John Fensham; he is a gardener.

How long have you lived at Enfield?—Fifteen or sixteen years.

Look at that old woman, take a full view of her.—I know her; I have seen her before.

When?—On the 16th of January 1753, I mean after new Christmas-day, I saw her in Trotts-walk, on the side of madam Crow's garden, in Enfield, pretty near the highway.

What was she doing?—I met her in the walk.

What time of the day?—In the fore part of the day.

What day of the week?—I can't recollect what day of the week.

Have you ever seen her since the 16th?—I have several times seen her pass and repass.

What was her business?—I don't know that, except it was going to the chandler's shop.

Do you know the time she was taken up?—I was not there then.

Did you see her often between the 16th of January and 1st of February?—I did divers times.

Did you see her after she was taken up?—I did in Newgate, and I recollected her then.

Look at her again; are you certain this is the same person?—Yes, Sir, I am certain of that.

What may be your reason for recollecting

the 16th of January?—There was a snow on the 15th at night, and the 16th it was wet; and walking along, I had like to have fell, as my pattens were on: she stopped and looked at me, and I at her: when I came home, my neighbours said, This snow is come in the right season, yesterday was the 15th; then I said, This must be the 16th; and not only that, but I went to the almanack, and looked that very day.

Did she speak to you?—No, nor I to her; but her person is so particular, that I can swear she is the same.

What did she appear to be?—A gypsey, which I had heard of before: I was asked, if I had seen the gypsey, because she went up and down telling fortunes.

Was you asked before or after this?—It was two or three days after, and then I knew her.

Cross-examined.

Mr. Willes. What is the reason you know it to be the 16th?—*Fensham*. Because it was a great snow on the 15th at night.

Recorder. Did you see any company with her at any time?—*Fensham*. No, I did not.

By Mr. Willes.

Did you look directly to the almanack?—No, Sir, not till the 16th at night.

Are you very well skilled in almanacks?—Why not? I can read and write a little.

Do you know what day of the week it is by the almanack?—I can, I think so; my head is good enough for that.

Look in this almanack, and tell me what day of the week it is?—(She takes it in her hand, which was a common sheet almanack, folded up into a book.) I can't see by this, it is so small.

Look at it again, and take your time.—I cannot see without my spectacles (she puts them on;) you shall not fool me so.

Tell me by this the day of the week for the 14th of December.—This is not such an almanack as I look in; I look in a sheet almanack; I cannot tell by this.

Mr. Willes. Give it me again, if you cannot tell. All the reason you have to fix it is, that the snow fell on that day upon which you refer to your almanack; and now you have shewn your skill in almanacks.

By Mr. Williams.

How long was it after New Christmas? Was it a fortnight, or three weeks, or a month?—It was not much above a fortnight after.

Do you know which is Sunday in the almanack? (She takes it again.)

Look in the month of January. (She tells down from the 1st to the 7th day, and said that was Sunday, which happened to be Tuesday.)

Elizabeth Sherrard sworn.

Mr. Williams. Where do you live?—*Sherrard*. At Ponder's-end; that is about a mile

VOL. XIX.

and half from Enfield. I keep a room, and pay my rent myself.

Do you remember seeing the gypsey about Enfield?—I do; I saw her three days running before New Christmas, Thursday, Friday, and Saturday.

Look about, and see if you see her here. (She could not see her; she went down and looked about, and up again twice; the last time she pointed to her.)—Why, this is the woman.

What Thursday, Friday, and Saturday do you mean?—I mean immediately before New Christmas.

Where did you see her?—In mother Wells's house. I went there, and went into her parlour, and when I came out again, I saw the gypsey stand at the kitchen door. I turned back again, and asked Mrs. Wells, who she had got in her house? She said, Lodgers. On the Friday I went into the Marsh-lane, and saw her standing at the window; and on Saturday I went down to Cheshunt, and she was standing then at the door.

How did you come to go to Mrs. Wells's?—She asked me to come in, that is, my neighbour Wells did; she wanted to see me, because I had not been well.

Had you any acquaintance with her?—No, nor never went near her house.

Have you ever seen the gypsey since that time, before to-day?—No, Sir, I never saw her but them times, and this time.

Did you see any body there that belonged to her?—There were two young wenches in the parlour, and a young man in the kitchen; but whether they were her son and two daughters, I cannot tell.

Had you any conversation with her?—No, I never changed a word with her; I don't like to have to do with them, I don't like them so well.

Cross-examined by Mr. Davy.

Look at that man (meaning George Squires:) Is that the man?—I did not see his face.

Did you see the two young women's faces?—I did; but whether I know them or not, I don't know; for they have changed their habits, to be sure; that is one of them (pointing to Mary the daughter.)

Lucy, shew your face.—Yes, this is the other; I think I can swear to them.

Do you swear they are the same?—They are very much like them.

You went down twice to look at the old woman; did you see her face the first time?—Yes, I did, but did not mind her till afterwards.

I hope you mind what you say; you know the consequence of perjury: you are before God, and a court of justice; therefore attend to me: Did you see that old woman upon your going down the first time from off the place you now stand?—I did not know her, because she is clean; she is not so nasty and dirty as she was before.

Then the second time you did recollect her: you say she is the same woman?—Yes, I do.

Did you see her face the first time going down?—No, I did not see her face, because I did not take so much notice.

Did not you see her face, or did not you know her face?—I did see her face; but being clean she is quite altered.

The man that swore you said, you were to swear to the whole truth, and nothing but the truth: you have one foot in the grave, and the other out, be careful what you say: Was she cleaner the first time than she was the second?—She is all the same, but I did not take so much notice; and being cleaner, she is altered.

Do you swear to her by her complexion, or features?—By her complexion and features both.

Did you ever see such another woman in your life?—No, I never did.

What day of the month is New Christmas day?—I cannot tell indeed, because I can neither write nor read.

What month is it in?—I cannot tell.

Was it in June, or July?—I cannot tell.

Was it in June?—I cannot tell.

Was it in April?—No, no, it was not in April.

What month then?—It might be in June, for whatever I know: I know that is the woman, to be sure.

Alderman Scott. Was it in winter, or in summer?—*E. Sherrard*. It was in winter.

By Mr. Davy.

Is New Christmas before Old Christmas, or after?—Nay, New Christmas is before Old Christmas, I am sure.

Did you keep New Christmas, where you live? do you go to church?—Yes, I know it by going to church, and every thing.

Did you go to church on Old Christmas day?—Yes.

Recorder. What day of the week was New Christmas day?—*E. Sherrard*. It was on the Tuesday, was it not? it was Monday or Tuesday howsoever.

(By Mr. Davy, continued.)

Do you go to church every Sunday?—I very seldom miss, when it is fair weather.

Did you go to church the Sunday before New Christmas day?—I did on Christmas day, and the Sunday before.

How many days were there between?—You can make it but two days, be it how it will.

Are you sure?—It was about three days; it was no more, nor could be any more.

How came you to know it was before New Christmas?—Why, I'll tell you how I came to know: Mrs. Wells bid me come, and said she would give me something for a Christmas-box: when I came there, she asked me to come in; I did, but did not stay but a very little time: when I came to the parlour door, I saw the old gentlewoman standing at the kitchen door.

What did she give you for a Christmas-box?—She did not give me no great matter.

There is no harm in saying what it was.—It was a small matter; I had but a penny.

Then she gave you a penny for your Christmas-box?—Yes, Sir.

Had you ever a Christmas box of her before?—No.

Did she give it you before or after Christmas day?—It was three days before.

Did any body else give you a Christmas-box?—Yes, Sir.

Had you ever a farthing given you before Christmas-day?—Yes, Sir.

From whom? tell me that.—At Mr. Picket's and all the people that are able; they always give me something at Christmas, and to all their poor neighbours.

What business are you?—I work for my living, as other people do.

Is it usual to give before Christmas or after?—We always go before Christmas.

Do all give before Christmas?—No, some give after Christmas.

Who are they?—The gentlemen at Bushy-hill do.

Where do the people live that give before Christmas?—All the people at Enfield do.

By Mr. Williams.

Then you have Christmas-boxes given you before Christmas? Then, I believe, you know pretty well when Christmas comes.—Yes, Sir.

What, you are a poor woman? Those people give it you before Christmas, in order to spend at Christmas?—Yes, Sir; only the Quakers, at Bushy-hill, give it after Christmas.

When Christmas comes, you know it, don't you?—Yes, I do, Sir.

By Mr. Recorder.

Do you know New Year's day?—I do.

When does that happen?—That is the week after Christmas-day.

How many days are there after New Christmas day to New-year's day?—A week.

Were you ever in the workshop at Mrs. Wells's?—No, never in my life; I never heard of it before.

Mr. Williams. Did you never hear there was such a place as the workshop at Mrs. Wells's?—*E. Sherrard*. No, indeed I did not.

Mr. Nares. On Saturday night, Mr. Morton received a letter in court, giving an account that there was one Mrs. Edwards, who could give some light into this affair: upon that he desired she might be subpoenaed. She was not in our original briefs, and, I declare, I have stuck to that very strictly, not to admit any witnesses that are not in the brief. We are totally in the judgment of the Court, whether she shall be called or not. The letter is anonymous.

Mr. Davy. The gentlemen have been so candid as to shew me this letter: I have not, to this moment, attempted to oppose any thing,

or the asking any questions. What has been done in this case, I have not done it. I have been in the search of truth: but after your lordship has tied us down very strictly, without any possibility of release, I hope the rule extends general without exception. I submit it as an objection, with regard to the general rule of practice; but, I imagine, the Court will not think it proper, considering what has been done.

Mr. Nares. Mr. Davy mentions he has not objected to any evidence; I don't know any evidence that has been called he could object to, on our side. We have not objected, or stopped them, in any instance: but here is a poor girl on her trial: I would submit it, how far the Court thinks this agreement binds.

Mr. Baron Legge. I will tell you my opinion as to this matter: I thought it a right proposal, when made, on both sides, that you should go on, according to your briefs, stated at that time, in regard to the trial; and as it has come to an unusual length, there was an absolute necessity for such an agreement, and to depart from it is an unprecedented thing; therefore we must ward against all the mischiefs that can arise from it; the worst that can arise is a growing evidence upon an anonymous letter; there is no foundation on either side for it, and we are not to admit of it.

Mr. Just. Clive. I am entirely of the same opinion with my brother: upon this evidence it will be left with the jury, upon which side the evidence is most conclusive.

Mr. Nares. It was my duty to mention it, as Mr. Morton desired she might be subpoenaed; therefore I hope the Court will excuse me. We will call Mr. Salt to prove the examination of Elizabeth Canning before justice Fielding.

Mr. Davy. Mr. Salt cannot explain away a written evidence taken before a magistrate: I object to his evidence.

Mr. Nares. Then we will call to the confession of mother Wells.

Mr. Davy. My lord, I object to that: she is a very proper evidence herself, she has been branded in the hand; if they will produce her, she is within a few yards of the court.

Mr. Nares. This girl is indicted for what she gave in evidence against Susannah Wells and Mary Squires; she is now called upon for a perjury in swearing upon that particular trial. Now these two persons were convicted; therefore, I take it for granted, we are at liberty to give in a circumstance to prove what she said, in evidence on the indictment. All that Wells had said at that time was evidence against Wells, and all that Squires had said was evidence against herself. We are now come to establish her evidence, standing at the time she was examined; and, if we can prove from their own declarations that Canning and Squires were there, we have a proper right to call in such evidence, in order to corroborate that girl's testimony; for it is that testimony that she gave upon the trial that is to be admitted.

Mr. Davy. I will beg leave, in order to give

light to this objection; to put the case more familiarly: suppose a person had sworn on a particular day that I was at York, and that I said I was at York; now my saying I was at York, is no reason at all for their swearing I was there. I can only give them authority to say, I said I was at York; but I am the proper person to be examined to the real fact. Mrs. Wells is here to swear whether she was or was not in her house, and she is a competent witness to that fact.

Mr. Just. Clive. This is an indictment for perjury, for a testimony she gave at a trial betwixt the crown and the two prisoners Squires and Wells; and in strictness the testimony, to wit, Susannah Wells's, would not in the course of the trial have affected Squires, or Squires's have affected Susannah Wells; but this is an indictment for perjury, in the testimony that this girl Canning gave of them both; therefore, I think, either are proper witnesses of what she said.

Mr. Baron Legge. To be sure, what they said is evidence against the person that did say it: when you have made use of those which were not produced in evidence at the time, that could not have been evidence against the necessary and not the principal; how will you produce that?

Mr. Nares. In the first place, their not being called as witnesses can be no objection in not calling them now, because it has been done several times: I do not call every witness in my brief; if I have fifty in my brief, and fifty swear to the fact, I would call them: when that person which is a witness is called upon, should not she have the benefit of every circumstance that will confirm the testimony? Or, will the Court exclude her, because the persons concerned in the prosecution did not think proper to call the other witnesses that they might have called?

Mr. Baron Legge. The indictment was laid jointly against Mary Squires and Susannah Wells; was it not, Mr. Ford?

Mr. Ford, (Clerk of the Arraignment.) They were both tried together, and the indictment on the same piece of parchment.

Mr. Davy. This only sets forth the indictment of Mary Squires, not a word of Susannah Wells; she is not mentioned in it.

Mr. Baron Legge. Would you produce that which originally had been evidence against Squires?

Mr. Nares. The same witnesses were examined on the whole trial all through, and they were found both guilty at the same time, and the jury were charged with both at the same time; the assignment of the perjury is, that she was in Susannah Wells's house, and robbed in her house.

Mr. Baron Legge. Then the evidence of Susannah Wells is evidence to that account.

Mr. Just. Clive. This is an indictment against principal and accessory, whereby they are complicated in the same indictment: it is against Squires as principal, and Wells as ac-

cessary after the fact: so far is extremely clear, that she never could have been convicted as accessory, unless there had been a robbery; and she knowing of that robbery, therefore she was interested at this trial, as it was one and the same indictment, and their case submitted to the consideration of the same jury. I think, that if Susannah Wells has given in any testimony that there was a robbery, considering the nature of the trial, as it comes before the jury, it is the same as if Squires had declared it herself.

John Ward sworn.

J. Ward. I have known Susannah Wells, I believe, twenty years.

Mr. Williams. When did you see her lately? —*J. Ward.* I seeing in a news-paper an account of her being taken up, and put into Clerkenwell Bridewell, and living in Southwark, the first time I came cross the water, I thought I would go and see her. (I had had a notion that she was dead, for I had not seen her for above twelve years.) I went to see her in Bridewell. The first word she said to me was, Who thought of seeing you here? My reply was, By seeing your name in the news-papers.

How long was this after she was taken up? —It was just after she was taken up; I cannot say to the day of the month; it was before the trial of Squires and her. I asked her, how she came to keep the girl there a fortnight?

What did you mean by 'there'?—I understood by the paper, the girl was kept at her house.

What was her answer?—She said, she was there twenty-eight days. I asked her, what room she kept her in? She said, You know the room very well.

Ald. Dickinson. Had you been acquainted with her, and did you know the rooms in her house?—*J. Ward.* I had been acquainted there twelve or thirteen years ago, (but not since I have been in business for myself) and have been all over the house.

Mr. Williams. Did you understand what room she meant?—*J. Ward.* No, Sir.

Did you see her after this?—I did, on the Sunday following; then I met her in the Bridewell-yard. We never drank together the first or second time. I asked her, how she thought to get off this affair? She said, she must take her trial.

Mr. Baron Legge. How came you to go a second time?—*J. Ward.* Because my wife had a mind to see her: we both lived at Waltham-Abbey before I married. Mr. Jones went with me the first time.

Mr. Williams. Where do you live now?—*J. Ward.* I live in Maid-lane, St. Mary Overy's parish, Surrey. I am a breeches-maker.

Are you a house-keeper?—Yes, Sir; I have lived there near the spot thirteen years, and have carried on business fourteen years.

Mr. Baron Legge. So you asked her, how she kept the girl a fortnight there, without

knowing in what room?—*J. Ward.* Yes, my lord.

Did she form her answer out of the news-paper?—Not as I know of.

Cross-examined by *Mr. Davy.*

What business carried you there?—By seeing her name in the paper, I went to see if it was the same woman, out of curiosity, not having seen her above twelve years.

How far did you live from Enfield-Wash? —I lived at Waltham-Abbey.

Had you had a great desire to know whether she had been dead or alive, you might have gone to Enfield-Wash, and have known that. —I wish I had never gone to have seen her.

Had you any other business there?—No, none at all; only I had some at Saffron-hill, with a man that works with me; and I had also some business in Shoe-lane, and Mr. Jones went with me.

What business had he there?—He went with me as a friend and acquaintance; he had never seen her in his life before.

Did not you ask her, what she was there for?—No, I did not.

Did not you ask her more questions than that you just mentioned?—No.

Do not you, upon your oath, believe she meant to let you know, she was charged for keeping the girl in her house twenty-eight days?—No, I did not understand her so.

Did not she tell you she was innocent of the charge?—No, Sir.

Did not she, before the trial, say she was innocent of it?—No, Sir; what I told you is all truth.

How long did you take the confinement to be, when you read the news-paper?—I took it to be a fortnight.

What are the words you made use of?—I said, How came you to keep the girl there a fortnight?

Where did you mean?—I meant in her own house; and she said twenty-eight days.

How came you not to give evidence of this when she was tried?—I did not know I should be wanted: the reason I came now was, I was with my friend drinking a tankard of beer, and he threw his skits, and said, Mother Wells had been an old procurer of mine; and the people in the house heard this affair talked over, and they went and brought some people from Aldermanbury, who came to me, to whom I related it again.

Mr. Davy. I insist upon Mrs. Wells's being produced to know if he knows her.

Mr. Nares. That you never intend.

Mr. Baron Legge. You say you saw it in the news-paper, and you asked her, how she came to keep the girl a fortnight? She said, Why, she was there twenty-eight days. Suppose it was to be said, I saw in the news-papers you sat five days in the Old Bailey: the answer would be, We sat ten, if the news-papers were ten.

Mr. Nares. Did you ask this with any ap-

prehension of becoming a witness against her?
—*Ward*. No, not in the least.

By *Mr. Davy*.

Did you ever make affidavit of this before?
—It was just when they were going to file a bill against the Abbotsbury men.

How long is it ago?—Before the trial of the Abbotsbury men, the gentlemen asked me to make it, which I did before sir Robert Ladbroke.

Were you examined then before the grand jury?—I was.

Richard Jones sworn.

Mr. Nares. Did you go with John Ward to Clerkenwell Bridewell?—Yes, Sir, he asked me to go with him to see mother Wells, and said, he knew her in the country.

When did you go with him?—I think it was about the beginning of February was twelve-month.

What conversation passed between Ward and mother Wells there?—He asked her, how she came to be so vile as to shut up the girl a fortnight? A fortnight, said she, she was there eight-and-twenty days.

What did he say to her upon that?—I cannot tell.

Did he ask her any thing more?—No, no more, as I know of.

Cross-examined by *Mr. Davy*.

Was any thing said about a news-paper?—No, he told me, he had read it in a news-paper of mother Wells's being in Bridewell.

How came you to go with him?—I went with him to keep him company.

Did he say any thing to her about seeing it before in the news-paper?—Not as I know of.

Not a word?—No, not as I know of.

Did not she say she was innocent?—No, nothing at all about it.

Did not she say she had never seen the girl in her life?—No, she did not say, she had, or had not.

By *Mr. Nares*.

Where do you live?—I live in Shoe-lane; I am a brass-founder; I have a wife and family there.

How long have you lived there?—About ten years.

Are you a house-keeper?—I keep a house of 20*l.* per year.

Mr. Nares. I have in my brief some witnesses of credit and character that were near the gypsy when she was tried, and heard some confessions which she made at that time. How far your lordship thinks these witnesses are proper, I leave to your lordship.

Mr. Davy. I waive that, I have no objection to that.

Mr. Baron Legge. Whether any thing said in Court is any evidence, unless said to the Court. There is here a manifest difference be-

tween what is said in Court, and to the Court; for what is not said to the Court, is the same as said any where else.

Mr. Nares. It is no part of the evidence given, but observations she made upon the evidence given against her.

Mr. Just. Clive. That is giving evidence of that which is no evidence.

Mr. Nares. We are now going, my lord, to impeach the credit of some of the witnesses: we begin with Judith Natus.

Nathaniel Crumphorne sworn.

N. Crumphorne. I live at Waltham-Cross in Hertfordshire; I have been a house-keeper there above seven years.

Mr. Williams. What is your business?—*Crumphorne*. I am a cordwainer.

Do you know Judith Natus?—I do, she is wife to Fortune Natus; they live at Waltham-Cross.

Did you know them when they lived at Enfield-Wash?—No, I did not.

When did you see Judith Natus?—I saw her at my house on the 21st of April last. She came to know if one Thomas Pain wanted a person to pick up stones. I said to her, Mrs. Natus, how can you have the conscience, knowing this innocent creature Betty Canning was at Mrs. Wells's house, that you should go and be an evidence against her? The answer she made me was, Indeed, Mr. Crumphorne, I cannot say but she really was there, when we lodged there.

Did she come to your house accidentally?—She came to ask if Mr. Pain wanted a person to pick up stones.

Who was by at the time?—My neighbour and my wife were.

Cross-examined by *Mr. Davy*.

Then they did lodge at Wells's, did they?—She said so.

When did you understand by her that she and her husband lodged there?—She told me so on the 21st of April; but I cannot tell when they lodged there.

Did she tell you they all three lodged in one room?—I can say nothing at all about that.

There is the little word 'but,' are you sure that was mentioned? I will read it without that word—'Mr. Crumphorne, I cannot say she really was there, when we lodged there.'—She said the word 'but.'

Are you sure she said that word?—She said it indeed.

What did you understand by it?—What I understood by it was, that she really was there, when she lodged there.

Mr. Baron Legge. When was it you had this conversation?—*N. Crumphorne*. It was on the 21st of April last.

Mr. Nares. Then what you charged her with was, how could she in her conscience swear so, knowing the innocency of Canning?

--*N. Crumphorne*. Yes, and the words she said were, 'Indeed, Mr. Crumphorne, I cannot say

but she really was there, when we lodged there.'

Mr. Baron Legge. How many days before this trial began was it that she said so?—*N. Crumphorne*. It was a fortnight ago yesterday.

Elizabeth Crumphorne sworn.

E. Crumphorne. Nathaniel Crumphorne is my husband. Judith Natus came to our house on the 21st of April last.

Mr. Nares. Did you send for her?—*E. Crumphorne*. No, I did not, nor I did not want to see her. She came to ask for a person about picking up stones. My husband said to her, How could you be so cruel, knowing Elizabeth Canning was confined when you was there, to go to swear as you did? Her answer was, Indeed, Mr. Crumphorne, really she was there, when we lodged there.

Tell the words as near as you can.—She said, Indeed, Mr. Crumphorne, she actually was there, when we lodged there.

Did she say she was confined there?—No, Sir.

John Jackson sworn.

Jackson. I have lived at Edmonton fourteen or fifteen years. I saw Fortune Natus lay a wager at the Four Swans at Waltham-Cross, that he was at Wells's house all the time of January 1753, and it was proved he lay at another house one night.

Paul Stevens sworn.

Stevens. I live in New-Prison walk, Clerkenwell; I am a publican, and have lived there between twelve and thirteen years.

Mr. Nares. Do you know Susannah Wells?—*Stevens*. I do; I have seen her in Bridewell, and at her own house.

Do you know Mary Squires?—I do.

See if you see her here.—That is the woman (pointing to her.) I saw her in New Prison, about three or four days after she was taken up and carried there. There was a gentleman or two and I went down to see the people on the common side in the prison. She was sitting by the fire-side in the kitchen, in the master's side. We had a bottle of wine there. She began to speak and resolve some questions. She acknowledged she was at Mrs. Wells's house, but said, For what I am here for, I am innocent of, that is, Cutting off her stays; but to be sure the person was there, I believe. She said, she never was guilty of robbing the girl.

How long did she say she had been there herself?—She said she had been there a fortnight and three days, I think.

What girl do you mean?—I mean Elizabeth Canning.

Cross-examined by Mr. Davy.

Then she said, she did not cut her stays off?—She put her hands up, and said, As God is my Saviour, what I am sent here for, I am innocent of; but she said, she believed the person was there.

Did she say she saw the person there?—No, she did not. She said, she herself was there a fortnight and three days, and the girl was there in the time.

Answer my question, Did she say she ever saw Elizabeth Canning at Wells's in her life?—No, she did not.

Did she make use of the word 'believe'?—She said, she was sure she was there.

Did she acknowledge she was there?—She did; she came into a free way of speaking at last, more than at first.

Did she say she was there not above a fortnight and three days in the whole?—She did not say she was there more.

Mr. Nares. Did she acknowledge she was there a fortnight and three days?—*Stevens*. She did.

By Mr. Justice Clive.

Did she say she saw her there?—She said, she was in the house sure enough; she believed she was, and positively, almost, sure of it.

What did you go to the gaol for? Was it to get this confession from her?—No.

Who were those gentlemen that you went with?—Mr. Martin and Mr. Dudley.

Did you give evidence here upon the trial?—No.

Joseph Haines sworn.

Mr. Williams. Are you a house-keeper?—

Haines. I live at Ware in Hertfordshire. I have been a house-keeper above forty years there.

Do you know Fortune Natus?—I do. I have known him six or seven years, or more.

Do you know his wife?—I do, she was bred and born in the town.

What kind of a character does he bear? Do you look upon him to be an honest man?—No.

Do you believe his oath is to be taken?—I believe it is not. I know it is not fit to be taken. He is a very dishonest man.

Cross-examined by Mr. Davy.

What is your business?—I am a barge-master. I am an owner of part of two barges.

Did you ever hear any body speak well of him in your life?—No, not lately. When he came to our town, he turned a bad man; when he worked at Fatham's-Hall, he went on better; but when he came to our town, he deceived a great many people.

How long is that ago?—That is ten or twelve years ago.

How long is it since you heard a good character of him?—I have not heard a good one of him for almost three years.

Do you think, if he was to come into a court of justice, and not to get a farthing by it, that he would perjure himself?—I think he would say any thing to get a shilling.

Suppose he could not get a shilling by it?—He would try for it.

Do you think he would rather swear false

than truth, though he did not get a shilling by it?—I think he would, he hates truth.

You say you believe he hates truth. I do not know what you mean. Is he a sad rogue?—Nobody will give him a good character about us.

Do you know his wife? Is she a sad wretch too?—She is a sad body.

A drunken beast?—You have guessed right as any man in England. You give a very good guess.

What, have you not made it up with him?—He once brought me a forged note.

Are you at law?—No, Sir.

Paul Chapman sworn.

Chapman. I live at Ware; and have done these twenty years.

Mr. Williams. What are you?—*Chapman.* I am a bricklayer.

Do you know Fortune Natus?—I do.

What is his character?—He has a very bad character.

Do you think he is to be credited upon oath?—I believe he is not to be believed upon oath.

Cross-examined by *Mr. Willes.*

How long has he left Ware?—I believe he has left Ware three or four years.

Have you seen him since he left Ware?—No, I have not till now; he behaved very ill there.

Thomas Green sworn.

Green. I live at Ware in Hertfordshire. I am a farmer. I have lived there thirty years, and have been a house-keeper almost as long.

Mr. Nares. What do you rent per year?—

Green. I rent 600*l.* per year.

Mr. Williams. Do you know Fortune Natus?—*Green.* I do.

What is his general character?—Really, in my conscience, he has a very indifferent one.

Is he to be believed upon oath?—I make a query whether he is, I believe not.

Mr. Just. Clive. Did you ever hear him forswear himself?—*Green.* No, I never did.

Cross-examined.

Mr. Dazy. One question, Yes, or No: Do you believe, that in a case where he was not interested a single shilling, he would perjure himself?—*Green.* I have reason to think he would say any thing for hire.

Recorder. Give a reason why he would say any thing for hire.—*Green.* He has never injured me, nor robbed me; but he was a pashioner of Ware, and he eloped, and left a child to the work-house.

Mr. Baron Legge. Is his character so bad, he would wantonly perjure himself?—*Green.* That I cannot answer for.

Mr. Nares. My lord, I will now call justice Tashmaker to shew, that Virtue Hall's confession was taken, not in the hearing of Canning. *Mr. White* says, they were taken in the hearing of one another.

Mr. Dazy. This is applying to the jury matter foreign to the case. With your lordship's leave, I will say, the jury are not to know that such a person ever existed as Virtue Hall.

Mr. Morton. The jury are not to take notice there is such a person as Virtue Hall in being; but we have a right to call what evidence she gave in the court here. You have heard Canning's evidence, and called the minuter here to prove it. If your lordship thinks I have no right to call the justice of the peace to prove she gave her testimony when the parties accused were not by, that is, when Wells and Squires were not by; I would call justice Tashmaker to prove what she said, who was in the room when she was examined.

Mr. Willes. I think it would have been extremely right, if Canning's evidence was not taken down in writing.

Mr. Baron Legge. The perjury is assigned upon the evidence she gave at the Old-Bailey. The question is not, Who was by when the deposition was made before a justice of peace? That is no way in issue in the case.

Mr. Just. Clive. We are of opinion it can be no evidence to call justice Tashmaker.

Mr. Nares. My lord, Ezra Whiffin swears, that on the 18th of January he was in the room where Canning was confined, to buy some sign-irons. We will call the man who painted the sign, to shew that he was not there at the time.

William Metcalf sworn.

Metcalf. I am a glazier, painter, and plumber, and live at Enfield highway.

Mr. Nares. Do you know Ezra Whiffin?—

Metcalf. I do. I remember I carried a sign home to his house, on the 8th of January 1753; Old Style, and set it down directly in my book.

Where is that book?—It is at home. I could easily have brought it, had I had an order so to have done. But I can satisfy you another way. I have a pocket-book in my pocket, and I took it from this pocket-book, and put it in my day-book. (He produces the pocket-book.)

Tell me, by looking into that book, the day you brought the sign home?—It was on the 8th of January, O. S. I wrote this myself in his own house, with his pen and ink.

Upon your oath, is it your own hand-writing?—Upon my oath, it is.

What day was it, N. S.?—It was on the 19th, N. S. He told me he had spoke to one Mr. John Garret, a blacksmith, to make the irons to hang it upon. I went directly to the blacksmith, and asked him, whether he had done them? He told me, he would not do them at all, till such time as Whiffin had paid what was due already.

Did you go back again then to Whiffin?—No. About ten or fourteen days after I saw Whiffin, and asked him, if he had got the irons? He said, he had got none. Then I said, You are very much to blame you did not go

down to mother Wells's, to see for her books, because they were the same that the sign hung upon; and I thought they might be in the same piece of wood, which was sawed off when the sign was taken down.

Did he say he had been for them?—No, he did not; but he said he would go.

Had he the books when you spoke to him?—That I do not know. He did not say he had been at mother Wells's, or that he had got them.

When was it hung up?—I do not know.

Cross-examined.

Mr. Willes. The 1753, which is in black figures, when was it wrote in this book? I observe it to be in a different ink.—*Metcalf*. That was wrote on Saturday was se'night, I believe; that was taken from the other book. I took that date out of my other book; for I set it down in my pocket-book without the date at first.

Mr. Morton. I observe in this, here is October 17, do you mean Old Style or New-Style?—*Metcalf*. I mean Old Style. All that is set down, is set down by my clock.

Mr. Morton. When you made that entry, did you mean it according to Old Style or New?—*Metcalf*. To the Old.

Recorder. Why did not you bring your book here?—*Metcalf*. I did not know it would be wanted.

To her Character.

Mr. Marshall sworn.

Mr. Marshall. I have known Elizabeth Canning the younger almost ever since she could go alone; since she has grown up, she has come to my shop almost every day. She bears a very good character. I never knew a girl behave more modestly in my life. I am one of her bail; and if I had not believed her to have been entirely honest, I would not have been bail for her.

Cross-examined by Mr. Davy.

Look at this paper; it has your name to it; was it done with your consent?—It was not; but when it was done, I did not contradict it.

Here is an attestation of all the facts she has sworn, why did you suffer it to be printed?—I did not contradict it.

Did you ever declare that you was ignorant of the things that you here attest?—As to the facts, they put my name in to attest her being a harmless girl; the contents I never saw, till I saw them in print.

You have said here, "The truth of the above-mentioned facts, we, whose names are under-written, being also ready to attest"—Did you ever take any pains to satisfy the world that you were not able to attest these facts?—I had nothing to do with the printing the papers. My attestation was only to tell of the girl's absence.

Did you give any of these papers away?—I believe I did.

Do you know of their being scattered about

at the time of the trial of Wells and Squires?—I have heard they were delivered about, but I did not do it. I said, it was a bad thing to distribute them about then.

Upon your oath, did you consent to the publication of it?—Upon my oath, I did not.

Was your name put to it without your consent?—It was.

Recorder. Did you see your name to them, before you distributed them about?—*Marshall*. Yes, I did.

Mr. Davy. Whether the intent of publishing these papers was not to inflame the world against the gypsey?—*Marshall*. No, I believe not.

Mr. Nares. Did you believe the truth of these papers that you distributed?—*Marshall*. My belief was, that the girl had been so long missing from her friends.

Mr. Davy. I am to tell the jury from the prosecutor, I have nothing against the girl's character, exclusive of this fact.

Mr. Nares. Then we need call no more to her character.

Mr. Davy. I have only to call witnesses to the support of Natus's and Whiffin's characters.

TUESDAY, May 7.

Mr. Morton. We last night finished this long trial in behalf of the defendant. I am very sensible, that perhaps, there never was a case came before a court of justice, in which it was more proper, I hope I need not say more necessary, for some of the counsel concerned to have made observations from the material part of the evidence given on both sides.

That is what is the province of a counsel, to observe how far our evidence answered the evidence given on the behalf of the prosecution.

It has been among the many misfortunes of the defendant, that it has been impossible for any one of her counsel to have attended through this whole trial. Mr. Williams, whose proper province it was to have replied, has necessarily been absent during great part of the evidence; therefore it is impossible for him to discharge his duty in that.

It has likewise been my misfortune to be absent, and it has also been Mr. Nares's misfortune be absent, so that we could not attend upon that part of the evidence. I mention this, that I may lay in my claim with your lordship, who has been so very acute and attentive, that whatever observations are proper to be made, the jury may carry the facts along with them, as well as the prosecutor's charge; and that your lordship will be so kind to supply what we have been obliged to omit. I make no doubt but you will do so, because no greater accuracy, and no greater attention can be shewn, than has appeared in your lordship through the course of this trial; therefore my client will not suffer through this absence.

Recorder. You may assure yourselves I shall, and I hope you will be present, when I

am up to the jury; and I shall not take it in the least amiss to be instructed, if I make any mistake whatsoever.

Mr. *Morton*. When once the case is in your hands, I am very sure it is in safe-hands.

Mr. *Davy*. I desire it may be proved to the jury, that the days of the arrival of the letters from Basingstoke, are Mondays, Wednesdays, and Fridays.

Thomas Ravenhill again.

Mr. *Willes*. As you are an officer in the Post-office, you can tell what days of the week the post comes into town from Basingstoke in Hampshire.—*Ravenhill*. It comes in on Mondays, Wednesdays, and Fridays; and no other days.

Cross-examined by Mr. *Morton*.

What post-road does it lie in?—It comes in the Portsmouth mail; it is in the western road.

Does the Portsmouth bag come through Basingstoke?—I cannot tell that.

Mr. *Davy*. Whether the Portsmouth bag does not come through Basingstoke? Or, whether there is not some every days post comes through Basingstoke?—*Ravenhill*. Upon my word I cannot tell. Basingstoke bag comes in three days a week.

Mr. *Morton*. That letter is not proved ever to have been in Basingstoke post-office; it remains still to be proved, that there is an every day's post comes through Basingstoke.

Mr. *Davy*. Do the Basingstoke letters ever come in on any other days besides Mondays, Wednesdays, and Fridays?—*Ravenhill*. No, they come in only on those three days.

Mr. *Davy*. When does the Salisbury post come in?—*Ravenhill*. That comes in the same days.

[Mr. *Davy* produced the almanacks back to 1749, which proved the 19th of January was never on a Monday, Wednesday, or Friday, since January 1749, till the year 1753.]

Mr. *Willes*. There is one Anne Johnson, who swears she saw Mary Squires at Enfield-Wash on the 18th of January; and she has sworn, that she works for Mr. *Smitheram*; and that she carried home her first work for that year on the 16th of January; and that her master constantly put the work carried home down in a book; and we have that book to prove it was carried home on the 23d of January.

Thomas Smitheram sworn.

Mr. *Willes*. What is your business?—*Smitheram*. I keep a boarding-school at Enfield highway, and I keep a shop likewise.

Did you employ one Anne Johnson to spin yarn for you?—I did.

Have you a book in which you set down the work as it is brought home?—I have; but it is seldom under my management; I leave it to my family.

VOL. XLX.

Do you, or some of your family, put down the time when you deliver out work to be done?—Yes, Sir.

Do you always put down the time when you have it brought home?—Yes, Sir; one column is to put down the delivery, and the other when brought home spun.

Look in it to the year 1753, and tell whose hand-writing that first article is.—It is my daughter's hand-writing; her name is Anne Hudgel.

I see in it, here is January 16, one pound S. fine, delivered.—That is the work delivered out.

Is there a mark upon the first column that signifies it was the time of the delivery of it to be spun?—Yes, here is Anne Johnson's name on the top.

Here is January 23, one pound S. fine, returned.—That is my hand-writing, the delivering out, but the receiving is not mine.

Was that the same yarn that is returned?—I take it so to be. I did not receive it myself.

Cross-examined by Mr. *Morton*.

In this last entry, is the word 'returned' your writing?—It is.

When was that word wrote?—The very same day. The reason of it is this, I had heard she had sworn what she did, and I looked in my book, and I said, You are mistaken; and the old woman was so angry, she brought home my work, and would spin no more for me; then I clapped that mark upon it, 'returned.' She returned it unfinished.

Recorder. When you heard what she swore—Where did she swear?—*Smitheram*. Before the grand jury. She came to our house, and I looked in the book after she had sworn. I said, You brought your work home on the 23d, and you are mistaken, or to that effect.

Recorder. Was that yarn you delivered to her on the 16th, the same she returned on the 23d?—*Smitheram*. I cannot tell that; it is possible sometimes they may change it.

Ald. *Dickinson*. Did she return the same weight?—*Smitheram*. She did, for aught I know; I did not take it in.

Anne Hudgel sworn.

Mr. *Willes*. What are you?—*Hudgel*. I am daughter to Mr. *Smitheram*, I generally keep this book; it is a day-book; I make marks when delivered out and when brought home.

Look for Anne Johnson's account.—The first entrance is my father's, and that of being brought home spun is mine, on the 23d of January. After we heard she was concerned in this affair, and had sworn to the 18th day of the month, we told her it was the 23d.

Can you recollect what time it was that you told her she was mistaken?—I cannot tell.

Did you ever tell her she was wrong?—No, Sir; but I heard my father tell her so, though I was not in the same room.

Had you no conversation with her about it?—No, Sir.

2 Q

Cross-examined by Mr. Morton.

Did not this woman apply to you to see the book?—When she brought the work home undone, she would see the book to see me cross it out, though she could not read.

Did she ever apply to you to see the time when she brought the work home?—I do not remember she ever did.

She has sworn she did.—Very likely she might, but I do not remember it, nor that she did till after the time she swore before the grand jury.

Do you think she would forswear herself?—I do not know that she would.

Mr. Willes. Did not your father tell her the wool was not brought home till the 23d?—Hudgel. Yes, Sir.

Mr. Davy. My lord, we now call witnesses to the support of the characters of these two people which they have impeached; that is, Ezra Whiffin and Fortune Natus.

Thomas Smitheram again.

Smitheram. I have known Ezra Whiffin a year and a half.

Mr. Willes. What is his general character?—Smitheram. I never heard but he was a very honest man.

Cross-examined.

Mr. Morton. Have you not known many honest men mistaken in point of time, at a year's distance?—Smitheram. I do not know but I have.

John Barnes sworn.

Barnes. I am high constable of Edmonton hundred. I know Ezra Whiffin very well, and have these three years and a half; he was two years a neighbour of mine. I believe him a very honest man.

John Smart sworn.

Smart. I am an attorney. I knew Ezra Whiffin all the time I lived at the coffee-house at Enfield.

Mr. Willes. How long is that?—Smart. I have known him about three years. I never heard any harm of his character.

Thomas Bell sworn.

Bell. I live at Waltham-Cross at the Four Swans.

Mr. Willes. How long have you known Fortune Natus?—Bell. I have known him about fifteen months; he has been a servant to me about thirteen months.

Did you ever know him before that?—No, Sir.

How has he behaved since he worked for you?—Very honestly, very civilly, and very industriously.

Do you look upon him to be an honest man?—Indeed I do. He assists to brew, and goes out with a load of hay. He always behaved very honestly. When I go out, if I bid him do such things, I am sure to have them done.

Mr. Davy. Do you think he would forswear himself?—Bell. I do not think he would.

Mr. Willes. During the thirteen months he has been with you, has he been faithful and honest?—Bell. During the whole time I do not know he has told me a lie. I have eight servants about my house, and I should be glad to find the fellow of him.

Mr. Morton. The gentlemen have called some fresh evidence in. I do not think to give it any answer; therefore it must rest upon these people's given testimony.

Here the material things are, to support the letter supposed to be wrote at Basingstoke, and to contradict Anne Johnson.

They endeavour to support the letter by producing the man again from the post-office, who tells you, the post comes in only on Mondays, Wednesdays, and Fridays, from Basingstoke. Then they have produced some old almanacks to shew the 19th of January was never on a Monday, Wednesday, or Friday, since January 1749, to the date 1753. But they have not proved the letter was put in at Basingstoke yet: that remains to the jury; and the post-mark, I own, my eyes are not good enough to distinguish. This might have been made clear, if the man that received it had been called; and if he had shewed he had received that letter at the time mentioned, that would have carried up this evidence, that I could have had nothing to say against it; but whether it was ever put into the office at Basingstoke or not, that must be left to the jury; it is a very easy thing to have a letter dated, and it might be the 9th, or the 29th, still there is no conclusion.

Now, as to contradicting Anne Johnson, a poor old woman. What does she swear? She swears she did apply to these people to be set right, and she was informed by their book; therefore she would have never referred to that piece of evidence, if she had not been mistaken in what she swore; it is only a mistake.

Now, after we are done, I do think it is a great misfortune for my client, that the other gentleman, who should have made a proper reply, was obliged to attend elsewhere; and was I to do it, I must do it very imperfectly; and so I rest it in your hands.

Mr. Davy. May it please your lordship, and you gentlemen of the jury;

After so unusual a time taken up in this trial, I wish I could dispense with giving you any farther trouble.

But, gentlemen, it is my duty to recall your attention to the evidence, which was produced to maintain this indictment—to reply to what has been urged by way of defence—and to make such observations upon the whole, as may convince you, that the evidence for the prosecution stands unanswered, and is the most indubitable proof of the defendant's guilt.

Before I enter upon this undertaking, which, I am afraid, will engage more of your time than would be found necessary, if the conduct

of this prosecution was in abler hands than mine, I cannot avoid taking notice of the great indulgence with which this cause has been already favoured. For, although five long days have been employed in this inquiry, yet hath not the least hint of impatience dropped, either from the Court, or the jury.

To the honour of this country be it remembered, its judges always administer impartial justice upon the most deliberate and careful examination; and never think any time mispent, which may conduce to the discovery of truth. There was indeed a particular necessity for a very solemn examination in the present case, because this was become an affair, not only of great importance and public expectation, but also of no less intricacy and difficulty,—arising, not so much from the nature of the question, as from the clouds of darkness in which it was enveloped by those, who, merely in opposition to the prosecutor, adopted the crime of perjury, and formed a faction to support it.

But such is the force of truth, and so strongly does it shine forth in this prosecution, that its opposers must now hide their faces, and reflect with shame, that they have contaminated themselves with the guilt which they are no longer able to conceal.

Gentlemen, as in the outset of this cause I desired you to divest yourselves of all prejudices, which you might have received in the defendant's favour; so now, out of humanity, I would caution you against falling into the like error on the other side, on account of some accidents which have happened during the course of this trial.

The insolence of mobs about this court, attempting to over-awe and intimidate justice, you all have observed, and some of you have felt. Although the design of these outrages was easily discovered, yet it would be very hard that such misbehaviour, however occasioned, should affect the unhappy person at the bar. She has enough to depress her, without the additional load of others guilt; and God forbid we should attempt to call in the aid of prejudice against her! We desire this cause may be tried singly upon its own merits, and that there may be no ingredient in your consideration, but what fairly results from the evidence on both sides.

You will take care, for your own sakes, to discharge your duty as jurymen, considering the obligation upon your conscience, the notoriety of this cause, and the freedom with which men will hereafter deliver their sentiments concerning it. You will consider, the eyes of the world are now upon you; and the circumstances of this cause are so peculiar, and have been so much the subject of controversy, that the history of this transaction hath travelled wherever the English language is understood. And, I doubt not, your serious and solemn determination, upon this important occasion, will answer the ends of justice, will gratify the universal curiosity, and will prove a lasting honour to yourselves.

Gentlemen, when you reflect upon the nature and circumstances of the offence this woman stands accused of,—together with the purposes it was intended to serve,—the fulness of the evidence produced to prove it,—and the weak, if not the wicked, defence attempted in answer to it; you will be fully satisfied, how much it concerns the public to bring this delinquent to justice.

Of all the crimes the human heart can conceive, perjury is the most impious and detestable. But the guilt of this person is so transcendent, that it seems even to defy aggravation.

To call upon the God of truth in the most solemn manner, and upon the most awful occasion, to attest a falsehood—to imprecate the vengeance of heaven upon her guilty head—to prostitute the law of the land to the vilest purpose—to triumph in the ruin of an innocent fellow creature—to commit a murder with the sword of justice;—and then, having stripped her own heart of humanity, by all the arts of hypocrisy to insinuate herself into the compassion of others, is the peculiar sin of this person, not yet twenty years of age!

One would wonder, indeed, at the folly of an attempt to impose so gross, so absurd a falsehood upon the world, if we did not live in an age wherein nothing is too incredible and fantastical to be well received.—Let it be but a novelty, and a subject of admiration, and it cannot fail to make its way with the bulk, the most ignorant part, of mankind.

How this strange story obtained credit so far as to prevail with a jury to convict two innocent women, you have seen in the course of this trial. For that there was false evidence given in that cause by one witness at least, appears now confessed even by his own testimony. Scarrat (of whom I shall have occasion to speak more hereafter) swore upon the trial of Squires, that Canning's information before alderman Chitty thoroughly corresponded with her then evidence: but he now owns, he does not know what account she gave before the alderman; and, upon his best recollection, he admits, in effect, that her information to Mr. Chitty was, in many respects, different from her evidence upon the trial. And yet this was one of the most material questions in the whole cause.

It is no wonder, therefore, that this story, with all its absurdities, so supported by prejudice and perjury, obtained belief. And, that it was not fatal to the poor wretch destined for a sacrifice, was entirely owing to the interposition of a magistrate, whose only motive to it was compassion, whose only reward the bitterest invectives.

Gentlemen, in this indictment there are as many assignments of perjury, as there are circumstances in the defendant's evidence, from the time of the pretended robbery in Moorfields; so that, if any part of her relation is false, she is guilty of perjury within this indictment. However, we do not mean to cavil, and catch at little circumstances; for the proofs

we have offered are sufficient to satisfy all mankind, that the whole of this story is a fiction from the beginning to the end.

Gentlemen, as this was a case of universal inquiry, the prosecutor was desirous of giving all the satisfaction in his power: for though the indubitable evidence of the gypsy's innocence, without any farther proof, would have been sufficient to justify his own conduct, and to convict the defendant, yet his regard for the public called upon him to detect the whole imposture; and, if possible, to put an end to all the disputes and troubles, to which this mysterious transaction hath given rise.

To answer these purposes effectually, there hath been a great variety of proof laid before you, under several heads of evidence; of which I will beg leave to remind you, in the order they were given.

Our first head of proof was to the alibi of Mary Squires.

With regard to this, and the answer attempted to be given to it by the defendant's witnesses, you will be pleased to recollect the certainty or uncertainty of the evidence on both sides, as to the identity of the persons sworn to, and the exactness of the times in which the witnesses swear to have seen them. For a mistake in either of these matters will account for a variance in the testimony, without impeaching the credit of the witnesses, which I am always willing, as far as I can, to avoid.

In the first place, as to the identity of Mary Squires.

She is not only so extremely remarkable, that it is almost impossible to mistake her for another, but several of the witnesses for the prosecution have known her a considerable time, from two to thirty years past, and have often seen her: it is impossible, therefore, for these people to mistake with regard to this person; and if they did not see this very woman, they are certainly guilty of perjury. Besides, the witnesses for the crown swear not only to the old woman, but likewise to her son and daughter, for they were seen all together through the whole journey; by which means they are less liable to mistake, than the witnesses for the defendant.

Are all the witnesses to this head of proof, forty-one in number, wilfully and corruptly forsworn?

Through the whole of this cause, hath the least reflection been thrown upon the character of any one of them?

Has it been even suggested, that they have any interest to serve, or any passion to gratify, which could lead them to so much wickedness and danger?

Are they not strangers to the defendant, and most of them to one another, living at remote distances?

They have all been separately examined; and I refer to your own observation, whether effectual care has not been taken to prevent any communication between them, so as that no one witness could possibly know another's testimony.

And yet what an amazing congruity is there in the whole of their evidence!—Not a material circumstance varied from!—But the testimony of each witness corresponds so exactly with what went before it, that it demands credit, and authenticates the evidence of the former.

Consider too the variety and weight of the circumstances sworn to, and the correspondence of events happening in consequence of them. The dancing at Abbotsbury,—the fidler there,—who and who were partners,—the wet night at Portersham,—the heavy rains that fell the next day, and the waters being out at Dorchester, two days after.

How notorious are these facts, and how easily disproved, if false!

Was it ever known, that any number of false witnesses pre-concerted circumstances, which ten thousand people were capable of contradicting?

Is it conceivable, that there should be a perfect harmony in the evidence of such a number of perjured witnesses, concurring in circumstances of public notoriety?

Then the parting with Clarke at Ridgway,—the piece of nankeen pawned with the landlord for a reckoning, and produced in evidence with the man's name upon it,—the skinning the dead horse, mentioned by several witnesses,—the letter from Lucy Squires at Basingstoke, alluding to the particulars of the journey with Clarke, and to the weather, "hoping he received no illness from it,"—

Were these circumstances all pre-concerted, or did they really happen at some other time, than that to which they have been applied by the witnesses?

Examine then into the certainty of the evidence with regard to time.

Besides the impossibility, that all the witnesses, speaking with such absolute certainty, and referring to collateral matters incapable of misleading them, should mistake in this respect; there are two facts before you, which prove the times of the gypsies being at Abbotsbury and Basingstoke to demonstration.

The time, referred to by the Abbotsbury witnesses, is ascertained by the books belonging to the Excise-office. Every one knows with what preciseness these books are kept,—that not only the days, but the very hours of each officer's visits, are regularly entered in his accounts;—that all his acts and entries are scrutinized and chequed by a supervisor,—and the books transmitted to the General Excise-office in London.

Now the book of January 1753, belonging to the Excise at Abbotsbury, has been produced in evidence from the General Excise-office; by which it appears, that Andrew Wake was placed at Abbotsbury in the room of Ward, the officer stationed there, who was ill and incapable of duty; and that Wake began to officiate in the Excise-office at Abbotsbury on the 1st of January, and continued to the 14th.

Wake swears, and is confirmed in it by all the witnesses from Abbotsbury, that he came

to Gibbons's house, to officiate as exciseman in the room of Ward, on the very day the gypsies came there.

Here then is no possibility of mistake; and if the Abbotsbury witnesses are perjured, all the rest of the witnesses must be so too; for the whole evidence refers to the journey from South-Parrot to Abbotsbury, and from Abbotsbury to Enfield Wash; and all the facts sworn to are like so many links of a chain, depending one upon another.

It is also remarkable, that this very John Gibbons, who has now given evidence of this fact, was produced as a witness upon the trial of Mary Squires in February 1753; and he then gave the same evidence he has given now; and with the same circumstance relating to the exciseman. For being asked on that trial, by what circumstance he recollected the day of the gypsies coming to Abbotsbury, this was his answer; "There came an exciseman, one Andrew Wicks or Weeks, to officiate there for one John Ward, who was sick, and I put the day of the month down when he came there; for the Excise-office is kept at my house."

It is also observable, that Gibbons was indicted for perjury in that evidence. What but the consciousness of truth could now encourage him to repeat the same evidence, and run the hazard of a second prosecution?

Another circumstance equally demonstrates the time of the gypsies being at Basingstoke.

The letter wrote there by the witness, Mrs. Morris, for Lucy Squires to Clarke, bears date the 18th of January, and she swears that was the day on which it was written.

On the outside there appears the mark of the General Post-Office, in London; and if this letter went from Basingstoke on the 18th, it must come to London on the 19th, for there is no post-road from Basingstoke to Abbotsbury, but by way of London. But the post-mark not being very legible, the clerk of the western mail, belonging to the General Post-office, is called to clear up this matter.

He tells you, that the post comes in from Basingstoke on no other days, but Monday, Wednesday, and Friday;—that by the nicest observation he is able to make (and he produces some stamps belonging to the post-office to verify his observation), this letter came into London on the 19th or 29th of January, and he gives you his reasons for saying so. The only remaining doubt then is, as to the year; for the last figure being torn off, there being only three figures 175-, the counsel for the defendant have thought fit to rely upon it as a capital objection, insinuating as if it had been torn off on purpose to mislead you; but at the same time they admit, that if the whole date had appeared perfectly, the fact intended to be proved by it would have concluded irresistibly upon them.

Now it happens very fortunately, that this defect can be supplied by another evidence, which proves itself; and that is the Almanack.

I have all the Almanacks since 1749 now in

my hand, which I desire you will examine yourselves; and by them it appears, that no 19th of January, since January 1749, has happened upon a Monday, Wednesday, or Friday, except in 1753, when it happened on a Friday; and by the three figures, which remain in this letter, the year's date must be either 1750, 51, 52, 53, or 54.

To this circumstance you will be pleased to add another,—that all the witnesses mention the days of the week, as well as the days of the month; and if you trace them in all their testimony, from Friday the 29th of December, at South-Parrot, to Wednesday the 24th of January, at Enfield-Wash, you will find the whole evidence refers to the gypsies being at Basingstoke on Thursday the 18th of January.

This observation will entirely remove the only doubt of the post-office, whether the post-mark is the 19th or 29th of January. For the days of the week, sworn to by all the witnesses, correspond exactly to their being at Basingstoke on a Thursday; and the Almanacks will inform you, that the 29th of January has not happened on a Friday for several years past.

From all which it appears, that the witnesses are as little liable to mistake in point of time, as in respect of the person of Mary Squires. And therefore, upon the whole of this evidence, I will venture to say, no man living can doubt that these gypsies were at Abbotsbury on the 1st of January.

For, through the whole chain of evidence to prove it, I appeal to your own observation, whether all the circumstances have not been supported by the best testimony and the clearest proofs, in their nature they are capable of receiving? And whether it would not be as unreasonable for one to doubt the fact they conclude to prove, as it would be to believe the story they are intended to contradict?

Surely there never was such a variety of circumstances so clearly and completely proved in any case,—surely there never was a case standing so little in need of it!

But, sufficient as it may be thought for the defendant's conviction, this is far from being the best part of the case. For though this fully proves the defendant was not robbed by Mary Squires, yet it goes no farther. But the rest of the evidence for the crown entirely overthrows the defendant's whole story, and evinces, to the utmost degree of certainty, that she is an impostress.

To the evidence of Mr. Alderman Chitty, Mr. Nash, Mr. Aldridge, and Mr. Hague, you'll be pleased to apply an observation, I took the liberty to mention in the opening, and which I apprehend to be very reasonable, That, if the defendant was really confined in this room at Wells's twenty-eight days, there being light enough to see every part of it, she could not possibly fail of giving an exact description of it; much less could she mention things that were not there.

Now the account she gave, before she was

carried down to Enfield on the 1st of February, is liable to objection both in respect to its defectiveness, and its falsity.

To try the truth of any relation, when its authenticity must depend upon the credit of the relator, we should inquire, whether at all times, in all places, and upon all occasions, he tells the same story, with all its circumstances, in the same uniform, invariable manner.

The gentlemen of counsel for the defendant, aware of the force of this observation, have, with great judgment, endeavoured to apply it in their client's favour, in respect to some few particulars pretended (but far from being sufficiently proved) to have been described by her, upon the 29th of January at her mother's, and upon the 1st of February, with regard to the prospect from the window.

In the first place, her description is extremely defective.

When she was asked by Mr. Alderman Chitty to enumerate all the particulars in the room, by which her veracity was to be tried, and when it so much concerned her to recollect the whole, she omitted several material things, which could not possibly escape her observation for a whole month together. The jack-line and pulley, and the broken casement over the chimney, entirely forgot. The three saddles are not one of them mentioned,—nor the chest of drawers. And, instead of mentioning half a load of hay, she in effect denied there was any; for part of her complaint, which melted the hearts of her friends, as they themselves have sworn, was the want of any thing, but the cold, bare floor to lie upon.

Can it be pretended, that any alteration had been made, between the time of her pretended escape, and her going there again in three days after? On the contrary, is it not fully proved, that all these things had been there, unmolested, for a very long time? Had they not marks of antiquity,—marks which could not be made, but by Providence itself, or by the creatures he formed for the purpose? When the chest of drawers was removed, in order to see if it had been newly put there, it rended from the wall a thousand cobwebs, covered with dust.

The same observation occurred, upon removing the broken casement from off the chimney ledge;—that also appeared to have been fixed there by many generations of spiders.

And it is remarkable, that the defendant herself was so struck with the force of these objections, and found herself so much in danger of immediate detection, that she then pretended to recollect some of the things,—particularly one of the saddles, which you are to suppose she had forgot.

This proves, at least, that the things had not been put there to deceive her. And to satisfy you that her not having mentioned them in her information did not proceed from hurry or surprise, Mr. Alderman Chitty swears, she was under examination above an hour, with all her friends, and none else about her;—and that after recounting all the particulars she thought

fit to mention, she, apprized of the danger of omitting any thing, was again asked, "Whether there was any thing else in the room?" To which she coolly and deliberately answered, "Nothing but the things in the paper."

But what excuse soever may be invented for the defectiveness of her description, who can account for its falsity? How came she to swear to an old stool or two, an old table, old pictures over the chimney, and a grate in the chimney?

Is it not most certain, none of these things were, or had been, in the room? The proofs, that some of them had not, are so strong, and of such a nature, that one is tempted to say, The finger of God points out the discovery of this imposture.

Had this woman been once in this room, even five minutes together, could she possibly have mistaken it for a little, square, dark room? She might as well have called it an amphitheatre, or a ship; for no description could be more unlike. And yet, you must either think she was actually there with her eyes open, light shining through two windows and a thousand holes, and a month's leisure for observation, or else that she is guilty of perjury. For no charity can impute all this to mistake.

Gentlemen, the pretended manner of her escape is another proof of her guilt.

At first she swore she escaped, "by making a hole, and removing a pane of glass, and so sliding down over a pent house." But when she afterwards went down to make observations, seeing the wall perpendicular from both windows, and that there was no pent-house or shed near it, she cut the knot she could not untie, and boldly swore, "she jumped out of the window."

Was there no other evidence in the cause, this alone would be sufficient to falsify her whole story.

But she was so unlucky, as to give still further proofs of her own guilt; and not only contradicted herself, but aided the detection of her mother's evidence.

Her account of being carried between two men, one at each arm, through Bishopsgate-street, is totally irreconcilable with her being stunned by a blow in Moorfields, which "threw her into a fit, wherein she remained insensible for four hours after."

The mother had advertised her being heard to scream in Bishopsgate-street.

Is it not marvellous that Bishopsgate-street should be mentioned by both mother and daughter upon the same occasion, when they had not seen each other, and this too merely by the force of imagination! For the daughter, you see, had no foundation for saying it; and what led the mother to it, I shall speak of, when I come to observe upon her evidence.

The multiplying four, five, or six pieces of bread, into four-and-twenty, will not be thought a trifling mistake, when we are tracing the several marks of falsehood, to detect so strange a tale.

When she applied for a warrant against the woman who had taken her stays, did she give any description of Mary Squires, who, you see, is marked so, as to distinguish her from all the rest of the creation? The defendant had told her whole story in the hearing of honest Mr. Scarrat, who had been acquainted with Mrs. Wells, but did not discover, by any description of the defendant's, that Wells was not the woman who had robbed her. For Scarrat was present, when a warrant was granted against Wells for the felony.

By what name will you call him, if he knew this to be a mistake, without attempting to rectify it?

One of her own witnesses proves, that when she was going up the great stair-case, she said, "These are the stairs up which I was carried."

This was after she had been in the kitchen; for they all agree she was first carried into the kitchen, but took no notice there, that it was the place wherein she had been robbed of her stays, or that it was contiguous to the room in which she had been confined.—They all agree likewise, that she went up the great stair-case into all the rooms of the house to which it led, without the least intimation, that the room sought for was upon a lower floor, and but six or seven steps from the ground.

Her behaviour upon this occasion staggered the faith of her friend Adamson. Even he thought it a strange mistake.

Gentlemen, the next evidence we troubled you with, was out of her own mouth. That witness, though unfit to be believed in any thing else, may fairly enough be admitted to give testimony against herself; for the best kind of evidence is confession.

Before Mr. Alderman Chitty she swore, she had not drank up all the water, even at her coming away, but left some of it behind her.

Before Mr. Fielding she swore, she drank it all up on the Friday.

In this court she swore, that she drank up the last drop about half an hour before her escape.

Let faction, in the mask of charity, suggest mistake and inadvertency, to palliate these self-contradictions as much as the defendant can wish; yet what regard is due to her oath, who can be drawn in to swear so rashly?

Shall one, detected of so gross prevarication, be believed, upon her single testimony, in the most marvellous tale which was ever heard?

Shall that tale, patched up with irrelative circumstances, stand a moment in competition with the indubitable proof of its falsity?

Our next evidence was the positive testimony of eleven witnesses, in absolute contradiction to the whole story of the defendant's confinement.

It was proved by most of those witnesses, each witness referring to several circumstances, and each circumstance supported by other testimony, that Natus and his wife lay in this very room every night of the month of January, 1753.

Is it even attempted in the defence to deny this? No other answer is given to it than by attacking the characters of Natus and Whiffin, which I shall observe upon hereafter, though it does not depend merely upon their credit.

White, the officer, swears he saw Natus's wife coming out of this room, as if just out of bed, in the morning, when he went down with Mr. Alderman Chitty's warrant to apprehend the people of the house. The bed of straw, with a sack of wool for the bolster, was particularly described by him, and many others.

Is there any answer given, or even attempted, to any part of the evidence which relates to the cutting the trees? and yet that evidence is totally incompatible with the truth of the defendant's story. So is the evidence with regard to the sign-irons bought by Whiffin, and taken out of this very room while Natus's wife lay in the hay-bed; which also stands clear of contradiction.

Permit me now, gentlemen, to make a general observation, which goes to all the witnesses for the crown;—that their behaviour, and the manner of their giving testimony, from first to last, carries with it the air of sincerity and candour.

Was there a single witness produced, who seemed in the least inclined to suppress the truth, or who hesitated, prevaricated, or was pinched at any question? Did they not, every one of them, speak out fully, clearly, and openly, so as even to force your assent to the evidence? But to how few of the defendant's witnesses may the like observation be applied? I appeal to your senses, whether truth is not visibly marked in this prosecution.

This, gentlemen, I think, is in general the substance of the evidence for the crown.

I have recollected it as well as I could, without troubling you with every minute circumstance, which might possibly lose its force by a tedious repetition. And when I reflect that all this weight of evidence is to prove that false, which in itself is impossible to be true, I have more need to apologise for having already taken up so much of your time.

But, gentlemen, how well supported soever this charge against the prisoner is, she had yet a right to give the best answer to it in her power; to which you have attended with unwearied patience. And this defence, if what has been attempted deserves to be so called, I must now beg leave to consider and reply to.

In order to bespeak your approbation of what was to follow, the gentlemen, who are of counsel for the defendant, were pleased to make their first address to your passions; they hope, that if this case should appear doubtful, if you can impute the defendant's evidence to a mistake with regard to the person of Mary Squires, your compassion will incline you to acquit her.

In this I agree with them most heartily; and so far as your humanity, under the regulation of reason, can afford her any assistance, I wish her the full enjoyment of it. If it

should lead you to acquit her, I shall for my own part, and I hope every one else will, cheerfully acquiesce under your verdict.

But you will remember, that when men suffer their compassion to silence the calls of reason and justice, they prostitute the brightest ornament of human nature;—that the most deserving object of our tenderest concern is the commonwealth;—and that whenever we extend compassion to any one, at the expence of the public, we are guilty of the highest injustice, and answerable for it to society.

I could wish indeed, for her own sake, that the defendant's title to humanity from others, had received no interruption from the want of it in herself.

When a poor, friendless wretch, the object of no one's pity, stood at this bar upon trial for her life; the least remains of humanity would have suggested to this defendant to relax a little of her severity towards her.—If there was a possibility of mistake, compassion would have inclined her to doubt at least; but if there was no possibility of it at that time, why should it be suggested now?

Surely, the defendant can have no pretence to this plea, having disowned it herself, upon the most solemn occasion.—She swore positively to take away an innocent woman's life; and being now called upon to answer for it in a criminal prosecution, it is too late to pretend she was mistaken.

It is objected, with an air of great seriousness, that the evidence for the prosecution is insufficient, because there is no proof where the defendant really was during the month of January.—An objection which has been sounded in the ears of the multitude, who have been fooled into a conclusion, that if the prosecutor could not prove this, she must have been confined at Wells's.

I am sorry the defendant's counsel have no better opinion of this jury, than to imagine that they are to be captivated by such an objection.

It was incumbent on the prosecution to prove she was not at Wells's; and if she was not there, it is of no consequence where she was.

However, if it could be fully proved, though it be merely a question of curiosity, I should be glad of it, for the sake of silencing every clamour. But her friends, to do them justice, have been so faithful to her, that this secret is yet impenetrable.

I am strongly inclined to include Mr. Scarrat in this compliment; though I cannot conceive so highly of him, as to suppose he would retain this secret at the expence of his interest; and therefore, when he finds the divulging it consistent with his own safety, he may, perhaps, choose to oblige the public with this discovery, rather than satisfy justice in a way that may be more inconvenient to him.

This man's behaviour, throughout the whole of this affair, according to his own account of it, will save me from the imputation of a rash suggestion. He, who thought fit, at first, to help her to a description, by which her evidence

was afterwards to be authenticated, and to perjure himself in order to corroborate that evidence, may fairly be presumed a principal agent in the whole contrivance.

Where was she? is a question we are not concerned to resolve: but if you desire to be further satisfied in it, ask Scarrat: if he refuses to inform you—ask the mother: if she too refuses it—I would refer you to her conjuror: and if he would reveal so much of his art, as to inform you what led him to tell Mrs. Canning, that her daughter was in the hands of an old woman, and would soon return, you would not be far from unravelling this mystery.

But in all likelihood, the time is not far off for an ample discovery.

The defendant has been hitherto very well supported by her managers (that being the name by which her friends have thought fit to call themselves in their late advertisement.) But when she shall be delivered up to justice, and find that those people can no longer protect her; when she shall seriously reflect upon the distress to which her guilt has reduced her; conscience, perhaps, may prompt her to atone in some measure for the mischiefs she has occasioned, and she may, at the same time, hope to obtain some remission of punishment, by the gratification of an universal curiosity.

But, say the gentlemen, why not call Lucy Squires to confirm her brother's evidence? She was a fellow-traveller with him and her mother through the whole journey; and therefore they insist, that our not producing her, which they call a concealment, is the strongest proof in the world that the evidence of her brother was false.

Was she concealed? You saw her every day during the whole trial; she is yet in court; and if you think it would be material, in a case of so much consequence, you have a right even now to her evidence.

But the true and only reason of our not calling her, is her gross stupidity: before her brother was examined, I confess it was our intention to have called her to the same facts; but finding that, in the course of his very long cross-examination, he had fallen into many blunders, and being told that Lucy was, if possible, still more stupid than him, we did not think it prudent to risk the credit of any part of our case upon the evidence of such a silly creature.

The objection to the brother's evidence, from his being so much more exact in the particulars of his journey from South-Parrot towards London, than from London downwards, will have no weight, when you consider that his memory, as to the former, has been refreshed by his having since travelled that road with Mr. Willis, and others, five times, in order to ascertain the places particularly; and that his not having re-travelled any part of the road through which he had gone before he reached South-Parrot, is the probable and natural reason of his incapacity to describe the other part of his journey.

You may easily conceive, in what an irregular manner gypsies dealing in smuggled goods traverse the country. They avoid market-towns as much as possible; for, being vagabonds, they are aware of the danger of falling into the hands of the civil magistrate.

But why not call Virtue Hall, in order to support her recantation from her evidence against Squires? The learned gentleman, who made that objection, supposes the omission to arise from our apprehension she would have relapsed. If that be really his opinion, I should be glad to know, why she was not called for the defendant? For, they know, she has attended the trial every day.

There are two reasons why we did not produce her as a witness; one of which has been mentioned by the learned Recorder; that by law she was not admissible as a witness to retract her own evidence on the trial of Squires.

Upon the trial of Titus Oates, in the first year of king James the second, (I mean his first trial,) the counsel for the crown would have produced one William Smith, in order to prove, that what he had sworn at a former trial was false,* and that he was persuaded to it by

* In Scotland this sort of examination is not permitted. "Our practice," says Mr. Burnett, (Treatise on Criminal Law, chap. 17, p. 463) "does not allow the credit of a witness to be impeached, by any evidence of his having given a different account of the matter, extrajudicially from what he has given in his examination on the trial, though in England such appears to be competent. In the case of Malloch, 16 July, 1750, something of this was allowed; but his majesty's Advocate entered a protestation, that it should never afterwards be made use of as a precedent. This notwithstanding, in the trial of Neil for robbery, 24th February 1777, a question was put to a witness of the name of Macairly, and, so far as appears, not objected to,—whether he had given a different account of the matter in his declaration when precognosced? The witness answered in the negative, was afterwards, on the 4th August 1777, brought to trial for perjury, he having, it was said, given a different account of the matter when precognosced; but after a full debate, where the chief point argued was the irregularity and incompetency of the question to which the oath applied, the diet was deserted. In the trial of Harkness, in April 1797, this matter was very deliberately considered. The principal doubt was as to the *corpus delicti*; and the surgeons who had seen the body were examined, and gave very contradictory evidence. To invalidate the testimony of one of them, the prisoner's counsel offered some witnesses to prove that he had given a very different account extrajudicially, and also in his declaration when precognosced. This evidence they contended was competent, especially in a case where the facts had happened four years before, and the statement had been given by the witness soon after. The Court, however,

VOL. XIX.

Oates the defendant. [See vol. 10, p. 1185.] My lord chief-justice Jefferies (who would have been glad to have hanged Titus Oates, and who of all men living could least be sus-

were unanimously of that opinion, such evidence was incompetent. They held that the only evidence that could be regarded by the jury was, what was given by the witness in their presence; and that to allow this to be invalidated by any thing he might have said extrajudicially, was not only without precedent, but of dangerous tendency. Hence every witness, before giving his evidence, is entitled to call for, and have his declaration cancelled. Indeed, the law presumes, that every precognition has been cancelled before the witnesses are examined, to prevent any thing they may have formerly said from being afterwards founded on to overawe or intimidate them. It was farther observed, that frequently witnesses themselves are asked as to what they formerly had said; but such questions are uniformly rejected by the Court; and for the same reason the evidence of third parties to that fact ought to be disallowed: that the best evidence of what the witness had said would be the declarations themselves; but these confessedly it was incompetent to produce: that the greatest confusion would ensue, if a proof were allowed of what witnesses had said when not upon oath: that this, if at all admitted, would be equally competent to the prosecutor and prisoner; and then there would, in many cases, be a kind of trial of every witness, which would render the procedure inextricable; and evidence upon oath, which alone courts regarded, would become of little avail. On these grounds, the Court rejected the evidence which was offered.

"Even in the prior case of Watt, for high-treason, in August 1794, where the English law on the subject was the rule, and the English forms necessarily observed, the prosecutor declined to insist upon a question which he had put to one of the witnesses relative to what he had said on a former occasion.—The Court recommended to him not to urge any question which was not competent by the law of Scotland."

To English lawyers it may perhaps be matter of astonishment, that when by attesting upon oath contradictory relations of the same transaction, a witness has shewn himself to be a liar, it should not be permitted to offer that fact in evidence of his unworthiness of credit. To Scots lawyer Mr. Burnett (cap. 18, p. 497, note) informs us it seems strange that in England depositions before a coroner or a justice of the peace may be used in evidence to discredit contradictory *viva voce* testimony afterwards given by the same deponent on the trial.

"After being questioned in *initialibus*,* and before giving his evidence on the case the wit-

* In Scotland, before a witness gives his evidence upon the case, he is examined as to malice, partial counsel, and instructions what to say.

§ R

pected of partiality towards him) rejected the evidence; and being told by sir Robert Sawyer, the then attorney-general, that the like evidence had been admitted in former trials, the chief-justice (who, with all his faults, has been ever esteemed a great lawyer†, and, I am sure, in this instance did no dishonour to his moral character) said, "he hated such precedents in all times;—that he could not believe a villain in one word he said, when he owned that he forswore himself; and that he ought never to be received as a witness." And in his opi-

ness, if he please, may call for his declaration, or deposition if he has been examined on oath, and have it cancelled in his presence, that he may be at absolute freedom in telling his story on the trial. This was done in the trial of Love and others, May 4, 1687, [See the Case in this Collection, vol. 12, p. 523,] where the privy council had examined several witnesses upon oath. But even if the declaration should not be cancelled, yet certainly it can never be employed in any manner of way to the prejudice of the witness, nor can it even be produced in the trial to discredit his evidence, by showing that on a former occasion he had given a different account of the fact. Still less in the ordinary case, will verbal testimony to that effect be received to impeach the credit of his oath. The only proceeding of this character which I have met with, is the trial of David Malloch, July 16, 1750, an exciseman, for killing a smuggler in the course of the duty of his office. One Stevenson, also a smuggler, had given a testimony highly unfavourable to Malloch, in which he differed from all the other witnesses in the trial. To invalidate this, Macarthur, an exculpatory witness, had been allowed to relate a very different story which Stevenson had told in his hearing on a former occasion, immediately after the slaughter. Now, to support Macarthur's evidence, and in farther impeachment of Stevenson's veracity, the pannel proposed to examine one Anderson, who had been present at Stevenson's conversation on this subject, along with Macarthur. The Lord Advocate objected. The pannel rejoined, that Stevenson was the only person present at the slaughter; himself, a known smuggler, was associated with the deceased in the act of smuggling at the very time when he was killed, and was more likely to tell the truth recently on that disaster than now, at a distance of time, when he might probably be actuated by motives of a different kind. In respect of these circumstances the Lord Advocate desisted from his opposition, but with the due precaution to hinder this concession from serving as a precedent in time to come. 'His majesty's Advocate and procurator for the pursuer consented to the receiving the witness, but under protestation that it should never be made use of as a precedent in this court.' Hume's Comment. Trial for Crimes, chap. 13, vol. 2, p. 192.

† See vol. 10, pp. 555, 556.

nion all the judges of the King's-bench concurred.

But I had another reason for not calling Virtue Hall.—As an honest man, I dared not; nor could I reconcile it to the hopes of supporting my own character an hour longer. For how immoral and treacherous would it have been to produce a witness, to prove she had been perjured in a former trial; when by that very evidence she would have exposed herself to punishment!

Besides, what degree of credit could be given to a witness offering such testimony?

Gentlemen, there is a reflection thrown upon Mr. Nash, Mr. Hague, and Mr. Aldridge, for their not appearing on the trial of Mary Squires; as their testimony would have been extremely material upon that occasion, and, in all probability, would have prevented her conviction.

I must confess, that their conduct, in this respect, is not strictly justifiable; nor are the reasons assigned for their absence sufficient. This seems to be their own judgment afterwards, when, sensible of their neglect, they made the best atonement in their power. Mr. Nash was so affected when he found the woman was convicted, contrary to his expectation, that he declares he was very uneasy, and should never have forgiven himself, if she had been executed.

Finding she was convicted, what was the behaviour of these gentlemen? They readily assisted in an application to the throne for mercy; and, in all likelihood, the facts disclosed in their affidavits materially contributed to the saving the convict's life.

The counsel for the defendant have thrown another reflection on Mr. Nash, on account of the letter which he wrote on the 10th of February to Mr. Lyon. These are the words of that letter:—"Mr. Lyon, I am informed by Mr. Aldridge, who has been at Enfield, that if a person be appointed there to receive contributions, some money may be raised in that place for the unhappy poor girl. I wish you success, and am yours."

The gentlemen, by mistake, (for I dare say they would not misrepresent it knowingly) have taken notice of this, as proposing contributions to carry on a prosecution. But you see there is not a word about a prosecution, for it is only to raise money for the unhappy poor girl.—What does this prove, besides Mr. Nash's compassion and friendship to the defendant, in distressed circumstances, whether her story were true or false? She was poor, and under affliction; and whether that affliction was the consequence of guilt or innocence, his humanity felt for her.

But there is a wide difference between assisting the girl, and assisting to carry on a prosecution. This letter shews, at least, that Mr. Nash did not then bear the least ill-will either to her, or her mother: and seeing there is no evidence, that he has since had any reason to alter his sentiments; what, but his duty to the

public, brings him here? What should induce him to appear in a court of justice, and perjure himself, to ruin a poor, unhappy, innocent creature, who never offended him?

It is not pretended, that he can propose any sort of interest to himself, or the gratification of any passion whatever, by so foul a villainy. And I defy malice itself to suggest any thing to the prejudice of his character. He, as well as Mr. Hague, and Mr. Aldridge, being citizens of extensive acquaintance, it is very likely their characters are not unknown to you—and if so, their credit must remain unshaken.

Gentlemen, having now gone through the several objections which were made by the defendant's counsel, I must intreat your patience while I observe upon the evidence which hath been offered on her behalf.

Through the whole defence, they have not attempted to prove a single fact in express contradiction to any part of our evidence, except to the *alibi* of the gypsy.

Neither have they attempted to impeach the character of any one of our witnesses, except Natus and his wife, and also Ezra Whiffin, by a little side-reflection, which is now wiped away. All the other witnesses for the crown stand clear of imputation.

It is also observable, upon considering every part of the defence, that the defendant may be guilty of the perjury charged in this indictment, if all her own witnesses speak truth; but that she cannot be innocent, unless fifty of ours are perjured.

For, is there one circumstance in the whole defence, which necessarily infers a belief of her story? Or, is there one in the charge, which does not clearly infer the contrary? So that, if you convict this woman, you find a perjury upon the fullest proof that ever came before a court of justice; but if you acquit her, you must disbelieve facts uncontradicted, yet sworn to by witnesses of irreproachable characters.

If these general observations are not justified by the evidence you have heard on both sides, I shall be very ready to retract them; for nothing is more remote from my intention, than to mislead you.

All the evidence for the defendant tends to prove, that she was missing from the 1st to the 29th of January: that she was in good health on the 1st, and very ill on the 29th: that she was seen upon the road between London and Enfield-Wash, on the 1st of January at night, between two men: that she was seen in the same road upon her return home: that on the night of her return, and three days afterwards, when she went down to Enfield with her friends, she told her story with such clearness and consistency, as ought to induce a belief of it: that Mary Squires was really at Enfield-Wash on the 1st of January: that Squires and Wells have confessed both the robbery and confinement: that Natus and his wife, and Ezra Whiffin, are a set of wretches not fit to be believed: and lastly, that the defendant herself bears an exceeding good character.

What of all this is material, namely, the defendant's being met upon the Enfield-road, the *contra-alibi* (if I may be allowed the expression) of Mary Squires, the confession of Squires and Wells, and the defendant's account of herself, I shall take notice of, when I apply myself to the witnesses produced to prove these several matters. And you will find, upon consideration, that it was not the defendant, but other persons, who were met upon the road the 1st and 29th of January, supposing their own witnesses swear truly; that the evidence to encounter our proof of the *alibi* is extremely weak, uncertain, and improbable; that the pretended confession of Squires and Wells was neither more nor less than a declaration of their innocence; and that the defendant's behaviour upon her supposed return, and afterwards at Enfield, is a further confirmation of the charge against her.

As to the rest of the evidence;

Whether the defendant was missing from the 1st to the 29th of January, concludes nothing to the purpose, unless it be proved she was at Wells's. Nor is it material to this cause, that the defendant was in an ill state of health on the 29th of January and afterwards, unless it were also shewn, that her disorder was the effect of such ill usage, as she pretends to have endured. But you observe, by the very witness, the physician, produced for that purpose, that her illness might proceed from other causes.

The characters of Natus and Whiffin I shall take notice of, when I come to that part of the case.

The only remaining evidence for the defendant, was to her own good character, to which several witnesses appeared; but, thinking it immaterial, and for the saving time and trouble, I was ready to admit it. And because such admission should be taken in the strongest terms against us, I am willing this young woman at the bar should be considered (exclusive of the present charge) as a modest, virtuous, honest, creditable girl, fit to be believed in any thing, as far as any body should be believed upon the like occasion.

But there is a time, gentlemen, whercin people begin to be wicked; with some it happens early, with others late: some are misled by ill example and bad education, and others by various accidents.

What was the cause of this unfortunate young creature's deviating from the path of virtue so far, as at last to plunge herself into all this guilt and misery, does not clearly appear: she was meanly, though not wickedly brought up, and had lately, you see, been a servant in an ale-house, where we may suppose, at least, that she was not much strengthened in virtue. I do not pretend to say, there is any direct proof of her want of chastity; but I think it may fairly enough be conjectured as the incentive of her present guilt; but whatever has been the cause of it, she has been proved guilty of perjury, and as she once bore

a fair character, it is probable that she did not fall into this sin at once. Which, I think, is all that can be inferred from her good character.

I have no objection to the evidence of Mr. and Mrs. Colley, the uncle and aunt: for the defendant might have parted with them at Houndsditch in good health on the 1st of January, and they not see her again till the 29th.

But Mrs. Canning, the defendant's mother, who is called to prove several circumstances, has said enough to create a jealousy, at least, that neither her daughter's perjury, nor the motives to it, are unknown to her.

First, With regard to the papers that were sent to the office, in order to be printed in advertisements; in one of which it was said, that the defendant had in her pocket twelve shillings and nine-pence half-penny. She tells you, that in the morning her daughter had half a guinea, three shillings, and a farthing:—that she lent her a box to put the half-guinea in, and that the girl took her money out, and shewed it her. Why then did the mother propose to advertise, as if her daughter had just twelve shillings and nine-pence half-penny? Why not insert half a guinea, three shillings, and a farthing? Because the little brother had told her, she had changed some money, and had given to each of the children a penny; and so computing what remained of the thirteen shillings and six-pence farthing, she reckoned that the girl must have twelve shillings and nine-pence half-penny in her pocket when she parted with her uncle at Houndsditch. Now, if this be true, the defendant's account of the money is false: she swore, that the men robbed her of half a guinea and three shillings. The farthing, you observe, was not taken from her; for she brought it home, and gave it, the same night, to one of her brothers. The mother, being pinched at this obvious objection, endeavoured to remove it by lessening the force of the evidence she had given before; and by way of recollection says, she is not positive whether the thirteen shillings and six-pence farthing were not shewn to her after the half-pence had been given to the children. And if it was after, then the mother is in hopes she has entirely removed the objection, and left the whole sum of thirteen shillings and six-pence in the daughter's pocket, which was the sum she swore to have been robbed of. But with all the mother's cunning and sudden recollection, truth is too hard for her; for by forgetting a little circumstance, (Mr. Fielding's pretty incident of the penny mince-pye,) she is in the same dilemma as before. For, supposing the half-pence had been given to the children before she had shewn the half-guinea, three shillings, and a farthing, yet the mince-pye was bought after she parted with her uncle, as was sworn by the defendant: now, out of what money was the pye paid for? And if she had no half-pence, and only half a guinea, three shillings, and a farthing, before she bought the pye, then how could she be robbed of half a

guinea and three shillings in Moorfields afterwards? Thus that pretty incident, "which" her learned advocate, in his pamphlet, says, "possibly saved this poor girl's life," leads to a detection of her guilt upon the evidence of her own mother.

The mother mentions another strange circumstance. "She thought the girl had been murdered by the Jews, and thrown into Houndsditch." Why then did she advertise her lost, strayed, or missing by her friends? Why no searching for the body? Was there a human creature sent to enquire about it? Besides too, the very next witness, the apprentice, swears, what stands in flat contradiction to the mistress, "That Mrs. Canning told him, she thought her daughter had been snapped up by some rakish young gentleman."

The screaming out of a coach, in Bishopsgate-street, seems to be one of the wandering thoughts she speaks of; for, though it is pretended she received information of that matter by the woman of the oil-shop, yet they have not thought fit to produce this person; which, in a case where every circumstance is material, is an omission one cannot account for to the credit of the defence.

But it seems, as if the thoughts of both mother and daughter wandered towards the same objects; for the daughter dreamt of Bishopsgate-street, while she was in a convulsive fit.

Then as to the conjurer; to whom, by the bye, there was not a word mentioned about being murdered by the Jews.

She was introduced to this illustrious personage with great solemnity: the lights, the skeleton, the magic instruments, the wand, the circle, and all the apparatus proper to inspire a poor ignorant woman with awe, and engage her to a discovery of what she wanted to know, were all before her.

She was so terrified, that you find, she hardly remembers one word she said to him; and yet she must have said something very material, instructing him to give her so good an account of her daughter.

At last she recollects, that she did tell him something about Bishopsgate-street, though she does not remember the particulars. But she must have gone much further, before the doctor could have found out, that her daughter was in the hands of an old woman; that she should advertise her once more, and she would come again. Whether she really had this intelligence from the conjurer, or, in order to carry on the plot, thought fit to invent it for the amusement of her credulous friends, who had lent her money for his fee, is not easy to say: but either way the inference is, that she knew more of her daughter than is consistent with the defendant's innocence.

For, if what the daughter swore had been true, how could the mother, at one time believing her murdered by the Jews at Houndsditch, and at another that she was snapped up by some rakish young gentleman, be so sud-

dearly undeceived, and discover she was in the hands of an old woman, and would return?

When one considers the whole of this woman's evidence together, the several advertisements,—the conference with this pretended conjurer,—her wandering thoughts,—the putting up bills in the church, and the meeting-houses of Presbyterians and Methodists, to pray for her daughter's safe return, (by which the pious congregations were predisposed to charity)—the nightly repeated prayers to the same purpose with the apprentice at home,—particularly the praying with him on the 29th of January for the daughter's apparition, (never mentioned till that very evening)—that prayer answered in the same moment by the daughter's suddenly rushing into the room,—her mother's pretended surprise at seeing her, "Feel her, feel her, it is an apparition!" and then fainting away; all these things put together, together too with the account the daughter gave before Mr. Alderman Chitty about Bishopsgate-street, though they do not directly prove, yet surely they create something more than a suspicion that the whole was a contrivance.

To support the defendant's evidence, as to the manner of her escape out of window, Mrs. Canning the mother, James Lord the apprentice, and Mrs. Myers, have sworn, that her ear (which the defendant said was scratched in breaking out of the window) was bloody when she returned home. The mother says, the "ear was then bleeding." James Lord says, "it was all over bloody, and the handkerchief bloody." And Mrs. Myers says, "the blood then dropt from her ear upon her shoulder."

This was six hours after the time of her leaving Enfield-Wash; and, according to the defendant's own evidence, she wrapped a white linen handkerchief round her head, which she found in Wells's room, and wore it, instead of a cap, all the way to her mother's: now, if her ear bled at the rate those witnesses would have you believe, the handkerchief must have been extremely bloody in one particular place. That handkerchief has been produced to shew to the witnesses under another head of evidence, and is now before you. Does it not give the lie to these three witnesses? It has indeed the marks of little spots of blood upon it, but in different places, all over the handkerchief, and not at all corresponding with their testimony, but rather like dots made by a finger on purpose.

But it being a good while since Mrs. Canning had the possession of this handkerchief, I do not wonder at her forgetting in what manner she had dressed it up, seeing her want of memory has betrayed her into a flat contradiction to the evidence she herself gave upon the trial of Squires. For she now swears her daughter came home with two handkerchiefs on her head, and that "she had no cap on;" but upon that trial, she said nothing of the handkerchief, but swore, that, upon her return, "she had a cap on."

Gentlemen, it is an objection to the credit of

the apprentice, that he has been hid, till he is brought here as a witness, lest he should make discoveries; for when Mr. Biddulph went to the house in order to ask him a few questions, another person was imposed upon him in his stead.

It will be material to another part of the evidence afterwards, to recollect Lord's description of the defendant upon the 29th of January, that "she was black and blue as if beaten," and that "her arms and face were as black as his hat." He also tells you, what is contradictory to all the rest of the evidence, that on her first coming home, before Mr. Scarrat or any body came in, she said she had been confined at Enfield-Wash. If you consider the whole tenor of the evidence for the defendant, you must be convinced that this lad has sworn falsely, and that he was hid for a very iniquitous purpose.

The name of Mr. Scarrat, the next witness, I have had occasion to mention once or twice already, in terms not much to his advantage.

He came to the defendant, before she was asked any questions;—one of the witnesses says, it was before she answered any questions.

What brought him there, a total stranger both to the mother and daughter? for, if you can believe him, he had never spoke to either of them in his life.

He says, he was prompted merely by curiosity, upon hearing, in the neighbourhood, that Betty Canning was returned home: and the moment he came in he asked her, "where she had been confined?"

Ready to satisfy this stranger at once, she told him she had been confined somewhere on the Hertfordshire road, for she remembered the coachman's going by.

The next question was, "How far from London?" She answered, "Near nine or ten miles."

Without further enquiry, Scarrat instantly replied, "I'll lay a guinea to a farthing, she has been at mother Wells's:" She immediately said, "I think I did hear the name of Wells or Wells:" and he then helped her to a perfect description of Wells's house, and the places about it.

Mr. Scarrat proceeds to ask her various questions, in order (as he says) to be satisfied, whether she really had been there. He asked her about the prospect from the window,—the ploughed land,—the brook,—the tanner's—and every remarkable thing he could recollect; and to every question she answered in the affirmative.

If Scarrat really meant to be satisfied whether she had been at Wells's, seeing she answered affirmatively to every question, why did he not put one question at least, to which her answering Yes would have convinced him, she had not been there? The reason of that omission may be easily collected from the rest of his behaviour.

Being asked, whether he knew Mrs. Wells's, he would have you think he only knew

her house by passing and repassing. Was you never there? Why, "he believes"—he is not sure—"he has been there once or twice." No oftener?—Upon your oath, have not you been there more than twice?—"I believe I have been there two or three times."—Four times, Sir? "He might have been there three or four times." At last it came up to ten. "He could not say but he had been there ten times!" But, says he, I had never been in the hay-loft. In this I believe him, because the defendant appears to have been helped to no description of it.—If he had been there, he might have asked some questions about that too, which she would also have answered in the affirmative: but though he might have never been in this hay-loft, yet he had been all round the house, and must have known by the outside, that there was such a room, and where the windows were.

He swears further, that as soon as the defendant went into the kitchen at Wells's, she pointed to the door leading to the workshop, though it was shut, and said, "This is the door leading to the room in which I was confined." But Scarrat, not knowing what the other witnesses had sworn, after having out-run them all, was reduced to the necessity of giving evidence against the defendant by answering this question, viz. If she had ever been before in the kitchen with the door of the workshop open, and yet had taken no notice of it, and had never pretended to recollect the place till after she was in the workshop, and this too after she had been in every other room of the house, supposing all this, what he would have thought of her? Little dreaming of what had been proved, he answered, it would have led him to disbelieve her whole story.

This is the man who was present at Mr. Alderman Chitty's granting a warrant against Mrs. Wells for a capital felony; who knew by the description she could not be the person meant, and yet he never dropt the least hint to prevent it: and now he denies bearing any ill-will to Mrs. Wells, his old acquaintance, or that he ever vowed revenge against her.

This is the man, who, though an entire stranger to Canning, first helped her to a perfect description of the places about Wells's house, which gave credit to her story; and afterwards, in order to give her credit with a jury to convict two innocent women, by way of corroboration, as he terms it, committed perjury.

Mary Myers and Mrs. Woodward say, the defendant's shift was neither draggled, nor dirty. Yet this was the shift, you are to suppose she had on, when two men had dragged her twelve miles, for six hours together, through dirty roads, in January—which shift she wore for a month in a filthy room, and upon her return through the same dirty road.

Had this been true, not only the shift would have been draggled and dirty, but her petticoat, shoes, and stockings must have been extremely so—Why were they never produced?

Mr. Lyon, Mr. Wintlebury, and Mr. Adamson are next called to prove what passed at Enfield-Wash.

The first of these witnesses, being an exceeding honest man, and cautious of what he swears, has done the defendant so little service by his evidence, that he might very well have been spared. He tells you, that he himself has no other reason for believing what the defendant said, than because she said it; for that he never made the least inquiry about it, but swallowed the whole story at once upon the credit of this servant of his, without supposing it possible she should tell him a lie. Had his head been as good as his heart, he would certainly have required some reason for assenting to the most wonderful story he ever heard in his life.

But as much as I admire his goodness, I cannot help being sorry for his credulity; because I am apprehensive, his being so easily to be imposed on, might have encouraged the defendant at first to invent this ridiculous excuse for absenting so long from his service.

Mr. Wintlebury endeavours to account for the defendant's saying there was more hay in the room than when she had been confined there, by swearing that it appeared to have been tossed up, and hollow towards the north window. But this stands contradicted by almost every witness.

He says also, that George Squires endeavoured to go away in a hurry, and that he would have avoided an examination. Though this is not much to the purpose, yet it is a very suspicious evidence; for Squires was so well guarded, it was hardly possible for him to escape; and there being no charge against him, nor the defendant so much as pretending to have ever seen him before, what had he to apprehend, which should make him attempt it? Besides, you find, he voluntarily and readily gave a full account of himself and his mother, the moment his mother was charged with the robbery, by declaring that they were at Abbotsbury on the 1st of January, and for several days after.

Mr. Adamson owns the defendant made no observation in the kitchen: and yet you find, even by her own witnesses, that she could have seen near two-thirds of it from the room in which she is supposed to have been confined. None of them deny this; and some admit, that the hole between the hay-loft and the kitchen was so large, that she might have looked through the kitchen into the road. Now, if she had been in this hay-loft for a whole month together, was it possible, when she was brought to the kitchen again, she should forget, that it was contiguous to the hay-loft, and leading to it by only five or six steps? Whereas you find by this witness, that when she was first brought into the house, seeing the staircase which faces the street-door, she immediately said, she believed, "That was the stair-case she was carried up."

It appears incontestably, that this stair-case

is at a considerable distance from the hay-loft, and has no sort of communication with it. And Adamson himself allows, it is not at all like the little flight of steps leading from the kitchen;—that it struck him, for he thought it strange she should make such a mistake. How contradictory to each other are the testimonies of this man and Scarrat! Observe here the good effects of a separate examination.

When she was carried into the hay-loft, did she immediately say, (what she must have known before she got up three of the steps, if she had ever been there before) This is the place? No.—But when she was in the room, and after a pause, she recollected, (having seen every other room of the house) “This is the room, but there is more hay in it.” Adamson tells you, it occurred to him to search about the house, whether there had been any hay lately carried there; but that there was no appearance of any,—not a single blade could be found.

Not recovered from the amazement into which her owning the stair-case had thrown him, and having yet received no proof of her sincerity, he devised a most ingenious trial, to satisfy himself that the defendant had been really confined in the hay-loft. And this was by asking her concerning the prospect from the window. But this sagacious gentleman had not thought of the experiment, until she had been in the room for the space of five or six minutes, to furnish herself with observations.

And, after all, what was her answer? “Hills and trees at a distance.” The chances were so many in her favour, that hills and trees might be seen from any country window, that she might have ventured this, before she was carried there. But if Mr. Adamson had not been overfond of removing doubts, he would certainly have required a more ample description of a prospect she pretended to have had for a month together. The trees were almost peeping in at the window, and must have been seen by her, as well as the hills, as soon as she entered the room.—But besides these, there were many other things (as you find by the witnesses) observable from the room. A hedge, and a ditch broad enough for a foot-way, just under the same window,—several fields, both plowed and in grass, and a variety of other things proper to be mentioned, in answer to such a question, of such a tendency. And yet, you observe, the answer of “hills and trees at a distance,” was sufficient with Mr. Adamson to destroy the glaring proof she had just before given him of her insincerity.

He also swears, he helped to pull down the boards from the window, and that Mr. Colley assisted in it. This was a fact so very material, tending to destroy one of the capital objections to the defendant's credit, that one should have expected the fullest evidence to prove it. Colley had been before called to facts infinitely less material, but he has not mentioned a word of this. From whence one might fairly conclude, that Colley's account

of this matter would have done the defendant or Mr. Adamson no service.

The willingness of Adamson to reconcile all difficulties, and regain for the defendant a forfeited credit, appears by his riding back to ask her about the hay. To obviate this objection to himself, he has ventured to deny even his saying to her, “What! hay, Bet!” But he dares not disown his riding back to inform himself about it; and another of the defendant's witnesses, who was then with her, swears to the very words. That other witness was material to several facts, as well as Mr. Adamson; and as one of them must be forsworn (unless the doctrine of mistake is to prevail universally) it will be of equal advantage to the prosecution, give up which you please.

Beals, the turnpike-man, was the next witness to prove his seeing the defendant on the 1st of January carried by two men in the road towards Enfield. But what does he prove? Most clearly, that he never saw her there; which appears past all doubt, even by the defendant's own testimony. She swore, she was stripped of her gown and apron in Moorfields, and had neither of them on when she arrived at Wells's; but Beals swears, the woman he saw had a light-coloured gown and an apron on: so that, of all the women in the world, whoever it was, certainly it was not Elizabeth Canning.

There is another reason, why she could not be the person. Canning was insensible, in a convulsive fit, and therefore unable to walk a yard; but the woman Beals saw, so far from being borne by two men, was walking very fast, nimbly going along the road, sobbing and crying; whilst one of the men was pulling her on, saying, “Come along, you are drunk;” the other following, “Loni, how drunk she is!” Could this be Elizabeth Canning? Were the cries he heard, like the screams of a woman in a convulsive fit? Could Elizabeth Canning, in her then condition, without either gown or apron, be the person this witness describes? How many impossibilities must be swallowed to suppose this woman guiltless?

But even these are not the only proofs it was not the defendant, whom Beals is supposed to have seen on the road. For, if you consider the place and time of the night, you'll find another impossibility to contend with.

What Beals has given an account of, was at Stamford-hill turnpike, about four miles from Moorfields. According to the defendant's evidence, she was robbed in Moorfields between nine and ten, and she arrived at Wells's about four in the morning: so that this journey of eleven miles (the distance between Moorfields and Wells's) must have taken up above six hours; at which rate of travelling, she could not have reached this turnpike till almost twelve o'clock. But what Beals saw was betwixt ten and eleven, which was but an hour after the defendant was first attacked in Moorfields. Is it possible that two men could have carried her, in such a condition, four miles in one hour?

Besides, the witness is uncertain as to the day of the month. He swears only to the "fore-end of January," but is not able, by any circumstance whatever, to fix it to the first day of the month. Whereas New-year's day being a very remarkable time, it is probable he would have been able to recollect it particularly, had that been the day.

Such was the evidence of the defendant's being seen upon the road, between London and Enfield-Wash, on the 1st of January. Let us now examine the proof of her being seen in her return home upon the 29th.

Thomas Bennet, the first witness called to this fact, says, that about a quarter of a mile from Mrs. Wells's, and twenty poles below the ten-mile stone, he met a woman, "miserably poor, without either gown, stays, or hat, yet with something about her, not a gown:" that she appeared to be a stranger to the road, for she enquired the way to London, and told him, "She had been frightened by a tanner's dog."

Had he omitted this last circumstance, there had been nothing to detect him of falsehood by; and the fact would then have depended merely upon his credit, which, probably by appearance, could not have weighed much, unsupported by other proofs. But the incident of the tanner's dog has quite defeated his evidence, for it was impossible she could tell him of this, in her way from Enfield-Wash to London, before she was come so far as the tanner's. She might, indeed, have met a dog, and been frightened by him; but how could she, a perfect stranger, know he belonged to a tanner? This witness tells you, the tanner's is an hundred yards on this side of the ten-mile stone, but he met the woman twenty poles below the ten-mile stone: and it was not the witness, but the defendant, who called it a tanner's dog.

This will not be thought too nice an objection to the credit of one deposing a fact not very credible in itself, and which you will find to be false, when coupled with the evidence of the subsequent witnesses. And in a case of this extraordinary nature, where the defendant's attorney (not the present attorney, to give him his due) had advertised for evidence, it became necessary narrowly to watch every circumstance coming from the mouth of a witness in so low a station of life.

The next witness was David Dyer. He says, he saw a "poor distressed creature" pass very slowly by him on the 29th of January; that he said to her, "Sweetheart, do you want a husband?" Being asked to give an account of her clothing, he says, She had a white handkerchief on her head. In this he goes too far; for, according to her mother's account, the white handkerchief was covered by a coloured one, which she had taken out of her pocket, and which, from the smallness of the white one, must have totally concealed it.

Willing to fix every circumstance, he swears to something that may answer to the bed-gown, "A shortish thing about her, that did not come very low;" and that he saw the woman soon

afterwards, and took her to be the same person with the prisoner at the bar. But being called upon to describe her, as she appeared to him upon the road, this witness, unacquainted with what the rest had sworn (another good effect of a separate examination) proves most clearly, that the person he saw, if any one he saw, was not Elizabeth Canning. Her face, says he, was very pale, not black, but whitish. He looked earnestly at her, and particularly observed her, and did not only admire her face, but her hands too—they were delicately white.

Refer yourselves to the description given of her at her return home, particularly by the apprentice: "she was black and blue, as if beat, her arms and face as black as his hat." Could this be a pale woman with a white hand, whom Dyer met upon the road?

Mary Cobb, the only remaining witness to the defendant's being on the Enfield road on the 29th of January, swears she met her creeping along, in the middle of the three Ducks-fields, between the five and six-mile stones. This is said to be a mistake, and that it is between the six and seven-mile stones. Take it either way: if she met her between the five and six-mile stones, it was near five miles from Wells's;—if between the six and seven-mile stones, it was near four miles from thence; for Wells's house is about the midway between the ten and eleven-mile stones.

Now, by comparing this woman's evidence with what the defendant has sworn, you will find it impossible to be true.

The defendant swore she set out from mother Wells's at four o'clock, and that the clock struck ten as she was going over Moorfields: so she was six hours travelling eleven miles, (the distance between Wells's and Moorfields) which is less than at the rate of two miles an hour.

Reckoning from the time the defendant herself has fixed for her setting out, it must have been past six before she had crept to the middle of the three Ducks-fields, supposing it to be but four miles from Wells's, and if five miles, then it must have been half an hour later. Now, at what time did this witness see her? She says it was duskish. The 29th of January was the day after a new moon, so there could be no moon-light; and if it was duskish, it could not be so late as five o'clock. A great deal of pains was taken, in the cross-examination of this witness, to fix the time of her being at the place, where she is supposed to have met the defendant. At three o'clock she left her own house,—she had a mile to go to one Mrs. Carter's—she had been there, but I think stayed not a minute,—she called no where on the road,—she might indeed be detained a little by acquaintances, who met her, but made no considerable stop any where,—and met Canning within a quarter of a mile of her own house, on her return home;—so then she must have walked a mile and three quarters, and no more, from three o'clock, and make very little stay. How late could it possibly be then?

Let this woman creep as slow as she pleases, let her be as slow in walking as she appears in invention, she could not eke out the time so as to meet the defendant. Even five o'clock will not do—duskish will not answer—it must have been past six before Canning could possibly come to that place, by her own calculation. But this Mrs. Cobb has even ventured to swear to a perfect, an absolute remembrance of the defendant's face, by the tip of her nose! By what light could she make so nice an observation, after six in the evening, on the 29th of January?

Upon the testimony of these three last witnesses I shall only make this further observation, that, if it were possible to admit they saw any person in the manner they have sworn, it appears, by every circumstance, they all saw one and the same person, and the evidence of Dyer fully proves, that woman was not the defendant.

These, gentlemen, are the objections which have occurred to me on that part of the case, relating to the defendant's having been seen on the Enfield road on the 1st and 29th of January: by which it appears, that her friends have reaped no great benefit from their advertising for evidence.

The next attempt was to answer the proofs we gave of the gypsies being at Abbotsbury on the 1st of January; in my observations upon which, I shall not take up much of your time. Indeed I cannot take upon myself to enter minutely into the evidence, because I was unavoidably absent yesterday, when most of the witnesses to it were examined. But from the notes of my learned friend, the gentleman whom I have the honour to assist, I am authorized to say, the defendant has had no better success in this part of her case, than in the rest.

Are the witnesses to prove the gypsy's being at Enfield before the 24th of January so very certain, both as to the person of Mary Squires, and the exact times of seeing her there, as to leave no possibility of mistake? If so, this will rest merely upon the credit of the witnesses; otherwise it will not admit of dispute. For it is most certain, that the witnesses for the crown cannot possibly be mistaken in either of these respects.

It is observable, that none of the defendant's witnesses pretend to have ever seen Mary Squires with either of her two children; whereas every one of our witnesses swears directly to all their persons.

With what uncertainty do the defendant's witnesses speak also to point of time! Some of them do not know one day, and some not one month from another, and some are ignorant whether Christmas is in June or January.—One keeps the day of the month by his clock,—another refers herself to the almanack, without being able to distinguish by it what day of the week such a particular day of the month was. The experiment was made upon her cross-examination, and an almanack was

VOL. XIX.

put into her hand,—she understood nothing by it. But, says she, I swear from the assistance of a sheet almanack; yet what had been shewn her, was the same cut into leaves, and bound up.

Gentlemen, those who pretend to be positive as to time, either refer to circumstances inconclusive, or to papers and books, not one of which has been produced. It was material for them to be exact, and they saw the necessity of being so. Why then did they produce no written evidence to ascertain facts of such consequence, since by their own account this was to be had?—Is it not apparent, no diligence has been wanting in this defence to lay before you every circumstance that could be construed in their favour? To what cause can such omission be ascribed? Persons speaking merely upon memory are very liable to mistake; and in a cause of so much spirit, the zeal of witnesses may urge them to strain the truth at least, even where they would not venture at direct perjury. Falshood is glossed with doubtfulness, and doubts are raised to certainty.

An instance of this was exemplified in the evidence of Anne Johnson, who swears she saw Mary Squires at Enfield on the 18th of January. Was it possible for any witness to be more positive than this woman? She remembers the time perfectly; it was just two days after she carried her work home to Mr. Smitheram her master, who entered in his book the time of its being both delivered out and returned.

Here was a reference to a written memorandum, and the producing it would have fixed the time past doubt. Yet this, like all the rest, was thought proper, by those concerned for the defendant, to be left merely upon the credit of memory. But, by accident, we got access to Mr. Smitheram's book of accounts; and he and his daughter, in whose hand-writing the entries were, have been so kind this morning, as to produce the very book which Anne Johnson referred to; by which it appears, that the work was carried home on the 23d of January. So that the time of her having seen Mary Squires, two days after, must have been on the 25th, which was the day after Squires's coming to Enfield, according to the account of all our witnesses.

I do not mean by this to impute any thing more than mistake to this Anne Johnson. But it shews how uncertain memory is, how positively witnesses, warmed into a contention for victory, will depose facts, which they should relate with some degree of doubtfulness, and shews indeed the reason, why no books or papers are produced.

Sarah Star swears to the 18th or 19th of January, and refers to a note of hand of the same date, which she delivered to Mr. Miles, the defendant's then attorney. But neither the note itself, nor Mr. Miles, nor the person, who, Star says, brought the note to her, is produced.

In short, for it is time to make an end, nothing conclusive appears.

Grace Kirby, another witness, ready as the rest to fix an early time of seeing Squires, upon her cross-examination is not certain of having seen her, till within eight days before Squires's being apprehended, which was on the 1st of February.

Wise Basset is sure of the time, because she killed a hog on the Thursday before New Christmas day; and she has no other reason for fixing the time, but because it was the Monday was a month after; which brings it to the 22d of January.

How vague and uncertain is all this evidence, compared with the clear, determinate, positive, absolute testimony, that Mary Squires was at Abbotsbury on the 1st of January! I should be ashamed to take up more of your time in observations upon this part of the defence.

They next call Ward and Jones to prove, that Susannah Wells confessed the defendant's confinement.

Ward, having just read the news-paper relating the particulars of the defendant's story, went to see mother Wells in Clerkenwell Bridewell, and Jones went with him as his friend. One of them (Ward, as I recollect) asked Wells, "How came you to keep the girl a fortnight?" To which Wells answered, "It was twenty-eight days." The next question was, "In what room was she?" The answer was, "You know the room very well." This was the whole conversation tending to a confession: but such a confession, I may venture to say, was never before given in proof.

Wells, at every other time, both before and after this pretended confession, stoutly denied every article of the charge. It is therefore most likely she did not mean, at this time, to admit it. And if you consider the occasion of Ward and Jones going there, and the very words of the conversation, you will find that Wells really confessed nothing; but only corrected Ward's mistake by the charge against her. The news-paper had mentioned, that Wells had confined the girl twenty-eight days; Ward had mistaken it for a fortnight, and Wells set him right. The whole of which, taken together, amounts to just as much as if Wells had more fully answered, viz. You are mistaken as to time, for I am charged with having confined her twenty-eight days.

Her answer to the other question naturally bears the same construction, "You know the room very well." What room did he know? That which he had read an account of, and in which the girl had said she was confined.

This is the natural and the only sensible exposition of the words. If Wells intended to confess the crime she was accused of, something more would have been said, explaining the motives and design of such an extraordinary transaction. The same curiosity, which carried these two witnesses to Bridewell, would certainly have urged them to further questions, and the same candour, which this pretended confession supposes at this time in Wells, would as certainly have led her to explicit answers.

If, on the contrary, Wells did not intend a confession, how infamous was it in these men, by a pretended mistake of a fortnight instead of twenty-eight days, to ensnare her into an answer, which by an equivocal interpretation should amount to a confession, and leave it unexplained, in order to be furnished with evidence?

If this was the only scandalous part of the defence, it would require more observation than I shall trouble you to make.

To as little purpose was the attempt by Paul Stevens, a publican, to prove the confession of Mary Squires in Clerkenwell prison. This witness went there with two or three gentlemen to see her, about three or four days after her commitment. But who these gentlemen are, or why they do not appear to support this man's evidence, we know not. The whole confession amounts to no more than this, namely, "What I am here for, I am innocent of:" and afterwards speaking of being at Wells's house, "I believe, whilst I was there, Elizabeth Canning was there." This, and this alone, they call a confession; to procure which, they treated her with a bottle of wine. Severities had been tried before to no manner of purpose: she had been complaining, that they had buffeted her about, because she was not willing to answer questions. But good words and a bottle of wine opened the old woman's heart, and she frankly confessed to these civil gentlemen,—What?—that she was innocent of the charge against her. But she believed, whilst she was there, Elizabeth Canning was there. She never said she knew, but she believed. It is plain she never saw her; for if she had ever seen her, it could not rest upon her belief. And the witness himself is so doubtful of the words spoken, that nothing, besides the innocence of Squires, and the perjury of Canning, can be collected from it. At first, Stevens was positive, that the words were, "I believe, while I was there, Canning was there." Then the witness believes these were the words—and then the words were, "To be sure Canning was there, as I believe." And several times afterwards the witness varied the expression, and could never fix it.

What a confession is here proved! A stedfast declaration of her own innocence, coupled with a belief, touching a transaction, which, if innocent, she must be ignorant of.

This poor woman was a stranger to Wells, having never seen her till the 24th of January, when she came to lodge in her house. Eight days after, she (with all the people of the house) was apprehended on the accusation of Canning, that she had been robbed and confined there.—Wells bore an infamous character universally; Canning's complaint was favoured by several persons of credit and reputation; and therefore Squires was inclined to believe the girl had been robbed by somebody, and that her story might be partly true. But her own innocence she persisted in;—so there's an end of all pretence of confession.

They next call witnesses to impeach the evidence of Natus and his wife.

Nathaniel Crumphorne says, that so lately as last Friday fortnight, the 21st of April, he asked Judith Natus, "How came you to have the conscience, knowing this poor, innocent creature was at mother Wells's, to go and be against her?" And that Judith Natus answered, "Indeed, Mr. Crumphorne, I cannot say but she really was there, when we lodged there."

Considering these words as an excuse, in answer to Crumphorne's reproach for giving evidence against Canning, you will have no difficulty in believing the very reverse of what that witness intends; and considering the time of this conversation, it looks as if this Crumphorne was tampering with the witness to swear what in truth she could not. Crumphorne is certain to every word spoken, and indeed it was very material he should be so; for by striking out the single word 'but,' the sense would be entirely altered, and then the answer would be proper to the question. And that Crumphorne goes too far in swearing to the very expression, appears by the next witness, his wife, who gives evidence of these words only, "Indeed, Mr. Crumphorne, she really was there, when we lodged there." The former part of the words, "I cannot say but," is entirely left out. So that it remains doubtful, what were all, and the particular, though few, words made use of upon this occasion. You will therefore apply your attention to the substance of this conversation, that Judith Natus was reproached with giving false evidence, and that she was justifying herself.

That Natus and his wife lay at Wells's during the month of January, is supposed even by this very witness. Now, I should be glad to know in what part of the house they lay. It appears, that every other room in the house, except the hay-loft, was wholly occupied by the rest of the family. And if they lay in the hay-loft, it could not be while the defendant was there, because she swore, "she did not see a human creature during all the time of her confinement, but once through a crack of the door."

Further, to discredit Fortune Natus's evidence, one Jackson is called to prove the proposal of a wager by Natus, at the Four Swans, whether he had not lain out of Wells's house a single night during the month of January. This was intended to contradict Natus, as having, in his evidence, denied proposing any such wager. But in reality Natus was so far from denying it, that he himself gave an account of his having lain out of the house one night, and no more. And his wife, you may remember, gave the same account. This circumstance, so confirmed by the defendant's witness, would add credit to Natus, if he stood in need of it.

The next evidence is to the impeachment of Natus's character, by three persons swearing with such rancour and malice, as is sufficient to overthrow all pretence of credit in themselves.

One of them, in effect, says, he believes Fortune Natus is so infamous a fellow, that without the temptation of interest, or any passion to indulge, but merely for the sake of giving false testimony, and from his propensity to lying, he would perjure himself in a court of justice.

But let not human nature bear the reproach of such a character.—There cannot be a man on this side hell so abandoned by his Maker, as that rash witness would have you to think. The earth has never bore such a monster, as to fall in love with naked falshood. What devil incarnate was ever heard of, who did not incline to truth, till he was warped by some particular temptation to leave her? For has not the Author of Nature created her lovely in the eyes of all mankind? Let any man breathing ask his own heart, whether he was ever persuaded to embrace a falshood, till she was robed in the garb of truth to deceive him? It would be a contradiction in terms to say otherwise. The witness, who is capable of representing Natus in such colours, must be conscious of the truth of this observation, and feel himself impelled to such a horrid misrepresentation, either by avarice or revenge, or some passion which he dares not avow.

But see the real character of this Natus, by one who knows him better.—Mr. Bell, his master, says, he has known him very well for fifteen months past, and that he is his servant;—that he is a very honest, civil, and industrious man;—that he never once caught him in a lie in his life;—that he has now eight servants, and would be glad to have his fellow.

The same man may indeed have several characters, as different people are differently affected to him. And perhaps it would be a good general rule, to take the medium betwixt the two extremes of any character whatever. But surely there never were two such extremes as these concerning the same character before; and considering the nature of the evidence, and who are the witnesses, I may very safely rest upon the credit of Natus's testimony, especially as it has been so well supported by many other witnesses, attesting such a number of circumstances to confirm it.

Another witness, Mr. Metcalf, was called to contradict Mr. Whiffin, as to the time of his receiving the sign-iron. But Metcalf's evidence is so very uncertain and indeterminate, that it proves nothing. He swears to a transaction upon the 8th of January; but when he is called upon to assign his reason for being particular to the day of the month, all he can say is, that he keeps his reckoning by his clock, and is ignorant whether his account is according to the Old Style, or New.

But Mr. Whiffin's evidence is sufficiently supported by several circumstances, the time is fixed beyond all doubt, and there now remains no stain upon his character.

Gentlemen, I think I have taken notice of all the material circumstances on both sides, two only excepted, which I did not sooner recollect.

One is, the defendant's claiming the bed-gown, before sworn by her to have been found at Wells's, in the grate in the chimney. This then lay, together with the pitcher, on a table at the Mansion-house; and she would have taken them both away; but that was objected to, because they did not belong to her, and that they might be deposited in some public place, for the sake of further discoveries: upon this (relinquishing the pitcher) she insisted on taking away the bed-gown, for "That was her mother's."—It has been proved, that there was no grate in the chimney at Wells's.

And I should have added to the observations upon the evidence of the mother, who proved the defendant's hand-writing to some papers now before you, that the innocence of the defendant having been most cogently inferred from her supposed simplicity, and she having been represented as a poor, silly, illiterate creature, incapable of inventing such a story, to furnish her advocates with so excellent an argument, she set her mark to her information before Mr. Fielding, as if unable to write her name; which information is also before you. I dare say, it was not then imagined that this marks-woman had received so good an education. Who would have thought, upon reading the pamphlet, which that good magistrate was pleased to oblige the world with, containing the information at large, with such ingenious remarks upon her stupidity;—who would have dreamt, that this "child in years, more so in understanding," was able to write a fair, legible hand?

And this may serve as a specimen to shew what mean artifices have been made use of to deceive mankind.

Gentlemen, you have now before you the whole merits of this cause; the subject of universal controversy, which it is hoped your verdict will put an end to.

Permit me, therefore, to remind you briefly of what you must necessarily believe, in order to acquit the defendant of the charge against her.

In the first place, you must believe a most astonishing story of several incidents, every one of which is to the highest degree improbable. You must also believe, that above forty witnesses to the alibi of the gypsy are all guilty of perjury, although there is a greater combination of circumstances to add credit to their evidence, than was ever before required to satisfy a human inquiry. To this end, you must also believe, that all these witnesses conspired to this perjury, and pre-concerted every circumstance with so much art and contrivance, as to defeat the possibility of detection upon a separate examination; and all this you are to suppose, although the evidence to contradict them is infinitely less clear, less certain, and less conclusive.

But if, notwithstanding, you can prevail upon yourselves to suppose Mary Squires to have been at Enfield, when we proved her elsewhere, or (which is as hard to suppose) that

the defendant mistook her for another, you have yet more difficulties to reconcile. For you must further suppose, either that Mr. Alderman Chitty, Mr. Nash, Hague, Aldridge, together with many of the defendant's own witnesses to several circumstances, are absolutely perjured; or else you must yield your assent to a new train of events, as many and as wonderful as those in the defendant's story.

You must, moreover, believe all the ten witnesses, confirming Natus's evidence, likewise guilty of perjury; although no attempt has been made to disprove their testimony, except only (what I hope is sufficiently answered) with respect to Natus himself, and also as to the time of Whiffin's buying the sign-iron.

And upon what foundation are you to suppose all this?—Upon the credit of Elizabeth Canning, proved to be self-contradicted in no less than three instances, relative to a single fact; or, upon the evidence of her witnesses, who have given no answer to the charge. For it is observable, that not one of the witnesses for the crown, except to the alibi of Squires, is contradicted by those for the defendant; and yet, if their evidence be true, she must be guilty.

These, gentlemen, are the remarks occurring to me upon the various circumstances in this very long trial. Many of them may, perhaps, have been unnecessary or improper, whilst some, which I may have omitted, should have been enforced; but whatever errors are imputable to me in the course of this prosecution, I solemnly protest, that the mis-stating or mis-applying any facts has been entirely foreign to my intention throughout the cause; in the merits of which I have at no time been engaged, otherwise than, as I conceived, the duty of my profession directed me: and this duty I have discharged to the best of my abilities.

Mr. Nares. I only beg leave to mention one thing. There has been one reason attempted to be given, why a very material witness is not produced, the want of which witness is attended with the utmost inconveinency to the prisoner at the bar; that is, Virtue Hall: by her not being called we can give no evidence relative to her; that is as to what she has said, and the means used in her recantation. Mr. Davy has given this as a reason, because she is not in law a witness; but I beg leave to say, that according to all the cases, and common practice every day, she is a witness; it only goes to her credit, and that goes to the jury. You know the case of Cartwright at Hertford; he confessed he had perjured himself in four or five different courts. I should be glad if the Court would deliver their opinions on it.

Mr. Baron Legge. I believe witnesses have very often been called, that have declared they have been perjured in other instances; but I will never admit or suffer a person, that will say they have been perjured in another affair, and I know it before they were sent far. When

she swears true I cannot tell; but that she has sworn false once, I must know.

Mr. Nares. In the case of subornation of perjury they are admitted every day.

Mr. Baron Legge. They are admitted; but it goes so much to their credit.

Mr. Recorder. I remember, that in the trial of Titus Oates, lord chief justice Jefferys would have been glad to have hanged him, but would not suffer a perjured person to be examined against him. What must such set of witnesses swear? Why, they must set out in saying they have been perjured before. Then what is the consequence, but that they must destroy their own credit.

Mr. Baron Legge. When a witness stands up, and tells us she has once sworn false, what credit can be given to her testimony?*

Mr. Dary. I have known such witnesses examined more than once: the jury have a right to call and examine her, but I have no right to call her, neither has the defendant.

Mr. Recorder. Gentlemen of the jury, Elizabeth Canning, the prisoner at the bar, stands indicted for perjury, in swearing that Mary Squires—[See the indictment, the perjury assigned, and the averment mentioned before in this Trial].—But as this is a trial of unusual length, and of great expectation, I shall state the evidence in the clearest manner I have been able to collect it; and if, in the stating the several facts which have been laid before you, during the course of this long proceeding, I should accidentally disclose my own opinion, I must desire that it may have no weight, or make the least impression on you, in determining your verdict, otherwise than as the weight of the evidence justifies it. As this indictment is founded upon the evidence given by Elizabeth Canning against Mary Squires, on whose testimony she was capitally convicted, Thomas Gurney, the short-hand writer, is called, who says, that upon the 22d day of February, Mary Squires was tried in this court; and upon that trial, Elizabeth Canning swore, "That on the 1st day of January, in the year 1753, she had been at Saltpetre-bank to see her uncle and aunt, and stayed there till about nine at night;—that her uncle and aunt came with her to Aldgate, when they parted;—that she was then alone, and so came down Houndsditch, and over Moorfields by Bedlam-wall, where two lusty men, both in great coats, laid hold of her, and took half a guinea in a little box out of her pocket, and three shillings that were loose; that they afterwards tied her hands behind her, and dragged her to Wells's house at Enfield-Wash, where they arrived about four o'clock in the morning; that she saw there the said gypsey woman Squires sitting in a chair, who took her by the hand, and asked her if she chose to go their way, saying,

that if she did, she should have fine clothes; but she refusing, Mary Squires then took a knife out of a dresser-drawer, and cut the lace of her stays, and took them from her;—that Mary Squires gave her a slap on the face, and pushed her up stairs out of the kitchen into a room called the hay loft, and shut the door and threatened her, if she stirred or moved, to cut her throat;—that when day-light appeared, she could see in the room a black pitcher, not quite full of water, about twenty-four pieces of bread, a fire-place, and a grate; that she continued there a month by the weeks, all but a few hours;—that she broke down a board that was nailed up at the inside of the window, and got out on Monday the 29th of January, about four o'clock in the afternoon; that she took out of the grate in the chimney an old sort of a bed-gown and handkerchief, which she tied over her head instead of a cap, and got to her mother's house in Aldermanbury, about a quarter after ten o'clock at night."

In order, therefore, to prove that the evidence she then gave was false, a great number of witnesses have been called to prove Mary Squires at a different place, at the time on which Elizabeth Canning has sworn to her robbing her at Wells's at Enfield-Wash.

The first of these witnesses is Esther Hopkins, who says, that she keeps a public house at South-Parrot, which is some miles beyond Abbotsbury in Dorsetshire; is positive she saw Mary Squires, her son and daughter, at her house, on the 29th of December 1752; that they lodged at her house that night; the reason of her remembering it is, that two gentlemen that day had been there, who left their reckoning unpaid; that Mary Squires, her son and daughter, went away next morning; is particularly positive to Mary Squires, having never seen such another remarkable woman; that she is more positive to the son than to the daughter, for he had a bag which he carried under his arm. They all travelled on foot.

The next witness was Alice Farnham, who lives at Winyard's Gap, ten miles beyond Abbotsbury. She says, that she saw Mary Squires at Winyard's Gap, about eight or nine o'clock, on the Saturday morning next after new Christmas, with her son and daughter; the reason of her being so positive to Mary Squires is, that having seen the picture of mother Shipton, she thought she resembled that picture. They all stayed about an hour at her house, and had a quart of beer, and some bread and cheese, and when they parted with her said, that they would come and see her again at old Christmas; that they all went towards Abbotsbury, which is ten or eleven miles from Winyard's Gap; that she had seen them come into South-Parrot the day before, and seeing they were gypsies, her mother asked, if she was not frightened. This she remembers was on a Saturday, because she had a mind to have gone that day to Crookhorne market to buy some things against old Christmas, but her mother would not let her go. She saw a bag

* But see the Note to that decision of Jefferys in Oates's Case, vol. 10, p. 2185, as cited above.

under the son's arm, and the daughter dressed very neat in a white holland gown. Has never seen them since; but is very positive to them. That they had a mug of beer, and paid for it.

The next witness, who undertakes to prove the whole journey to Enfield-Wash, is George Squires, who is son to Mary Squires, who says, he was at South-Parrot on Friday next after new Christmas-day, and they put up at the Red Lion there, and stayed one night only: that (they set out from Newington near South-wark about seven or eight weeks before Michaelmas preceding) from South-Parrot they all went to Winyard's Gap, and then to Litton: that they lay there upon Saturday, and he left his mother and sister there, and went to Abbotsbury on Sunday, to see some friends he had there, and particularly to see William Clarke: that he and Clarke went to Litton for his mother and sister the Monday following, and at Litton the sister, Clarke, and he, dined together; his mother being gone towards Abbotsbury to see for Clarke and him; but upon her return dined with them. After dinner they all set out for Abbotsbury, and arrived there upon the Monday night, being the 1st of January, and lay there, at the sign of the Ship, at one Gibbons's; they danced till twelve o'clock at night, and several people were with them. His partner was Gibbons's sister, and having been at Abbotsbury before, he knew several there. Clarke danced with his sister; and that his mother, his sister, and himself, stayed at Abbotsbury from the 1st to the 9th of January. That the 1st of January being a wet day, one Andrew Wake, who was then an exciseman at Abbotsbury, borrowed his great-coat of him, in order to make his survey. That on Tuesday the 9th of January, his mother and sister and himself left Abbotsbury: Clarke went with them to a place called Portersham, about a mile and a half from Abbotsbury. The next day they went to Ridgway, about five or six miles from Abbotsbury. Clarke and he lay together, and lay there at the sign of the Ship, at one Bewley's, where there happened to be a horse which had just died; and his money being short, he left a piece of nankeen for his reckoning, his mother and sister being then with him. From thence, on Thursday the 11th, they all went to Dorchester, and there they had an account of his sister Mary's illness, and then they determined to hasten to her; and the waters being very much out, he carried his mother upon his back, and a miller took his sister on a horse behind him through the water. They travelled on foot almost the whole night, and arrived at a village called Chettle, which is four miles beyond Blandford, and on the Saturday following they all lay at Martin in a barn belonging to farmer Thane. On the Sunday after they all went to Coombe, and lay there at one Greville's, the sign of the Lamb, who is since dead. On the Monday following he does not recollect where they lay, neither can he recollect where

they all lay till his arrival at Basingstoke, and when they got there, they put up at the Spread-Eagle, where the woman of the house, at his sister's request, wrote a letter to Clarke at Abbotsbury. They lay that night at a place called Old Basing (their usual way of travelling being about ten miles a day). From thence they went to Bagsshot, and lay at the sign of the Greyhound there; and from thence to Brentford, where they all arrived and lay there upon the Saturday; and on the Sunday he went to London to see his sister Mary, and on the Monday he brought her to Brentford to one Mrs. Edwards's, where they all stayed till Tuesday, and on Tuesday they all went to the sign of the Seven Sisters at a green near Tottenham, and on Wednesday they all arrived at Mrs. Wells's at Enfield, whom he never saw before, but was recommended there. That before they went to Mrs. Wells's, they called at another house, where they were recommended to a house at Chesbunt; but that being too far, they went to Wells's, where he left his mother and sisters. That in two or three days after he went to London to receive some money, and returned next day, and found his mother and sisters at Wells's. His mother and sisters lay in the room over the parlour, and he lay in a little room fronting the stairs, and Wells, her daughter, and Virtue Hall, lay in a room on the left hand, and one Fortune Natus and his wife lay in a room some few steps out of the kitchen. That, during the time they were at Wells's, they bought their chandlery ware of one Larney, and it being herring time, they lived very much upon herrings, which they bought of an old man who carried them about to sell. That, during the whole time he was at Wells's, he never saw the prisoner Canning, neither had he ever seen her before his mother was arrested, which was on Thursday the 1st of February. Upon his cross-examination he says, that he cannot recollect where he was the Christmas before he set out towards Dorsetshire, neither can he recollect the several particular places through which he travelled, except Lewes and Salisbury, and some other principal towns in the west of England. He gives an account of the whole journey from South-Parrot to Enfield, except four days, which is from their arrival at Coombe till they got to Basingstoke.

Then, to confirm the account which George Squires has given, they call a great many witnesses. The first is John Fry, who is a tiler and plaisterer, and lives at Litton in Dorsetshire. He says, that he saw a gypsy the 30th of December at one James Hawkins's, a public house; that it was on a Saturday. He remembers it, because it was New Christmas time, and the Monday following was New-year's day. Is very positive both to Mary Squires, her son, and her daughter. The part of the house he saw them in was the kitchen, and has known Mary Squires for 30 years.

Francis Gladman is called next. He is sure that he saw Mary Squires, her son and

daughter, at Litton, in the morning of the 1st of January, for he shaved George Squires the Sunday before. He remembers the day particularly, because he was one of the ringers who rung-in the New-year. That Mary Squires was asked whether she could tell fortunes, and she said, No. Then he asked her, whether she could speak Spanish or French? who answered, she could not. The next witness is

James Angel, who says, that he saw Mary Squires and her daughter at Hawkins's at Litton on the 31st day of December: but he did not see George Squires, because he was gone to Abbotsbury. He remembers it, because the Monday following he was called to ring-in the New-year. He did not see Mary Squires in the evening, because she was gone to Abbotsbury, which was three miles from Litton. The next witness is

James Hawkins, who remembers that Mary Squires, her son and daughter, came to his house at Litton on Saturday the 30th of December, and they stayed there all Sunday, except George, who went to Abbotsbury on the Sunday; and that George Squires and William Clarke returned from Abbotsbury about ten or eleven o'clock on Monday morning; and after they had dined, they all set out for Abbotsbury about two o'clock the same day.

William Clarke is called next, who lives at Abbotsbury, and is very well acquainted with Mary Squires, her son and daughter. He says, that George Squires came to him at Abbotsbury on Sunday the 31st of December; he stayed with him there till Monday morning. That he asked George after his sister Lucy, who told him, that his mother and she were at Litton. That they both together went to Litton next morning, where they arrived about three o'clock. Mary Squires was not there upon their first arrival, because she went towards Abbotsbury to meet her son George. That upon her coming back to Litton, they all dined together upon a boiled fowl, and after dinner he went with them to Abbotsbury, and it being the 1st of January, they had a dance at Gibbons's, the sign of the Ship there. That Lucy Squires was his partner, and one Arnold played on the music. Is very sure, that both Mary Squires, her son and daughter, were at Abbotsbury upon that day, and is as sure that they all continued there till Tuesday the 9th of January, for he saw them there every day; and upon that Tuesday he set out with them on their journey, and went with them to Portersham, and then to Ridgway, where he left them at one Bewley's house there. That they had beef-steaks for their supper, and when he parted with them, George borrowed six shillings of him. That he, the witness, desired Lucy to write to him, and told her how to direct to him. That he has known Mary Squires, her son and daughter, four years.

The next is John Gibbons, who keeps the sign of the Old Ship at Abbotsbury. He says,

he knows Mary Squires, her son and daughter. Has known Mary Squires for three years. Is very positive they were all at his house the 1st of January, 1753, in the evening, dancing. That George danced with his sister, Lucy with Clarke. That they all stayed at his house from that time till Tuesday the 9th of January; and remembers, that while they were there, the exciseman borrowed George's great coat to go his rounds. That they and Clarke went away together on Tuesday the 9th of January. He was a witness at the trial of Mary Squires, but doth not remember he was asked about the dancing on the 1st of January.

George Clements is called next, who confirms what the other witnesses have sworn, about the dancing at Gibbons's, in every circumstance. That he saw Mary Squires, her son and daughter, at Abbotsbury, the 2d and 3d of January. The Sunday following he dined with them at Gibbons's. That Clarke and they set out together the Tuesday following. That he knows them all very well, remembers Mary Squires many years. The next is

Melchisedech Arnold, who is a blacksmith, and lives at Abbotsbury. He saw Mary Squires, her son and daughter, at Abbotsbury the 1st of January, at the Old Ship there. Remembers the dancing that night, and played on the fiddle. That Clarke was Lucy's partner, and George was Mary Gibbons's partner. That he saw them all several times during the week they were there, and remembers all the several circumstances mentioned by the other witnesses.

John Ford is called next, who is a carpenter, and lives at Abbotsbury; is uncle to Gibbons, who keeps the Old Ship, which is the Excise-office; saw Mary Squires, her son and daughter, there every day during their stay there, which was from the 1st of January to the 9th; knows Mary Squires as well as his own mother; that he sells bread, and they bought their bread of him during the whole time they stayed. The next is

Daniel Wallace, who is a mercer at Abbotsbury. He is very positive that he saw Mary Squires, her son and daughter, at Abbotsbury on Sunday the 7th of January, and that George Squires bought sugar of him; that seeing Mary Squires on the day of his having bought a new jack, she asked him to dine with her that day. Then they call

Hugh Bond, who is a schoolmaster at Abbotsbury, who says, that on the 31st of December, being holiday-time, he went to see his wife, who was ill in Devonshire, and he returned to Abbotsbury on Monday the 8th of January. That he lodged at the Old Ship. Is very positive that he saw Mary Squires, her son and daughter, there that night, and saw them there next morning, the 9th of January. That he had some conversation with George Squires, along with one Wake an exciseman, who officiated for one Ward an exciseman, who was then sick; and Wake lay at the Ship in the same bed where Ward used to lie, and

that George Squires lay in another bed in the same room. Then

John Bailey is called, who is a carpenter at Abbotsbury. He says, he has known Mary Squires ten or fifteen years, and has known George and Lucy three years. Is very positive that he saw them all at the Old Ship there on Monday the 1st of January; that they continued there from that time till Tuesday the 9th; and that he shaved George twice within that time, and remembers it particularly by his brother's setting out on the 1st of January for Bristol, in order to go to sea. The next is

Thomas Anson, who lives at Abbotsbury. He has known Mary Squires, her son and daughter, about four years, and is very sure he saw them at the Old Ship there on Friday the 5th of January, and is sure they are the same persons he had seen four years before; that Clarke was with them, and it was reported that Clarke and Lucy were sweethearts. Then they call

John Hawkins, who is a weaver at Abbotsbury, who remembers seeing Mary Squires, her son and daughter, at Abbotsbury the 1st of January at Gibbons's; is certain that they all continued there from the 1st to the 9th of January, having seen them every day; and he particularly remembers the dancing, and Arnold's playing on the fiddle. Then

Andrew Wake the exciseman is called (who is mentioned by some of the former witnesses.) He says, that he was ordered to officiate as exciseman at Abbotsbury during the illness of one Ward, who was taken sick there. That he went to Abbotsbury on Sunday the 31st of December, to Gibbons's, the sign of the Ship, which is the excise office; was in company with George and Lucy Squires, and Clarke, at that house, and on that day; and that George and he lay in the same room; and that he saw Mary Squires, was in company with her and Lucy, and in the same house, on the Wednesday following. He also remembers the dancing at Gibbons's on the 1st of January, and that George and Lucy and Clarke danced there on that evening, and particularly remembers that Arnold played on the fiddle; and he being a dealer in cyder, he surveyed him; and this witness being at that time out of order, he borrowed a great coat of George; and that Mary Squires ordered something for him to take; and says, that he left the excise-books with Ward, when he went away from Abbotsbury, which was on the 14th of January. He then refers to those books, and swears to the entries and the journal. Says, that when he went to bed at Abbotsbury, he always went to his own room through that where Mary Squires and Lucy lay, and that he generally saw them every night during his stay there. He afterwards went to Dorchester, where he saw in the News an account of Elizabeth Canning's being robbed by Mary Squires on the 1st of January, and that she was found guilty; and that he then immediately said, she could not be the woman, because he saw her on that day

at Abbotsbury. He then went to Lewes, and there he received the commissioners of excise orders to attend the then lord mayor in London; and upon his arrival there he went to Mary Squires then in Newgate, who immediately knew him, and seemed rejoiced to see him, and put him in mind of all the several circumstances before mentioned; and concludes with saying, that she is the same person that he saw at Abbotsbury at the time he has sworn to. The next is

Francis Aldborough, (who is produced to confirm the evidence of the last witness, with respect to the entries in the books returned to the excise-office by the excise-officers out of the country) and he produces the books, by which it appears that the last witness Andrew Wake officiated for John Ward (who was ill) during that time of which Wake has given you an account. The next witnesses are

William Haines, and John Haines his son, who both prove, that Mary Squires, her son and daughter, were all at Portersham (which is a few miles off Abbotsbury) on the 9th of January, and that William Clarke was with them, and that they lodged at the sign of the Chequer there: that he invited them to his house, which they refusing, he and one Chipman, who was with him, went to them at the Chequer: that the reason of the father's being so certain of the day of the month is, because he went to Abbotsbury the day before, which was the 8th. He is very positive to Mary Squires, and has known her for thirty years.—The son confirms the testimony of his father, in remembering them at Portersham, and remembers also his seeing Mary Squires at Abbotsbury on the 6th of January, and that it was wet weather. From Portersham they went to Ridgway, which is four or five miles from Portersham. To prove their arrival at Ridgway,

Francis Bewley is called, who keeps a public house there, who swears, that he saw this family at Ridgway on Wednesday the 10th of January, about ten or eleven o'clock in the morning; that they had beef-steaks there; that he remembers a woman whose horse died there; that he supplied her with another in its place, and remembers this particular circumstance of the horse being drawn out of the stable to be skinned, and that at that time Mary Squires came into the yard, and it was a remarkable wet day; that Clarke bargained with a turnip-man for a horse to carry him back to Abbotsbury. Remembers that Mary Squires and her family being short of money, desired he would take a waistcoat they had for the reckoning, which he did, and which witness produced it, and has kept it ever since; and that he remembers them both by those circumstances, as well as by the dead horse, the witness of the weather, and by its being Blandford sessions, which is always held on the 10th of January. Then they call

Thomas Mockeridge, who is the man that sold turnips, and whose horse Clarke hired to return to Abbotsbury; and he remembers all

or most of the above mentioned evidence, as to Mary Squires, her son and daughter, being at Ridgway on the 10th of January; that they were at one Bewley's, the sign of the Ship there; that he remembers Mary Squires above three years before that time, and is very positive as to the circumstance about skinning the horse. The next is

John Taylor, who lives at Fordington near Dorchester, who swears, that he saw Mary Squires, her son and daughter, there on Thursday the 11th of January. Remembers that the rains had been so great on the 10th, that they could not go along the high road, but were obliged to go through his yard; that a miller's boy carried the daughter through the water on his horse, and that Mary Squires walked through great part of the water, and there were three little rivers to cross. They all told him they lay at Ridgway the night before, and asked him their way to Chettle. The next witness is

Thomas Hunt, who was threshing in a barn at Chettle, on the 12th of January, and says, that he knows, and saw Mary Squires, her son and daughter, there on that day; that there being no public house there, he, at their request, got them lodgings in an out-house belonging to Mr. Watts, where they lay on straw, and stayed there till between nine and ten o'clock next morning: it was very wet weather, and it was on or about Old New-year's day. From Chettle they went to Martin; to prove which

John Elderton is called, who says, that he is servant to one farmer Thane, who lives at Martin, and is positive that Mary Squires, her son and daughter, by consent of his master, lay in an out-house belonging to his master; that he saw them all there at four in the afternoon on the Saturday se'nnight after Old Christmas day, and he saw them about eight o'clock next morning; and that his master saw them at the same time, of which he would have given evidence, but was prevented by his being taken ill at Salisbury. This last witness is confirmed by

William Hort in the circumstances and facts before-mentioned, with this further, that Lucy was next morning mending some china. The next is

John Blandford, who is a blacksmith, works for farmer Thane, and is positive that he saw Mary Squires at farmer Thane's barn at the time the other witnesses swear to. Then

Joseph Hayter is called, who is a malster at Coombe, who says, that he met them all upon the road between Martin and Coombe on the 14th of January, being the Sunday next after Old Christmas; is positive to Mary and George Squires, having seen them before; he met them about eleven o'clock in the forenoon, and upon his return to Coombe the same day, he saw them all at one Mrs Greville's the sign of the Lamb there. This last witness is confirmed by

Mary Greville, who was sister to Thomas
VOL. XIX.

Greville, who was prosecuted for perjury, for what he swore at the trial of Mary Squires, but is now dead; and she swears, that she saw them all at Coombe on the 14th of January at her mother's, Mrs. Greville's, the sign of the Lamb there, and that they lay there that night, and went away the next morning. They are also proved to be at Coombe on the 14th of January by four other witnesses, the first of whom is

George Towil, who saw them there on the 14th of January at Mrs. Greville's, the sign of the Lamb:

Richard Aimer, who saw them at Mrs. Greville's the morning they went away, which was the 15th of January: and by

Robert Merchant, who saw them there the 14th of January: and by

Martha Waters, who saw them there the same day, and that she asked them to tell her fortune. From thence they went to Basingstoke, which was about forty miles, and they were four days in travelling thither; but there is no evidence laid before you of the several places through which they went in getting there: but this chasm will not be very material, if you give credit to the several witnesses whose evidence I have already laid before you; for if you believe that Mary Squires was at Abbotsbury on the 1st of January, which is the day on which the perjury is assigned, it is impossible that she could have been at Enfield on the same 1st of January, which the defendant swore she was.

Mary Morris is called next, who says, that she lives at Basingstoke, and is positive that she saw Mary Squires, her son and daughter, at her own house there, the sign of the Spread-Eagle, on the 18th of January, and has this particular reason for remembering it, which is, that Lucy Squires desired she would write a letter for her to one Clarke at Abbotsbury. The letter was produced, and she swears it was the same she wrote, and which she sent by her little boy to the post-office. She says, that they stayed at her house about four or five hours, and from thence they set out for Old Basing, which is about two miles from Basingstoke. She is very certain as to their persons, and says, that Mary Squires had lain once at her house. From thence they went to Brentford; and to prove them there,

Elizabeth Edwards is called, who says, that she lives at Brentford; that Mary Squires, her son and daughter, came to her house there on Saturday the 20th of January; is sure they came on that day; recollects the time, because one of her neighbour's children was christened on that day; and on the next day, being Sunday, George Squires went to London to fetch his other sister, and brought her on Monday, and on Tuesday they all went away; is positive to Mary Squires, because some time after she saw her in Newgate. The next is

Susannah Burwill, who is daughter to the last witness, and confirms her mother's evidence in every particular. From thence they

went to a place called Page-Green; to prove which, they call

William Tredget, who keeps the Seven Sisters, a public house at Tottenham, four miles from London; is very sure that he saw Mary Squires, her son and daughter, at Page-Green on the 23d of January, who told him they wanted lodgings; that his wife and he were together; she recommended them to lodge at a farm house in that neighbourhood; and says, that he is certain as to the person of Mary Squires, having seen her three years before, and had taken notice of her as the most uncommon face he had ever seen, and went to see her when in Newgate. They then call

Mary Tredget his wife, who agrees with her husband in every circumstance of his evidence. And the next day, as appears by the evidence of George Squires, they all arrived at Enfield.

The next piece of evidence is to prove the letter sent by the post, which Mary Morris says in her evidence she wrote to Clarke at the request of Lucy Squires; and to prove this they call

Thomas Ravenhill, who is clerk of the western road, and he proves the letter to be sent from Basingstoke to London by the mark of the post-office in London; it was sent to Dorchester, which is the post-town to which Abbotsbury is nearest; and that the whole postage through London from Basingstoke to Abbotsbury amounted to seven-pence.

The evidence next proper to be laid before you is that of Mr. Alderman Chitty, who was the sitting alderman at Guildhall upon the 31st of January 1753, which was the day on which Elizabeth Canning laid her information before him of the treatment she had met with at Wells's. The account she then gave, appears by the notes he took, which he produced, and which have been already read in evidence; so that by comparing the information she laid before him, and the evidence she gave at the trial of Mary Squires, you will find they differ in many remarkable circumstances, both as to the size of the room she was confined in, the furniture of it, as well as the bread and the water she swears she found and left there. As to the size of the room, she swore before him, that it was a square, dark, or darkish room, furnished in the manner you have heard; that there was some water left in the pitcher when she made her escape; and that she found in the room no more than four or five pieces of bread, amounting to the quantity of about a quartern loaf: so that, by comparing the information she then gave, with the evidence she gave at the trial of Mary Squires, you will find that there is a manifest contrariety in those two accounts in many particulars. The next witness is

Mr. Gawen Nash, who says, that upon seeing a very extraordinary paragraph in the newspaper relating to Elizabeth Canning, and being an acquaintance of Mr. Lyon, (who was her master) he went to Mr. Lyon on the 31st

of January 1753, and hearing that Elizabeth Canning was to be examined before Alderman Chitty that day, he went with Mr. Lyon to hear the account she gave; and remembers that being asked by the alderman, what sort of a room she was confined in, her answer was, That it was a little, square, dark, or darkish room, and that there were some boards nailed before the windows, through which she saw the Hertford stage-coachman, who used to carry her mistress; that there was in the room a broken stool, and an iron grate in the chimney, and a few old pictures over it. She said, that she lay on bare boards, and that there were several pieces of bread which were blue and mouldy, and amounted to about the quantity of a quartern loaf. The account she gave of her escape was by pulling down a board nailed on the window, and that she hurt her ear by a nail in getting out. She said, she heard the name of mother Wells during her confinement, and therefore concluded she had been at her house; but she never mentioned the name of Virtue Hall before Alderman Chitty. Upon this, the alderman granted his warrant, which being backed by a Middlesex justice, Aldridge, Lyon, Hague, and himself, went to Enfield to see it executed. That, when they went to Wells's, they saw several people in the parlour there, and having taken a view of several rooms in the house, they saw a labouring man there, and asking him if there were not some other rooms in the house, he pulled a button off a door, and opened it, which led up seven or eight steps into the hay-loft or workshop. He is very confident that there was no lock on the door, or even the marks of one, when he went into the room: it appeared a very long one; and not resembling the description which Canning had given of it, he wondered where the room was in which she was confined; and upon acquainting his companions with the variety of things he had observed there, (and of which she had not made the least mention) particularly of the quantity of hay, the nest of drawers, the tub of pollard, the three old saddles, the bed made of hay, where some poor people seemed to have lain, together with the jack-line and pulleys, the little chimney, where there did not appear to have been either hearth or grate, nor any pictures over the chimney, nor the appearance of any; though he says there was a window which commanded the great Hertford road, through which might be seen a great watering-pond, which was within nine or ten feet of the window; and that this window was in the east part of the room, but had not, as he could observe, the least appearance of ever having been boarded up, and was large enough for him to get out of, and was so near the ground, that he shook hands with his wife out of it when she stood on the ground, the casement of which opened and shut very easy, and the room was light; and if he had hung his body out of that window, his feet could have been at most not above three feet from the ground. The east window looks over a lane, and trees grow with-

in reach of it; and then observing that there was a good deal of hay, which Elizabeth Canning had not mentioned, he told the company with him, that he was sure that could not be the room. Afterwards they had an account brought them, that Wells, and Mary Squires, and the rest, were secured; upon which, they went to Wells's, and being impatient for the arrival of Elizabeth Canning, who was then on the road, Adamson went to meet her, and asked her upon the road, whether there was any hay in the room? who answered, there was a little hay there; at which he seemed very much pleased. And a very little time after this, Elizabeth Canning was brought to Wells's; and being brought into the parlour, where the prisoners then were, she was desired to fix on the person who robbed her, and she instantly fixed on Mary Squires (but at this time Mary Squires was in such a situation in the room, that neither Canning nor he could see her face). Upon which, Lucy Squires said to her mother, The young woman (meaning Elizabeth Canning), charges you with robbing her. Mary Squires, upon that, came across the room to her, and said, Madam, do you say I robbed you? Pray, look at this face; for if you had seen it before, you must have remembered it; for God Almighty never made such another. And upon Canning's saying that she robbed her on New-year's day, Mary Squires said, Lord! madam, I was on that day an hundred and twenty miles off. Upon which the witness asked, Where? Her answer was, That she was at Abbotsbury in Dorsetshire, and that she could bring an hundred people to prove it, who had known her for 20, 30, and 40 years. There was one Judith Natus then in the room, who said, that she, Judith Natus, had been in the house ten or eleven weeks, and that Mary Squires had been in the house but a very little time; and that Judith Natus then said, that she had never seen Canning before. When she was taken into the room called the hay-loft, she said, she remembered a little hay there, the pitcher, and a tobacco-roll; but being asked about the chest of drawers, the tub wherein the pollard was, and several other things in the room, she made no answer. And being asked, why she did not endeavour to escape out of the east window, she said, she thought it was fastened. And upon the whole, this witness tells you, that upon comparing what he had observed at Wells's, with the account which Canning gave before Alderman Chitty, he was of opinion, that her evidence was designedly false, or at least that she was grossly mistaken. On his being asked, why he did not give this evidence at the trial of Mary Squires? his answer was, That he was that day obliged to leave the Old-Bailey, to attend the Goldsmiths' company (having an employment under them); and being fully satisfied of the innocence of Mary Squires, concluded that she could not be found guilty; and that he declared the substance of what he has now sworn to several people before that trial; and being extremely uneasy after

her conviction at his not giving evidence upon her trial, he went to sir Crisp Gascoyne, then lord-mayor, to whom he disclosed the whole or the substance of the evidence he has now given. The next witness is

John Hague, who went with the last witness to Enfield, and having told him what passed before Alderman Chitty, agreed to go with him, Aldridge, and Lyon, to Enfield. He confirms the account which Nash has given in every particular; but with this addition, that during the time that Elizabeth Canning was in the house, till she was carried into the parlour, (where Mary Squires, Wells, and the rest were) she never mentioned her being robbed. He says, indeed, that Elizabeth Canning, on being asked whether she saw the person who robbed her, pointed to Mary Squires; but he was surprised at her doing so, because, in the situation Mary Squires then was, he thought it impossible she should see her face. Says, he heard Mary Squires express herself (when she was charged with the robbery) in the manner Nash has mentioned. He describes the room in the same manner Nash has done; that there was not the least appearance of a grate ever having been there, or pictures over the chimney. Agrees with Nash as to the windows, trees, hay, and bed there, and likewise the chest of drawers, &c. which appeared to have been above a year there, and that there was only a button on the door, and no lock, no pent-house under either of the windows; and then finding that what he saw did not correspond with the account which Canning had given, said to her with some warmth, Zounds, child. I cannot think you have been here at all. Upon which Nash, Aldridge, and he told Lyon, that they thought her whole story was false, which he thinks to be the reason they were not subpoenaed to give evidence at the trial of Mary Squires, though he owns he was in court during the whole trial. He says, that Elizabeth Canning charged Virtue Hall and Lucy Squires, as being present when her stays were cut off; but they both very solemnly affirmed at that time, that they never saw her in their lives, before she so charged them. He says, he was so greatly affected by the evidence which Elizabeth Canning had given, that he had not spirits to desire to be called to contradict her. And says farther, that upon Mary Squires being convicted, he could not rest till he applied to the late lord-mayor, to acquaint him with the account he has now given; and that his only motive in so doing, was that of rescuing the innocent from oppression.

The next is Edward Aldridge, who is a silversmith in Foster-lane, who went with Nash, Lyon, and Hague, the 1st of February 1753, and who agrees with the two former witnesses in every particular as to the description of the room, and is of opinion, that when Elizabeth Canning was first carried there on that day, that she did not seem to know where she was; and that when she was first taken into the parlour, Wells asked her, if she knew her?

Her answer was, that she did not. And that George Squires asked her the same question as to her knowing him; to which she gave the same answer: but says, that she charged the old woman in the corner of the chimney (meaning Mary Squires) as the person who cut off her stays; but is of opinion, that Elizabeth Canning could not at that time see her face; and is positive in remembering what Mary Squires said as to her being very remarkable in her person, and of her being at Abbotsbury at the time when Elizabeth Canning swore she was robbed. He then made his observations on the room called the hay-loft, and recollects seeing all the particulars there which Nash and Hague have mentioned in their evidence; and says, that from all the observations he could make, he is convinced that it was not a place of confinement. He says, that he went to Wells's as a friend of Canning's at his own expence; and after laying all the circumstances attending this extraordinary case together, he saw one Mr. Hall, of Theobalds, and told him, that he thought Elizabeth Canning was mistaken; for he was sure she never had been at Wells's. He says, he was at the Old Bailey part of the time of the trial of Mary Squires, but went away to dine with the Goldsmiths' company, concluding that she must have been acquitted, as being quite innocent of the robbery with which she was charged. The next witness is

William White, one of the marshal's men, who is one of those who went to Wells's, in order to execute the warrant, and took Wells, Mary Squires, and the rest into custody. When they were secured, they desired they might look over their goods, which they did in his presence: but he saw no stays amongst them. He then went into the hay-loft, where he observed about twelve or fifteen trusses of hay, which seemed to have been there a considerable time; and he also observed all the other things in the room, which the other witnesses have mentioned, and concluded as they did, (for the reasons you have heard from them) that Elizabeth Canning was mistaken. He went under the north window, out of which she says she escaped; but there were not the least marks or footsteps to be seen of any body's getting out of that window, neither was there the appearance of any shed or pent-house. Was present when Elizabeth Canning fixed on Mary Squires, and heard both Mary Squires, her son, and her daughter say, that they were at that time in Dorsetshire; and the other daughter said, that she was at that time at her uncle's in the Borough. The next witness is

Fortune Natus, who is a poor labouring man, (and is mentioned by some of the other witnesses). He says, that he came to lodge at Mrs. Wells's about a fortnight after sir Crisp Gascoyne was sworn lord-mayor, and that he and his wife lay in the room called the workshop or hay-loft; that his bed was made of hay and straw, and his bolster a sack of wool; and describes the situation of both windows in the

room, and that one of them looked into the great road. He says, that he and his wife continued in that room from the 27th of November to the 2d of February following, except one night, during which time he had a very good opportunity of observing every thing in it; and says, that there was no grate in the chimney, but remembers the nest of drawers, the side-saddles, the tub with pollard, and many other things, which he specifies particularly in his evidence. He mentions the sign of the Crown, which was at the feet of his bed, which he says was bought by Whiffin; but is positive that there were no pictures over the chimney; and says, that he is sure that he lodged there the whole month of January, and continued there till the warrant was executed on the 2d of February, and after; and that he never saw Elizabeth Canning there, or any where else, before that day. He says, that during that month of January, Wells's son and daughters used frequently to go into this hay-loft, where he and his wife lay, for hay and pollard, as they wanted; and says, that during his stay there, Virtue Hall was a lodger in the house; and says, that Mary Squires, her son, and daughters, had been there no longer than a week and a day before they were taken up; and when he is asked why he is so particular, his answer is, that Mary Squires's person was so remarkable, that it struck a sort of terror in him. He remembers the pitcher, and says, that his wife, and all Wells's family, used to bring water in it from Mrs. Howard's, which was opposite to Wells's; but says, that he never saw a bed-gown at Wells's. He was subpoenaed to give evidence at the trial of Mary Squires and Wells, and attended in the yard at the Old-Bailey; but was assaulted there, and was (with some other witnesses, who attended there on the same occasion) turned out of the yard three or four different times. Then

Judith Natus (who is wife to the last witness) is called in, who agrees with the evidence her husband has given in every particular; that they lodged at Wells's ten weeks all but three days, and continued there till they were all taken up, which was on the 2d of February. She is rather more exact than he is as to the signs; for she says there were two signs, one the sign of the Fountain, and the other was the sign of the Crown; and that Whiffin bought the sign of the Crown some time (as she believes) before Old Christmas, and afterwards bought the irons of both the signs, which were not taken away till about a week before Mary Squires and the rest were taken up. When she is shewn the bed-gown and handkerchief, she swears that she never (to her knowledge) saw them before. She remembers all the several things in the room, of which her husband has already given a very exact account; and says, that she gave the same account she does now before Mr. Fielding; but was so insulted by the mob at the time, when she attended at the Old-Bailey upon the trial of Mary Squires

and Wells, that she was not able to give evidence. The next is

Mary Larney, who keeps a chandler's shop at Enfield-Wash, who says, that she remembers the two last witnesses lodging at Wells's about the time they have told you. She says, that the first time she saw Mary Squires was on Wednesday the 24th of January, and she did not see her after till the Thursday se'night following; and that during the time that Mary Squires was at Wells's, Lucy Squires used to buy chandlery ware of her.

Sarah Howit is the next, who is Wells's daughter, and swears, that she lived with her mother that same month of January which Elizabeth Canning has fixed on to be the time of her confinement; and says, that Mary Squires and her family came to her mother's on Wednesday the 24th of January, and remained there till they were taken up. She is positive that Fortune Natus and his wife lodged at her mother's, in the hay-loft, both before and after they were all taken up; and that they had been there considerably above two months in the whole; mentions the hay and pollard there, and the use they were put there for. She is very certain that she lay at her mother's the whole months of December and January, during which time Virtue Hall and she went very frequently into the hay-loft. Remembers a particular circumstance of trees growing against the east window of that room, and that upon the 8th of January, Edward Allen, Giles Knight, and John Larney lopped them, and at that time Virtue Hall and she both looked out of the window, the casement of which, she, the witness, opened, and that the trees belonged to one Richard Allen. She was present when Elizabeth Canning fixed on Mary Squires as the person who robbed her; but says, that at that time Mary Squires was in such a situation, that it was impossible for her to see her face. The next witness is

John Larney, (who is produced to give an account of the lopping the trees mentioned by the last witness) who says, that he very well remembers that he, Allen and Knight, went together on the 8th of January 1753, for that purpose; and that Knight lopped them, and told him, that he should have the lops; and that at the same time Sarah Howit and Virtue Hall were looking out of the window of the workshop, and that Allen flung dirt at them, which they desired he would not do. He says, he had the arms of the trees and Wells had the spray. He says, that he plastered up two of the four windows in the workshop, and there remained only two, viz. one on the east, and the other on the north; that the window on the east was not above seven or eight feet from the ground, and that the wall was so very thin, being only lath and plaster, that any one might have pushed it down. He is very positive to the 8th of January being the day on which the trees were lopped, because his child was christened, and he set his chimney on fire with the lops which he burnt on that occasion.

He lives opposite to Wells's, and gave this account before the trial of Mary Squires.

Giles Knight is called next, who says, that he lopped the trees mentioned by the former witness, and is very positive that he lopped them on the 8th of January. Remembers that circumstance of Virtue Hall and Sarah Howit looking out of the window of the workshop at the same time, and of dirt being flung at them, and that Larney had the lops, and Wells the spray, for which she gave them some beer. Remembers an accident of one Mrs. Picket's cart breaking down that day; and says, that the window out of which the women looked at that time was large enough for him to get out of. The next witness is

Edward Allen, who (as the two former witnesses swear) was with them at the time of the lopping the trees which were near the workshop, and is very positive to the 8th of January, as the other witnesses have sworn; and particularly remembers that Virtue Hall and Sarah Howit looked out of the window of the workshop or hay-loft at the same time; and confirms what they have said in every circumstance.

John Cantril is called next, who keeps a public house a little distance from Wells's, and says, that upon this 8th of January, Knight and Allen came to his house, and said they had been at play, throwing clods at Sarah Howit and Virtue Hall, who were looking out of a casement that day at Wells's: he is very particular to that day, because it happened on a Monday, and the Tuesday following he had a piece of beef, which he intended to roast for his customers, being Christmas time; and says, that he remembers that Fortune Natus and his wife lodged at Wells's between two and three months. The end of producing this remarkable piece of evidence, as to that circumstance of lopping the trees on the 8th of January, is, that (if these witnesses swear true) it is impossible that Canning could have been alone, or even at all in the workshop or hay-loft at Wells's, upon the 8th of January 1753, which she swore she was, upon the trial of Mary Squires and Wells. The next witness is

Ezra Whiffin, who is referred to by some of the former witnesses, as being the person who bought Wells's sign-irons. He lives at Enfield-Wash, and having occasion for some sign-irons, and hearing that Wells had some to dispose of, he went to her on the 18th of January 1753, who told him they were in the room called the hay-loft; he went with her there, and looking about for the irons, Wells said, Now I recollect, the irons are under the feet of this poor creature's bed (pointing to the bed where Natus's wife then lay.) She then took up from under the bed a piece of wood, to which the irons were then fixed. He agreed to buy the irons, which his son took out of the wood, and brought the wood back to her. He gives you a reason for his remembering the day so particularly, because he was on that 20th of January going to a place called Worm-

leigh, to borrow five guineas of a man who kept a public-house there, in order to make up a sum he then owed his brewer, (for which he had given a note, in which one Livingstone joined with him) who had arrested him for it. Then Livingstone is called, who confirms Whiffin in that circumstance of the note.

John Whiffin, the son of Ezra Whiffin, is called next, who swears that he went with his father to Wells's on the 18th of January; and is positive to his taking the sign-irons out of the wood by his father's orders, and returned the wood to Wells in about three or four days after. The next witness is

Elizabeth Long, who is one of Wells's daughters, and lives only three doors from her mother, and used to go there every day. She is very certain that her sister, and Virtue Hall, and Fortune Natus and his wife, lived at her mother's the whole month of January 1753. She says, she has known the room called the workshop above twenty-two years, and believes she went into it almost every day during that whole month. She is very positive to the bay-bed, the chimney, (in which there was no grate) the pollard, and the rest of the things mentioned by the other witnesses. Swears to the pitcher being her mother's; but as to the bed-gown and handkerchief, she never saw them till she saw them at the lord-mayor's. She was in the parlour at her mother's when Canning was brought in, in order to fix on the person who robbed her, and gives the same account of her behaviour there which you have heard from the other witnesses. She says, she was in the Old Bailey yard, together with Larney and Knight, when her mother and Mary Squires were tried; but they were not suffered to continue there, or give their evidence. The next is

John Howit, who married Wells's daughter, and is very positive that he was in the workshop on the 19th, 20th, and 21st of January 1753, having some tools there which he had occasion to make use of; remembers Fortune Natus and his wife lodging there at that time, but never saw Canning till the trial of Mary Squires. He was at the Old Bailey at the time of that trial, but was very near being killed there by the mob.

Robert White is called, who very well remembers Fortune Natus and his wife lodging at Wells's about the time you have heard.

The next piece of evidence laid before you, is the model of this hay-loft, or workshop (to shew you that it is not a little, square room, as Canning described it before alderman Chitty), which is produced by John Donoval, who is a surveyor; and it appears to be thirty-five feet three inches long, and nine feet eight inches over.

Elizabeth Mayle, a midwife, is called next, who says, that in the beginning of February (being a few days after Elizabeth Canning came home) she went to make her mother a visit, and seeing Elizabeth Canning lying on her bed there, and to all appearance very

ill, and enquiring into the cause of her illness, her mother told her the condition her daughter came home in. Elizabeth Canning then told her the whole which had happened to her; and on the witness's asking her, whether she had been debauched? she answered, That she had lost her senses, or was in fits, and could not tell. Upon which she enquired for the shift she came home in; and upon its being produced, she asked, if that was the shift she went away in? and upon being told it was, she immediately said, that she supposed it had been washed since it came home; but the mother saying it had not, she said, she thought it appeared a good deal too clean to have been worn so long; for it was uncommonly clean for so long wearing: that upon looking on the shift, she assured the mother, that her daughter had not been debauched, if she had worn no other shift: but she says, that in her opinion, the shift could not have been worn three weeks; nay, thinks that a week's wear would have made it as dirty as it then appeared; for it was not the least draggled. That there were only three little spots upon it, which appeared to be excrement. She said, she made her a few visits after, and ordered her a glyster; and on the last visit she made her, she mentioned the three spots on her shift, as having the appearance of excrement; at which her mother was very angry, and told her, that she came to set her friends against her. On being asked the character of Elizabeth Canning, she gave her a very good one. The next witness is

George Brogden, clerk to Mr. Fielding, and he is produced only to prove the information, which she swore to before Mr. Fielding, and to which she set her mark: and by that information it appears, that the water in the pitcher was consumed on the Friday; but in her evidence she swears it was consumed the same day she escaped.

Deputy Molineux is called next, who swears, that being with sir Crisp Gascoyne, then lord mayor, at the Mansion-house, some time after Mary Squires was convicted, that Elizabeth Canning and Virtue Hall were there together; and after sir Crisp Gascoyne had examined Virtue Hall, he asked Elizabeth Canning, if she had any thing to say? who answered, No. And the bed-gown and pitcher, being then upon the table, Elizabeth Canning was rolling up the bed-gown in order to take it away. My lord mayor then said, she must not take it: upon which Elizabeth Canning said, It is my mother's. This surprised the witness very much, because he had heard, that, upon the trial of Mary Squires, she swore, that she had found it in the chimney at Wells's. The next and last witness is

Mr. Read, who swears, that he was present at the Mansion-house at the same time which the last witness mentions, and remembers the several circumstances mentioned by him, as aforesaid.

Here concludes the evidence given in support of this indictment.

The counsel for the defendant have made many observations upon the evidence you have heard, which it is unnecessary for me to repeat; but upon the whole, insist upon it, that as this matter has undergone a very strict examination by a solemn trial, that therefore any future inquiry is unprecedented, and consequently improper: however, in order to oppose or contradict a good deal of the evidence you have already heard, they have called several witnesses; the first of whom is

Edward Lyon, who says, that Elizabeth Canning was his servant, and continued in his service till the 1st of January 1753; that he has known Elizabeth Canning above sixteen years, and that she always behaved well; that the first time he missed her was on the 1st of January 1753, and that she never had been absent before; upon which he went to her mother's, but could hear nothing of her. The first time he saw her after that was upon the 31st of the same month, when she was under examination before alderman Chitty; but being thick of hearing, did not know what had passed. He says, that a warrant being granted, he went to Enfield-Wash, with Hague, Nash, and Aldridge. When they arrived there, he was told, that several persons were secured at Wells's; and when he came to Wells's he saw several women in the parlour there. That some time afterward Elizabeth Canning arrived there, and was set upon the dresser in the kitchen. He says, he cautioned her very particularly not to charge any but those she was very sure of. She promised him she would not. She was soon afterwards carried into the parlour, where they all were. She saw Mrs. Wells first, and said, she had nothing to charge her with: but upon seeing Mary Squires, she said, she was the woman who cut her stays off. He believes she saw her face before she charged her (because otherwise he thinks she hardly would have charged her). Upon this, Mary Squires came up to her, and said she hoped she would not swear her life away, for she never saw her before: but says, that Elizabeth Canning did not at that time mention the day upon which she was robbed. She said that Lucy Squires and Virtue Hall were in the room at the same time she was robbed; and that when she saw George Squires, she said, he looked very like the man who robbed her in Moorfields; but she would not swear to him. At this time he had no great coat on; but when he was with his great-coat on at Mr. Tashmaker's, she was more positive to him, saying, that was the great-coat, under which he put her gown when he robbed her in Moorfields. He said, for his part, he never had any doubt of the truth of what Canning had sworn at the trial of Mary Squires; and says, that he several times, and with the utmost seriousness, desired Elizabeth Canning would tell the truth, and not deceive him; and owns that this affair has been the means of his breaking off his acquaintance with Nash, Hague, and Aldridge. He denies his contri-

buted any thing towards the prosecution of Mary Squires. The next witness is

Thomas Colley, who married Elizabeth Canning's aunt; and he says, that upon the 1st of January 1753, Elizabeth Canning dined at his house upon mutton, and drank tea in the afternoon, eat toast and butter, and supped upon cold roast beef. She lived at that time with Mr. Lyon, and that he and his wife went with her at nine o'clock that night, and left her at the end of Houndditch; and about twelve o'clock at night her mother's apprentice came to his house, to enquire for Elizabeth Canning, which made him conclude she did not get home.

His wife, Mrs. Colley, is called next, who gives the same account that her husband has, with this addition, that she did not see her from the 1st of January till the 30th, when Elizabeth Canning was at her mother's, and complained she was very ill. The next witness is

Elizabeth Canning, the mother of the defendant, who says, that her daughter had been some time in Mr. Lyon's service, and that, upon the 1st of January, 1753, she called upon her in her way to her uncle Colley's; and that pretty late that evening Mr. Lyon called upon her, to enquire for her daughter. This surprised her a good deal; upon which she sent to Colley's, who sent her word, that they had parted with her at Houndditch at nine that night: and says, that she never heard of, or saw her from that time till the night before the 30th of January, when she came to her house about a quarter after ten that night (though she advertised her three several times). She says, that when she came into her house she was in a most deplorable condition, her hands black and blue, and her face bloated, had on the bed-gown now produced, and two ragged handkerchiefs on her head, neither of which she had ever seen before; her ear was bloody; that she sent for Mrs. Woodward and some other neighbours, who came to her; and on her daughter's being asked, where she had been? she answered, she could not tell, but had seen the Hertford coach from the place where she was. She said, that she remembered an old woman and two young women. She gave an account of her being robbed, and carried away, and her confinement; and said, she had nothing at all to support her from the Friday before she made her escape. She gives an account of her daughter's illness, and that she sent for a physician and an apothecary. She remembers that her daughter, on the night she came home, mentioned the name of Wells or Wills. She mentions the money her daughter had in her pocket at the time of her going to Colley, which I think was between twelve and thirteen shillings. She says farther, that during her daughter's absence, she was advised to go to a conjurer, who bid her be easy, for she would certainly come home again, and believes he told her she was in the hands of an old woman; but says, that her own apprehen-

nions were, that she was murdered by the Jews, and thrown into Houndditch. She says, that she told her she lay in hay during her confinement; that she has only a very moderate stomach, and has known her frequently to be fourteen days without going to stool. Upon this witness's being asked whether she did not swear, at the trial of Mary Squires, that her daughter had a cap on her head when she came home? she answered, she did not; but upon the short-hand writer's being asked that question, his answer was, that she did, at that trial, swear, that her daughter had a cap on her head at that time. At this time some notices were produced, and proved to be signed by the defendant, signifying her intention to take her trial at some of the times mentioned in some or one of those notices, and her name wrote in a very legible hand; though in the information before Mr. Fielding, nothing more appears but her mark. After this, a witness is called, who speaks only to the several advertisements in the news-papers. The next witness is

James Lord, (who is apprentice to Elizabeth Canning's mother) who agrees as to the time of her being missing, and was sent to several places to enquire for her; but he did not see her from the 1st to the 29th of January 1753; and on that very night his mistress went upon her knees, to pray that she might see even the apparition of her daughter; and very soon afterwards the latch of the door was lifted up, and Elizabeth Canning came in. When he first saw her, he did not know her, she was in such a miserable condition, much the same as her mother has mentioned, and particularly her ear bleeding fresh, (though she had then walked ten miles) and was almost spent. He went for Mrs. Woodward, and others of the neighbours; and she then told them, that she had been at Mrs. Wells's at Enfield-Wash, and said, that she had heard people go to and fro in the house, and mention the name of Wells or Wills. Then

Robert Scarrat is called, who says, that hearing, on the 29th of January, 1753, that Elizabeth Canning was come home late that night, he went to her mother's, late as it was, to see her. She had a bed-gown on her; and having heard her asked where she had been, and hearing her answer, that she had been at a place from whence she had seen the Hertford coachman, and about nine or ten miles from London, he immediately said, he would lay a guinea to a farthing that he guessed where she had been; and then said, he was sure she had been at mother Wells's; upon which she said, she was sure she had heard that name mentioned in the house where she was confined. She then described the room to be a longish and darkish room (which does not agree with her description of it before the alderman). She then described the fields through which she passed in her return home, a little brook, and a tanner's yard; said that she met a man who directed her in her road to London; and

described the woman who cut her stays to be a tall, swarthy, black woman, and two young women in the room at the same time. He says, that he went to Enfield-Wash the 1st of February, and was present when Elizabeth Canning was brought into the parlour, and saw her point to Mary Squires, saying, That is the woman who cut my stays off; upon which Mary Squires said, Dear Madam, take care how you swear my precious life away; to which Elizabeth Canning said, I know you too well, to my sorrow. And on being asked whether she knew any other in the parlour, she said, that she did not know George Squires; but that Lucy Squires and Virtue Hall were in the room when her stays were cut off. He says, that she mentioned some of the things which were in the room she was confined in, and pointed to the window out of which she escaped. Upon his cross-examination, he says, he never was in the workshop at Wells's, till this 1st of February; but owns (with some difficulty) that he might have been in the house near ten times, and that he has known Wells for about three or four years. He says, that he heard Canning give her information before alderman Chitty, and heard her give evidence at the trial of Mary Squires, and thinks that her evidence on the trial did not vary from her information before the alderman; but will not take upon him to give an account of the particulars of her evidence before the alderman. He owns, that when he was in service, at Edmonton, that he rode his master's horses to Wells's; but disowns his having any quarrel with her, or saying that he would be revenged on her. And says, that he believes there was no lock on the door of the room called the workshop. The next is

Mary Myers, who says, that she has known Mrs. Canning and her daughter some time, and that the daughter is a very sober girl. She gives an account of the time when Elizabeth Canning was missing, and of her return to her mother's between ten and eleven o'clock at night on the 29th of January. She tells you the company she saw there, and the condition she was in, which was very bad. She says, that she gave the same account of her being robbed in Moorfields, and her being carried to Wells's, and of her treatment there, which you have already heard, and is much the same account which she gave at the trial of Mary Squires: that she then gave a particular account of her escape, which you have also heard; and that she tore her ear, and the blood dropped upon her shoulder after she returned to her mother's. This witness says, that she went with Canning to Wells's on the 1st of February, and gives you an account of her fixing on Mary Squires as the person who robbed her, and what Mary Squires then said, as is before mentioned by the other witnesses then present; that she fixed on the workshop as the place of her confinement; but said, there was at that time more hay in it; and that Adamson put his back against one of the

windows there, to try if she could give an account of the prospect; which she did, by describing hills at a distance. She says, that she looked at Canning's shift, and that it was dirty. Cannot tell the reason of Scarrat's being at Mrs. Canning's the night her daughter came home; but says, he lived in that neighbourhood. The next witness is

Mrs. Woodward, who says, that she was at Mrs. Canning's the night that Elizabeth Canning came home, and was the first person that came there. She came home about half an hour past ten, the 29th of January, on Monday at night, and saw Scarrat and Wintlebury there; and at Elizabeth Canning's request, she sent for her master and mistress Lyon, and that Elizabeth Canning said to the witness, Oh! Mrs. Woodward, I have been almost starved; I have had only bread and water, and have not had even water since last Friday. She was asked where she had been, and said she had been confined in a room on the Hertford road. She then gave a very particular account of her being robbed, and of the treatment she met with from Mary Squires at Wells's, and of her being confined there. She agrees with the other witnesses in the account they gave of the deplorable condition she was in, and believes her to be as ill as she then appeared to be. That she went with Elizabeth Canning to Enfield-Wash on Thursday the 1st of February; and upon Tuesday after that, she was so ill, they were forced to put her in a chair, to carry her to Mr. Fielding's. The next witness is

John Wintlebury, who was known to Elizabeth Canning's mother about fourteen or fifteen years. He says, she is a very honest woman, and that her daughter Elizabeth lived with him as a servant about eighteen months; that he saw her the night she came home, when she was in a very bad condition, and had nothing on but a bed gown, and a piece of a handkerchief upon her head; that her ear was bloody; that upon taking her by the hand, she said, Lord! Sir, you do not know what I have undergone; that then she gave an account where she had been, by seeing the Hertford stage coachman: that he was with her when she gave her information before alderman Chitty, but cannot be particular as to what passed there: that he went on the 1st of February to Wells's at Enfield-Wash, and went into the room called the workshop, and observed a good deal of hay there, which appeared to be fresh tossed up; and says, he arrived there at least an hour before Aldridge, Hague, or Nash: that upon Elizabeth Canning's being carried into the parlour, she fixed upon, and charged Mary Squires, as the person who cut her stays off; to which Mary Squires made no answer; but, on the contrary, denies that Mary Squires even desired her not to swear her life away (which is a circumstance the other witnesses have very particularly sworn to): that when Elizabeth Canning saw the door of the workshop opened, she said,

VOL. XIX.

This is the room I was confined in. He was present when Adamson set his back to one of the windows of the room, and examined her about the prospect; and says, that the north window seemed to be fresh boarded up. That when he observed George Squires in the parlour, Elizabeth Canning thought he was very like one of the men who robbed her in Moorfields; and among eight or nine women then in the parlour, she fixed upon Virtue Hall and Lucy Squires, as being present when her stays were cut off. He says, he cannot be so particular as to the account she gave before alderman Chitty, as to that which she gave before Mr. Tashmaker; and thinks that the account she gave before Mr. Tashmaker corresponded exactly with the evidence she gave at the trial of Mary Squires. Upon his cross-examination, he owns, he did not give so particular an account at the trial of Mary Squires as he does now; and says, he took little observation of the evidence given by her before alderman Chitty. The witness called next is

Joseph Adamson, who has known Elizabeth Canning for eleven years; but had not seen her for three months till he went to meet her going to Enfield-Wash. He denies his giving her any information of there being any bay in the room; but that she of her own accord said there was. That when she was taken into the parlour, she fixed upon Mary Squires as the person who cut off her stays; and when she was carried into the workshop, she said the east window was fastened up, and she could not open it; and that he made the experiment by setting his back to the window, to know whether she could give any account of the prospect; and he observed that the wood which covered the north window seemed to be fresh cracked. The next witness is

Sutherton Bakler, apothecary, who says, that he saw Elizabeth Canning on the 30th of January; that she was in bed, and in a very low condition; that he administered some medicines to her, being glysters; and then Dr. Eaton, a physician, was sent for; but before the medicines which the doctor prescribed had any effect, she went to Enfield-Wash, which was on the 1st of February. He says, she appeared to be half-starved, and she did not make water till after the 6th of February. And then they call

Dr. Eaton, who says, that he attended Elizabeth Canning on the 6th of February, that he found her very weak, and that she complained of a colic in her stomach and bowels; that he thought her in danger seven or eight days, but upon the 4th of March she was quite recovered; and thought the symptoms of her illness proceeded from hunger, thirst, cold, and great hardships; though he says, that her disorder might have proceeded from other causes, and thinks she had a bad habit of body. The next witness is

Robert Beale, who, upon the 1st of January 1753, kept the turnpike on Stamford-hill, which leads from Moorfields to Enfield; who says,

2 U

that he was very ill the Christmas before; and that the February following, his two children, which are very young, (not above eight or nine years old) told him, that a woman had been forced away from Moorfields to Enfield-Wash, and had been confined there above a month; upon which he said, Lord! I was at the gate when she was carried through; and says, that about ten or eleven o'clock at night, the beginning of January, he heard a sobbing sort of a cry about three hundred yards distant from him; that there appeared to him to be two men and a woman; that they did not come through the gate, but as they were going over the stile, heard one of the men say, Come, along, you bitch, you are drunk; and the woman seeming very unwilling to go over the stile, one of the men attempting to lift her over, she fell down, and cried bitterly, but never spoke; one of them held her, and the other pushed her along. She appeared to be a woman in great distress, and sobbed and cried bitterly; but, notwithstanding this distress, he never mentioned it for above six weeks; and he says, he durst not venture to stop the two men, because he was alone. He cannot take upon him particularly to say, that this was upon New-year's day; but says, the gown the woman then wore was white, though he says there was no moon that night. The next witness is

Thomas Bennet, who lives at Enfield, opposite to the ten mile stone; and he says, that upon the 29th of January, coming towards London between four and five o'clock in the afternoon, he met a woman, who appeared miserably poor, at a gate-way between Wright's and Jenge's, about a quarter of a mile on this side Mrs. Wells's; that she had neither gown, stays, cap, or hat on; that she enquired the way to London, which he directed her: he remembers it by a circumstance of binding an apprentice that day; but says, that he never mentioned this till the March following.

David Dyer is called next, who says, that about the same time he met a poor distressed creature, and asked her, if she wanted a husband? and looking upon the defendant, believes her to be the same person; that he saw her about four of the clock in the afternoon. She did not appear black in the face, or at all bruised; but, on the contrary, very pale and thin. Then they call

Mary Cobb, who says, that about three miles on this side Wells's, in a field called Ducks-field, just at the shutting in of daylight on the 29th of January, she met a woman in a miserable condition, dressed in a poor dirty bed gown, a black petticoat, and a bit of a handkerchief on her head, who was near falling as she was getting over a stile; that some time afterwards, hearing of this affair, and recollecting the person she had so met, she concluded that she must be Elizabeth Canning; and now upon looking at her more minutely, believes it was her; for she then observed something particular about the tip of

her nose, by which she is more certain of her now; that justice Tashmaker asked her about this affair, to whom she gave the same account she now does. The next witness is

William Howard, who is produced in order to shew, that the witness Aldridge had once a different opinion of Elizabeth Canning to that which he has now disclosed in his evidence. He says, that Aldridge and his brother, a little time after Mary Squires was taken up, brought him the Case of Elizabeth Canning, and recommended her as an object of compassion, and proposed a subscription to support her; and that he came to him a second time on the same subject; but when he came the second time, he said, that the girl (meaning Elizabeth Canning) was not so clear in her description of the room where she said she was confined. Then

Mrs. Howard, his wife, is called, and confirms what her husband has said as to Aldridge's desiring him to subscribe. She lives opposite to Wells's, and believes that she saw Mary Squires pass and repass several times in the month of January; and thinks that she saw Mary Squires and her family at Wells's door the Sunday se'night before they were taken up, and believes her to be the same woman now in court. She owns that she is shortsighted, and that Mary Squires and her family might be fifty yards distance from her, when she first saw them; but she thinks that she has seen them pass by her house within the distance of thirty yards. The next witness is

William Headland, who says, that to the best of his memory, he was with his father (who lives at Enfield-Wash) some time before January was twelve-month, and was there when Wells and the rest were taken up; and says, that he took a piece of lead up, which lay under the window from whence Elizabeth Canning escaped: it was bloody, and he heard that it was the lead which tore her ear when she escaped. He cannot tell the exact day he took it up, but he gave it to his mother. He says, that he saw Mary Squires the 9th of January at Enfield-Wash, telling fortunes; and also saw her there on the 12th, doing of the same; and her two daughters were with her at Wells's; remembers it by its being market-day. He saw her get into the cart when she was taken away, and saw her in court, and believes her to be the same woman he saw there. He says, that he is twenty-one years old; but though he is so particular in his account of Mary Squires, &c. he gives but a very uncertain account of himself: for he can scarce (if at all) give an account with whom he has lived for several months past before he returned to his father; neither can he tell us in what month Christmas is; he says indeed, that he lived with one Allen, as an hired servant, ten or eleven weeks.

Elizabeth Headland, the last witness's mother, is called, who only proves, that her son gave her the piece of lead at or a little after

the time that Mary Squires and the rest were taken up, and the blood on it was dry; but she has now lost or mislaid it. The next witness is

Samuel Story, who (upon looking at Mary Squires) says, that he knows her very well, and has seen her several times, and particularly at a house in White-Webbs-lane, near Enfield-Chace; and that he saw her on the 23d of December 1752, at Wells's door; and says, that his curiosity led him to see if she was the same woman he had seen before, and therefore he went within ten yards of her, and thinks her the same; and afterwards went to see her in Newgate, and is still of the same opinion; and says, that he has occasionally seen her for three years together, but never spoke to her. He says, that he has seen two young women with her, and that they all used to wear blankets, and travel with two asses and a little horse. Then

William Smith is called, who lives at Enfield, and is a considerable farmer there. He says, that he saw Mary Squires in his cow-house on the 15th of December 1752, and has seen her and her family about the country several times. They came at that time to enquire for a lodging. He saw Mary Squires next morning, and there were two young men and two young women with her, whom he cannot remember. They lay in his barn, and were there three nights and two days, and had a little black horse with them, which they lost. He afterwards saw her in Newgate, and is positive to her. He is positive that he saw her the 15th of December, because he sold some corn on the 16th. The witness called next is

Loomworth Dane, who keeps the Bell at Enfield-Wash, and says, that he never saw Mary Squires till winter was twelve-month; and that upon Old Christmas day, which was the 5th of January, as he was standing on a heap of gravel, he is sure he saw her at Enfield-Wash; for his servant having a holiday that day, he kept shop; and one Norton bought a collar of him for his horse, which he entered in his book, (which book is not produced) and that is the reason which he gives of his remembering the time. He saw her when taken up and put into the cart, and also in Newgate, and is sure she is the same woman. He is asked about Mrs. Headland's character, (whose evidence you have heard) which, he says, is not a very good one. The next witness is

Samuel Arnot, who is a labourer, and lives on Enfield Chace, and says, that upon a Friday, about nine or ten days before New Christmas, Mary Squires asked him (telling him her name) for a little brown horse which she had lost; and says, that he saw her the Sunday after, and that a man, two women, and two children were with her, which children were not above four or five years old, and he believes they all lay at William Smith's; that he afterwards saw Mary Squires in Newgate, and is of opinion that she is the same he then saw. Then they call

Elizabeth Arnot, wife to the last witness,

who says, that she saw Mary Squires in farmer Smith's cow-house at Enfield, about a week before New Christmas, and that she then inquired about her horse, which she had lost, and that she saw her afterwards in Newgate. The next is

Sarah Star, who lives next door to Wells's, and says, that she saw Mary Squires at her own house on the 18th of January was twelve-month, but had never seen her before: that she then offered to mend china, and stayed at her house three quarters of an hour, and wanted to tell her and her servants their fortunes, and terrified her very much. She afterwards saw her in the cart when taken up, and in Newgate, and believes her the same person. She believes she saw her on the 18th of January, because she thinks her husband sold a load of pease that day, and that there was a note given on that account; but that note has not been produced. Then

Daniel Vass is called, who says, that he saw Mary Squires go by his house near Enfield on Old Christmas day; she went the foot-way, and he was then in his own yard; he looked pretty much at her, and she seemed surprised at his doing so. He did not look at her above a minute, and never saw her before; but he went to her when in Newgate, though in a different dress; yet is sure she is the same person he saw go by his yard. The next is

Jane Dadwell, who keeps a shop at Enfield, who says, that she saw Mary Squires at her house on Thursday the 28th of December; knew her very well, for she had been there several times before; is particular to that day, because she dressed meat on Christmas day for her customers, and she was then in her back-house washing her dishes. She went to see her in Newgate, when she owned that she had been at her shop. The next called is

Tobias Kellog, who lives at Enfield, and says, that he saw Mary Squires at Enfield some time before Old Christmas (though he is so ignorant, that he cannot tell on what day of the month Old Christmas day was;) but says, he believes he saw her there a month before she was taken up; he thinks that he saw her three or four times; that she asked him for tobacco, and would have told him his fortune; and that she told one John Rowley his fortune. Then one

John Frame is called, who, in January was twelvemonth, lived as a servant with Mr. Parsons in James's-street, Grosvenor-square, who had a country-house at Enfield; and being at work in the gardens there on the 11th or 12th of January was twelvemonth, Mary Squires spoke to him through the palisadoes, and wanted to tell him his fortune, which she told him: he is positive to the time, because his master and mistress went to London on the 9th of that month; and says, that he saw her about a twelvemonth before at Enfield, and saw her in Newgate, and thinks her the same person. The next is

Joseph Gould, who lives at Enfield, and

says, that he saw Mary Squires on the 8th or 9th of January 1753, about a quarter of a mile from Wells's; and hearing from Virtue Hall that there were gypsies at Wells's, he took particular notice of her; and he saw her afterwards in Newgate. Then

Mary Gould, his wife, is called, who says, that she saw Mary Squires the 11th or 12th of January was twelvemonth, who asked her, if she had any china to mend, and told her she would not live long. She says, she saw her about a week before she was taken up, and saw her when she (the witness) was at work at Mr. Parsons's; and also saw her in Newgate, and believes her the same. The next witness is

Humphrey Holding, who says, that the first time he saw Mary Squires was on the 8th of January 1753; that he is a gardener, and was at work at Mr. Parsons's, and that the family went to London on the 9th of January; and that he saw Mary Squires the day before, who asking him if the family were at home, he answered, that they were; and says, that he saw her afterwards on the 11th, when he was pruning Dr. Harrington's vines, and he set down his day's work in a book, because he was not paid for it. She also inquired if the family had any china to mend. He is desired to produce his book, which he had not about him; and says, that he was examined two or three times, but could not possibly recollect the time of seeing her, because he had not his book wherein he sets down his work. He says, that he saw her at Mr. Tashmaker's, and in Newgate. Then

Sarah Vass, wife of Daniel Vass, a former witness, is called, who was a charwoman at Mr. Parsons's, and saw Mary Squires on Thursday the 11th of January 1753: she fixes on that day, because Mr. Parsons went to London on the 9th, which was on Tuesday; and that she would have told her her fortune. She also saw her passing by the day before she was taken up; she then asked her for a pipe of tobacco, and had then some conversation with her; and afterwards saw her in Newgate, and is certain she is the same person. The next witness (whose evidence is something particular) is

Anne Johnson, who has lived at Enfield some years, and gets her living principally by spinning. She says, that she saw Mary Squires on the 18th of January 1753, at her door. The reason of her fixing upon that day is, because she spins for one Mr. Smitheram, and swears that she carried her work to him two days before she saw her (which was the 16th.) She says, that she saw Mary Squires three several times before that, and in the compass of ten or eleven days; and afterwards saw her in Newgate. This witness has also told you, that when her work was given her to do by Mr. Smitheram, and also when she carried it to him after it was done, that it was entered into a book kept by Mr. Smitheram, or by some of his family, for that purpose. It was therefore thought proper to call Mr. Smitheram, and to enquire whether a book was kept for that pur-

pose; and he tells you, that he did employ the witness Anne Johnson in the business she has mentioned; and he produces a book, in which are two columns, in one of which is entered the yarn which he delivers out, and in the other, that which he receives after it is spun; and upon producing that book, it is observable, that it is entered, that on January the 16th one pound of yarn is delivered to Anne Johnson to be spun; and in the second column in the same book, one pound of yarn is entered to be returned on January the 23d, by the same person, Anne Johnson, who spun it; so that it is impossible (if credit is to be given to this book, to which she herself refers) that she could have seen Mary Squires on the 18th of January; because she did not carry home her work (as appears by the book) till the 23d of that month; which is an observation you will think worthy your notice, and especially as this is the only written evidence referred to by the defendant's witnesses which has been produced. They then call

Wise, the wife of John Basset, who says, that she saw Mary Squires at Enfield-Wash on the 21st or 22d of January 1753, and remembers it by a circumstance of killing a hog, and of a servant's leaving her service at that time; that she saw her in her own house, and gave her a penny to tell her fortune. She saw her afterwards in Newgate; and upon a conversation with Mary Squires there, about seeing her, Mary Squires told her, she wronged her. The next is

James Pratt, who says, that he saw Mary Squires, a man, two women, and some children, in farmer Smith's cow-house, about three days before New Christmas, as near as he can remember, where they continued about three days; and that Mary Squires then complained of the loss of her horse. Then they call

Lydia Farroway, who was a servant to Mr. Howard at Enfield-Wash, and she says, that she saw Mary Squires there upon the Tuesday se'nnight before she was taken up, and remembers it by this circumstance, that she was on that day making pyes for her young master's birth-day; and saw her afterwards in Newgate, and thinks she can be certain to her. The next is

Margaret Richardson, who says, that she saw Mary Squires at Enfield last January was twelvemonth, in a chandler's shop there, and stayed with her a quarter of an hour, and left her in the shop; and she also saw her on Old Christmas day; remembers it, because her dog was going to lay hold on her, which her husband prevented. She appears to be very ignorant; for, being asked in what month Christmas is, she says, she does not know. Then

George Clements is called, who is servant to Mr. Star at Enfield, and says, that he saw Mary Squires there a fortnight before she was taken up, and that she wanted to tell his mistress her fortune, which frightened her; and says, that he saw her two or three days after, but nobody was with her either of the times.

He afterwards saw her and knew her in Newgate, and she asked, what harm had she done him? The next is

Hannah Fensham, who says, that she saw Mary Squires alone at a place near Enfield on the 10th of January 1753, and saw her several times afterwards passing and repassing; and saw her afterwards in Newgate.

Elizabeth Sherrard is the next, and she says, that she saw Mary Squires at Wells's on Wednesday, Thursday, Friday, and Saturday next before New Christmas; and says, that she saw a young man and two women with her, which she believes to be her son and daughters. She appears very ignorant, and can scarce give an account at what season of the year Christmas is. The next witness is

John Ward, (who is produced in order to prove a confession made by Susannah Wells, at the time of her confinement in Bridewell, before she and Mary Squires were tried) who says, that he went to see her in Bridewell; upon her shewing some surprize at seeing him, he told her, that he saw her name in the news, and then asked her, how she came to keep the girl a fortnight? She, upon that, said, she was there twenty-eight days. He then asked her, what room she was in? Her answer was, that he knew the room very well (though he says, that he had not seen it for twelve years before.) You will consider in what light this evidence appears; for, as it is laid before you by the defendant to prove Wells's confession of the fact charged upon her, the question is, whether it can have that effect? And in order to determine that, you will observe, he tells her, that the reason of his visit was, because he saw her name in the news-papers, and then asked her, how she came to keep the girl a fortnight? Upon which she said, it was twenty-eight days: Now it is very notorious, that the account which the defendant herself gave of her confinement, as well as the account given of it in the news-papers, was twenty-eight days; so that you will take it into your consideration, whether you will believe this to be a confession, or whether she spoke from the news-papers, in order to rectify the witness's mistake in charging her with confining the girl (as he then called the defendant) a fortnight, when it appeared by the news-papers to be twenty-eight days. Then

Richard Jones is called, who was with the last witness to see Wells in Bridewell, and agrees with him as to the conversation which passed relating to the defendant's confinement in the terms you have heard. The next witnesses they call, are

Nathaniel Crumphorne, and Elizabeth his wife; and they are produced to prove a conversation between those witnesses and Judith the wife of Fortune Natus, relating to the present defendant, which seems very extraordinary; for they tell you, that upon the 21st of April last, Judith Natus was at their house, and that Nathaniel Crumphorne said to her, that as she knew that Elizabeth Canning was

at Wells's, how could she go against her? And that the answer she made was, Indeed, Mr. Crumphorne, I cannot say but she really was there when we lodged there. I mention this as a very extraordinary piece of evidence; because, if what is sworn by this evidence is true, the consequence must necessarily be, that not only this Judith Natus and her husband, but many witnesses, whose evidence I have already stated to you relating to that fact of her being there, must be absolutely and wilfully perjured. The next is

Paul Stevens, who is called to prove a confession which he says Mary Squires made in New Prison, and there he says, that Mary Squires owned she had been at Wells's; but at the same time said, that she neither cut the defendant's stays off, or robbed her; but said, that Betty Canning was at Wells's about a fortnight and three days, and that she was there at the same time. Now this, as well as all other confessions, must be taken intire; and if so, it is certain that Mary Squires disowns the robbery, though she owns (if she made this confession) that Betty Canning was at Wells's at the time she was there. This confession also (if she made it) must appear something wonderful, when you consider the former evidence.

Then, in order to discredit Fortune Natus, they call three witnesses, viz. Joseph Haines, Paul Chapman, and Thomas Green. The first of them says, that he has in general a bad character: the second says, that both he and his wife have but very indifferent characters, and ought not to be believed upon oath; but it seems that there has been some difference between Chapman and him about a note: and the last witness says, that he believes Fortune Natus would swear any thing for hire. Then, to discredit Ezra Whiffin, they have called

William Metcalf, who is a glazier and painter, and he says, that upon the 6th of January, Old Style, which is the 19th New Style, Whiffin having employed him to paint his sign, it was brought home that day, and then the witness told Whiffin, that Mrs. Wells had got her sign-irons to sell; and therefore concludes, that if Whiffin had bought her sign-irons on the 18th, which he swore he did (which was the day before) he would naturally have told him so. Upon his cross-examination, he tells you, that he remembers this circumstance by an entry in a book, a copy of which he produced; but he owns, that the figures 1753 in that copy were wrote so late as last Saturday. Now to establish the characters of Whiffin and Fortune Natus, the counsel for the king have called some witnesses. The first is

Mr. Smitheram (who has been called before), who says, that he has known Whiffin a year and a half, and that his general character is a very good one, and that he does not believe he would forswear himself. Then

Mr. Barnes and Mr. Smart are called, who both have known him between three and four years, and agree in giving him the character of

a very honest man. As to Fortune Natus's character,

Thomas Bell is called, who says, that he has worked for him about fifteen months, and that he has always behaved honestly and well, and does not believe he would be guilty of perjury; and says further, that he has eight servants, and does not think he has so good a servant, or one he values so much as he does Fortune Natus.

I have now laid before you the evidence given both on one side and the other, with all the exactness I have been able; and as the verdict you are to give is attended with great expectation, you will weigh and consider the evidence you have heard with the utmost care and impartiality, and not suffer yourselves to be influenced either by popular clamour, or by any apprehensions of the consequence of doing the public and yourselves that justice which is expected from you. It is certain that this trial has been carried on by different sets of people, who have interested themselves in it with uncommon zeal, and whose passions have led them into the greatest extremities, as well as the highest extravagancies, according to the part they have supported, which has drawn it into an unusual length, and has given it the appearance of greater intricacy and difficulty than otherwise it could have met with. As you have heard all the witnesses examined with the utmost accuracy, and carefully attended to their evidence; your verdict will, at least it ought, to give a general satisfaction, in clearing up those doubts which this extraordinary affair has occasioned.

I believe there never happened a greater contrariety of evidence (not to give it a worse name) during the course of any trial, than there has in this: however, it is generally so ordered by Providence, that truth is attended with so strong a connection, and such an invincible uniformity, that it seldom, if ever, fails in having its due weight.

It may not be amiss just shortly to recapitulate, and take a view of the evidence as it has been given, and how it has been applied.

The first fact, they, who are concerned for the prosecution, undertake to prove, is, that Mary Squires, her son and daughter, were, upon the 29th of December, at a place called South-Parrot in Dorsetshire; and that she and they travelled from thence through Abbotshury (where they stayed from Monday the 1st of January to the Tuesday se'nnight following), then arrived at Wells's on Wednesday the 24th of that month; and their whole journey through the several counties they passed, proved by thirty-eight different witnesses, confirmed by many circumstances, who don't appear to have the least correspondence together, or to act in concert on this occasion; but, on the contrary, most of them utter strangers to each other.

You will then compare Elizabeth Canning's information before alderman Chitty, with the evidence she gave at the trial of Mary Squires,

as to her description of the room, as well as the account she gave of what was in it, and consider how, and in what particulars, she differed. Then the principles upon which Nash, Aldridge, and Hague went upon; first in giving her credit, and then in disbelieving her whole story after they had taken a view of the room, and considered the different accounts she gave, as well as their opinion how easily she might have escaped, if she had been there. There is another very remarkable circumstance, which you must remember is proved by four witnesses, I mean that of lopping the trees which grew at the window of the room she swears herself confined in, which was done on Monday the 8th of January, at which time she swore herself in that room. There is also something very particular as to the shift she had on, in which she swore she was, at that season of the year, dragged to Wells's, and worn twenty-nine days. Besides this, her setting her mark only to the information she gave before Mr. Fielding, and writing her name in a fair legible hand to the notices she gave of taking her trial. And added to all this, her attempting to take away the bed-gown at the time of her being at the then lord-mayor's, insisting upon its being her mother's. When you have laid this evidence together, and weighed it with proper attention, you will then take her defence into your consideration, and determine whether she has answered the crime with which she is charged to your satisfaction. In the first place, you will consider, whether the evidence she gave against Mary Squires can possibly be true; and in the next place, whether you think it probable. As to the first, there is no sort of evidence even to assist you in determining whether it is possible for human nature to subsist for twenty-nine days together upon no more than a quarter-loaf, and a pitcher of water of the size you have seen. If you should think this possible, you will then take the probability of her defence into consideration. Her master Lyon tells you, that he differed from the rest of his companions who went with him to Enfield, and that, for his part, he had no doubt of the truth of what she had sworn; and many other witnesses she has called are of the same opinion, for the reasons you have heard them give. Then her mother, and the neighbours whom she sent for upon her daughter's return, have described her dress, and have given you an account of the miserable wretched condition she was then in, as well as the account she then gave of her confinement, and the place where she was. The evidence of Beals, who kept the turnpike at Stamford-hill, is very observable, who says, that he believes Elizabeth Canning was dragged through the turnpike on the 1st of January; yet says, that he never spoke of it till six weeks after; and then closes this part of her defence with the evidence of three witnesses, who swear that they met her on the road (as they believe) on her return from Enfield-Wash. And then, to induce you to believe that she was not mis-

taken in the person of Mary Squires, from whom she swore she met with this severe and cruel treatment, she has called twenty-seven witnesses, who all swear, that they saw Mary Squires in and about Enfield in the months of December and January; which, if true, thirty-eight witnesses, who positively swear to her being in other places, must be wilfully perjured; but you must remember, that some few of those twenty-seven witnesses have appealed to written evidence, such as entries in books, none of which (as I recollect) have been produced, except that of Smitheram, which was referred to by Anne Johnson, by which it manifestly appears how greatly she was mistaken in her evidence; and it is very remarkable, that there are not two of these twenty-seven witnesses who can swear they saw her at the same time. And last of all, you will consider the confessions of Wells and Mary Squires after they were in custody; and what Judith Natos said a few days ago relating to this affair, on which I made such observations as have occurred to me.

And now, gentlemen, the whole rests for your determination; and as it is very observable that you have attended to the evidence with the greatest application, and your characters being such as will not suffer you to deviate from the paths of truth and justice, I can make no doubt but that you will acquit yourselves as honest men. If therefore you are of opinion that the defendant is guilty of this perjury, you will find her so; if innocent, you will acquit her.

The Jury withdrew at twenty minutes after twelve o'clock in the morning to consider of their verdict, and returned at fifteen minutes after two, and brought in their verdict, Guilty of perjury, but not wilful and corrupt.*

Upon which the Recorder told them, "That he could not receive their verdict, because it was partial; and they must either find her guilty of the whole indictment, or else acquit her."

Upon which they were sent out again at twenty-five minutes after two, and returned at forty-one minutes after two; and brought in their verdict Guilty of Wilful and Corrupt Perjury.

Upon which she was committed by the Court to the custody of the keeper of Newgate.

On the Monday following, the 13th of May, she was called to the bar, in order to receive sentence; when her counsel delivered into court affidavits of two of the jurymen, Mr. Frome and Mr. Russell, setting forth that the verdict was given not according to their consciences, which were read.

Upon which Mr. Manning, the foreman of the jury, was sent for by the Court, and asked

* See in the *Duchess of Kingston's Case*, A. D. 1776, the answer of the duke of Newcastle when called upon for his verdict.

how this matter was? who gave the following account how they were divided.

The Foreman then acquainted the Court, 'That all of them, but those two, were of opinion she was guilty of the whole indictment, but the said two did not think she was wilfully guilty, yet nevertheless thought she was guilty; but believing somebody had seduced the girl, and forged the story, for her to tell and stand by (in short, they all believed so): and upon such belief they found, and gave their verdict, Guilty, but not wilful: but were informed by the Recorder, that he could not take that verdict, for they must either acquit her, or else find her guilty of the whole indictment.

"That when they withdrew to consider again of the charge, the said two men declared they could not come in to find her guilty of the whole indictment; but upon arguing the case with them, and telling them they might as well find her guilty of the whole indictment, they said, they could not agree to it, unless the rest of the jury would consent to recommend her to the Court for mercy. That then they all agreed to find her guilty of the whole indictment; which they all agreed she was guilty of before, except the said two; and accordingly gave in their verdict, Guilty of Wilful and Corrupt Perjury."

Upon which the prisoner's counsel insisted upon a new trial, which the Court would not agree to.—The Court were divided, and the Recorder read the act of parliament concerning the crime of perjury, wherein it empowers the Court to sentence the parties found guilty of the said crime.—Her counsel still insisted it was law, and that they had a right to a new trial, and quoted the *Case of Ashley and Simons the Jew*,* where the jurymen made affidavits, that the verdict recorded was by mistake, and was not what they meant or intended to bring in, and thereupon a new trial was granted; and farther, that they had something to offer in arrest of judgment.

Then the Recorder said,—“As this case is so much become a party affair, (which I am sorry to see) I had rather put it off till next sessions, that it may be argued before the same judges that tried her, who may come down next sessions on purpose.” Then the Court agreed to put it off till the first day of next sessions, which began May 30, 1754. †

* See it at the end of this article.

† After the Court had deferred giving sentence till the following sessions, the friends of Elizabeth Canning drew up the following Queries, and laid them before counsel.

QUERIES proposed to SOLLON EMLYN, esq. counsellor at law, (Editor of *Hale's Pleas of the Crown*, folio, and of a former Edition of this Work, to which see his admirable Preface, vol. 1, p. xxii.)

QUERY. I. 'Is not Elizabeth Canning surrendering herself voluntarily, when she had

At the session of Oyer and Terminer holden for the city of London at Justice Hall aforesaid, on Thursday the 30th day of May, 1754, before the right hon. Thomas Rawlinson, esq. lord mayor of the same city; sir John Willes, knt. chief justice of his majesty's court of Common Pleas; sir Thomas Dennison, knt. one of his majesty's justices of the court of King's-bench; Edward Clive, esq. one of the justices of his majesty's court of Common Pleas; Henry Legge, esq. one of the barons of his majesty's court of Exchequer; sir Sidney Stafford Smythe, knt. one other of the barons of his majesty's court of Exchequer; sir John Barnard, knt. William Benn, esq. sir

'nothing to lose by going away, an argument of her innocence?'—*Answer.* As a person's flying from justice is a presumption of guilt, so a voluntary surrender is, by parity of reason, a presumption of innocence; but then it is but a presumption, which may be overthrown by direct positive evidence.

II. 'Is it agreeable to law, that a jury, once charged with the evidence, may be permitted to go at large, before they have delivered in their verdict?'—*A.* I am of opinion, that though a jury once charged, may, by consent of parties, be discharged wholly from trying the cause; yet I do not apprehend that the law will allow them to go at large, in a criminal case, while the trial is depending: for though in a long trial such a confinement may be inconvenient, yet I cannot find that the law has provided any remedy for it; it being in the eye of the law a loss inconvenience, than exposing the jury to be tampered with before they have brought in their verdict; yet I see not but that they may take refreshment, and retire to rest in a place provided for them, provided that they be guarded by a sworn officer, that nobody be admitted to speak to them.

III. 'Is it not necessary upon an indictment for perjury, not only to prove that the fact sworn to is false, but also that the defendant knew it to be so at the time of swearing?'—*A.* I think it to be very clear, that a mere mistaken false oath, without wilful and corrupt design, is not perjury within the meaning of the indictment; for the indictment charges it to be done falsely, wilfully and corruptly. Nor did I ever know, hear or read of any one convicted of perjury, without evidence to prove a corrupt design, plot or confederacy, or else that the party must needs know it be false; as in this case, if it were proved that Elizabeth Canning was elsewhere at the time she pretended to be at Enfield; for in this she could not swear false through mistake, as she might with respect to the person of the gypsey. Nor is it sufficient that even this evidence be but of equal weight with the defendant's oath; for that would be but oath against oath, which determines nothing, unless it be of superior weight and credit; for else, by turning the tables, the witness might equally be convicted on the defendant's oath.

Robert Ladbroke, knt. Francis Cokayne, esq. Robert Alsop, esq. aldermen of the said city of London; William Moreton, esq. recorder of the same city; Stephen Theodore Janssen, esq. Marshe Dickinson, esq. Robert Scott, esq. sir Richard Glyn, knt. and William Alexander, esq. other the aldermen of the same city; the defendant was brought to the bar, to receive judgment.

Her counsel argued for a new trial, and to support their arguments, again quoted the Case of Ashley and Simons the Jew, and insisted, That was a precedent in their favour.—Lord Chief Justice Willes acquainted the Court, "A new trial could not be granted, for in the

IV. 'Does the law require that a jury charged upon such indictment, must necessarily bring in their verdict Guilty or Not Guilty generally?'—*A.* Certainly the law requires no such thing; for the jury may, if they please, bring in their verdict special, or guilty as to part, and not guilty as to other part. Indeed, if it be only verbosely worded, and amounts in substance to a general verdict, it may be right in the Court to tell them, it would be more proper to find it general; but then care should be taken so to explain it to them, that they may not by a general verdict find the defendant guilty of more than they believe or intended to find him.

V. 'Does not a finding the defendant not guilty of wilful perjury, amount to an acquittal, although they should also find the party guilty of swearing falsely, not wilfully?'—*A.* If the jury really believed the party innocent of wilful forswearing, this is in effect a general verdict of an acquittal, for this is the only criminal part of the indictment; and the swearing falsely, if not with design and knowingly, is, as I conceive, not criminal in law: and after this, to find a general verdict of guilty, is quite the contrary to their first finding.

VI. 'Suppose the jury, through surprise, inadvertency, or mistake, find such a verdict, is there any remedy to prevent judgment in such case?'—*A.* This is extremely difficult, unless some error can be shewn upon the face of the record, which may be cause for arresting judgment. Perhaps the suffering the jury to go at large in the midst of the trial may be such a cause, as being a mis-trial.

In the Case of Simons, the Polish Jew, upon affidavits of the jury, that they did not mean to give such verdict as was entered (as here, that they did not mean to find the defendant guilty of that part of the indictment, which charges her with wilful and corrupt perjury, but only that she had in some part sworn falsely, though not wilfully) the Court did set aside the trial.—If this be really the case, the jury ought however, for disburthening their own consciences, to make such representations to the Court, and leave the effect to them.

A. Eburn.

May 9, 1754.

Case of Ashley and Simons the judge there took a wrong verdict, which was not the meaning of the jury;—but in this Case the verdict was general, and they all abide by it, but two, who are but weak men, first to consent and give in their verdict according to their oath, and then to recant.”—On which the motion was over-ruled.—Then the Court were proceeding to sentence, when sir John Barnard stood up, and recommended her for mercy, and that her sentence might only be six months imprisonment, for he believed she was not guilty alone; in which seven other aldermen joined.

Then L. C. J. Willes told them, he had observed that collections had been made for her amounting to considerable sums of money; and if her sentence was only to remain in Newgate, there would be such sums collected, and such assemblies of an evening, as would render her sentence rather a diversion than a punishment.—Nor the pillory he no ways judged safe, fearing much mischief might be done.—And, concluding, that he thought her notoriously guilty. In which opinion all the other judges joined, with my lord mayor, the recorder, and two aldermen, viz.

For Transportation.—The right hon. Thomas Rawlinson, esq. lord mayor of the city of London. Sir John Willes, knt. chief justice of his majesty's court of Common Pleas. Sir Thomas Dennison, knt. one of his majesty's justices of the court of King's-bench. Edward Clive, esq. one of the justices of his majesty's court of Common Pleas. Henry Legge, esq. one of the barons of his majesty's court of Exchequer. Sir Sidney Stafford Smythe, knt. one other of the barons of his majesty's court of Exchequer. William Moreton, esq. recorder of London. Stephen Theodore Janssen, esq. Marshe Dickinson, esq. aldermen.

For Six Months Imprisonment only.—Sir John Barnard, knt. William Benn, esq. Sir Robert Ladbroke, knt. Francis Cokayne, esq. Robert Alsop, esq. Robert Scott, esq. Sir Richard Glyn, knt. William Alexander, esq. aldermen.

Then Elizabeth Canning addressed the court with the following speech, with a low voice.—“That she hoped they would be favourable to her; that she had no intent of swearing the gypsey's life away; and that what had been done, was only defending herself; and desired to be considered as unfortunate.” Then the Recorder spoke thus:

Mr. Recorder. Elizabeth Canning, you now stand convicted (upon the clearest proof) of wilful and corrupt perjury; a crime attended with the most fatal and dangerous consequences to the community, though (as yet) it is not punished with death. Your trial has taken up a great deal of time, and the several witnesses have undergone the strictest examination; and I think I may venture to affirm, that there is not one unprejudiced person, of the great numbers who have attended it, but must be con-

VOL. XIX.

vinced of the justice and impartiality of the jury in the verdict they have given.

It is with horror I look back, and think of the evidence you gave at the trial of Mary Squires, whom you knew to be destitute and friendless, and therefore fixed upon her as a proper object to make a sacrifice of, at the dreadful expence of a false oath; this you preferred to the making a plain discovery to those who had a right to know where you really were those twenty eight days of your pretended confinement at Wells's; and in this you were encouraged to persist, as well by that misapplied charity, which was bountifully given you in compassion to your supposed sufferings, as by the advice of your mistaken friends, whom you had deluded and deceived into a belief of the truth of what you had falsely sworn.

This audacious attempt, and that calm and deliberate assurance with which you formed a scheme to take away the life of one (though the most abject) of the human species, together with your youth, and the character you then had, as well as your seeming inexperience, imposed upon many, and gained you a credit which must have exceeded your highest expectations; and being thus abandoned, and thus encouraged, you not only wickedly persevered, but even triumphed over those who would not suffer their judgments to be misled by so gross an imposition.

But when at last people had a little recovered their surprize, and this almost miraculous tale of yours came to be temperately canvassed and tried, by comparing your own original information with the evidence you had given at the trial, and was found to vary in so many material and significant circumstances; then that resentment you had raised began to subside, and give way to that most necessary enquiry (which the worthy magistrate who then presided in this court so charitably undertook, and) which in its consequence not only saved that life, which by your false testimony was intended to be taken away, but gave rise to this prosecution, which must both expose the guilty, and convince the doubtful. And as evil actions have sometimes been productive of unforeseen, nay, even good effects; so this iniquity of yours will, I hope, instruct mankind not to suffer their credulity to get the better of their reason, by giving way to those very early impressions, which the artifice of falshood too often makes.

I shall add but very little more; for I would avoid aggravating your guilt, which is sufficiently manifest by your trial, or saying any thing which may increase the affliction of one whom I must call unfortunate: but as I attended both your trial, as well as that of Mary Squires, it may be expected that I should declare my thoughts as well of one as the other; I therefore, in the most solemn manner, affirm, that I always thought your evidence false, and that the witnesses produced in your defence were most grossly mistaken.

The policy of foreign countries punishes of-

2 X

fences of this magnitude with death, and upon this most rational principle, that when a life is attacked by false oath, maliciously and deliberately taken, the punishment to which such a supposed criminal is thereby exposed, falls upon the person guilty of so horrid an attempt: but it is your particular happiness that you are in a country, where severe and sanguinary laws are not so familiar; and though many may expect, and the Court surely could in this case, justify the most severe and exemplary punishment which the law can inflict; yet you will soon be convinced, that your sentence is in no degree adequate to the greatness of your offence. The judgment therefore of this Court is,

That you shall be imprisoned in the gaol of Newgate for one month; and after the expiration of your imprisonment, you shall be transported to some of his majesty's colonies or plantations in America for the term of seven years; and if within that term you return, and are found at large in any of his majesty's dominions of Great Britain or Ireland, you shall suffer death as a felon without benefit of clergy.

The following Affidavits were soon after made and published by two of the jurymen.*

"Joseph Russell and Richard Frome, two of the jury for trying the issue between our sovereign lord the king, and Elizabeth Canning, spinster, upon an indictment for perjury, at, &c. each speaking for himself, and not one for the other, jointly and severally make oath and say, That these deponents, and the rest of the jurors sworn to try the said issue, agreed in their verdict first delivered to the Court, and which said verdict was unanimously agreed to be reduced into, and was accordingly reduced into writing; and was, that the said Elizabeth Canning was guilty of perjury, but not wilful and corrupt; as these deponents, or either of them, did not apprehend or believe, that she the said Elizabeth Canning knew or believed the facts by her sworn in her evidence against Mary Squires, upon the trial of the said Mary Squires, were not true when she so swore the same. But these deponents say, they were induced to join in and agree to the verdict that is recorded, believing that the words 'wilful and corrupt' were mere matter of form, and understanding it to be the opinion of the Court that the said jury could not bring in their verdict in the manner they did at first, and not from an opinion or belief that the said E. Canning had any intent to charge the said Mary Squires falsely, or maliciously and deliberately to cause or procure the said Mary Squires to be untruly convicted. And these deponents further say, that they are very uneasy in their minds, and dissatisfied in their consciences, by finding that the verdict delivered by them, and recorded as aforesaid, is understood and imports a conviction

tion of the said E. Canning of deliberate, wilful, and intended perjury, in swearing facts which she knew to be false.

JOSEPH RUSSELL.

"RICHARD FROME."

"Joseph Russell, one of the jurors sworn to try the issue between our sovereign lord the king and E. Canning, spinster, upon an indictment for perjury, at the sessions of Oyer and Terminer holden for the city of London, the 24th day of April last, and the following days, at Justice Hall in the Old Bailey, in the suburbs of the said city, maketh oath, and saith, That when the said jurors went out of court to consider of their verdict, they began to examine, from the notes taken by them in court, the evidence on behalf of the prosecution; and that when they had proceeded therein so far as the testimony of about twelve or fourteen witnesses, (to the best of this deponent's remembrance as to the number of such witnesses) making their observations on those whose testimony either appeared to deserve credit, or to be exceptionable, an officer (whose name this deponent doth not know) came (as he said) from the Court, to know whether the jury were agreed in their verdict? Whereupon William Parsons, one of the jury, said, How can they think we can agree on a verdict in so short a time? Others of the jury said, You find the Court is impatient, there is a perjury in the two informations that lie on the table: others declared, that was not the thing they were come to yet: and one (the foreman, to the best of this deponent's remembrance and belief) said, If you can make those two examinations one thing, there is no perjury; but as one mentions all the water to be drank up on one day, and the other mentions its being made an end of on a different day, there is a perjury: whereupon it was urged by several of the jury, that that was not a wilful and corrupt perjury: and it was then (without further examination of the evidence in behalf of the prosecution, or any examination of the evidence in behalf of the defendant, or once reading of the indictment, or any mention being made of the criminal import thereof) unanimously agreed to bring in the defendant guilty of perjury, but not wilful and corrupt. And he this deponent then speaking to the foreman said, Mr. Foreman, as we have agreed of a perjury, but not wilful and corrupt, write it down, for fear you should make a mistake in giving of it in; which the foreman did accordingly. And he this deponent took the same out of his hand to read it, and finding it to be as aforesaid, returned it again. And this deponent further saith, that such verdict as aforesaid was delivered by the foreman to the Court; who being dissatisfied therewith, directed the jury to go out a second time. And this deponent further saith, that he cannot remember particularly what passed or was said in court between the jury's delivering in their first verdict, and going out a second time to re-consider it: but saith, that he this deponent did not see, nor does he believe,

* From the Refutation of sir Crisp Gascoyne's Address to the Livery, p. 44, 45.

that there was any copy of the indictment against the defendant E. Canning before the jury, nor did he hear the meaning or purport of such indictment once mentioned by a single person on the jury whilst they were considering of their verdict, or either of them: nor did he this deponent at that time, nor doth he now believe, that the defendant E. Canning is guilty of wilful and corrupt perjury, in swearing falsely against Mary Squires; but saith, that on comparing and considering the evidence, as well on the part of the prosecution, as in behalf of the said defendant E. Canning, he then did, and doth now believe, that Mary Squires was at the house of mother Wells's, at Enfield-Wash, and that she the said defendant E. Canning was wronged at Enfield-Wash. And this deponent further saith, that whilst the said jury were out a second time considering of their verdict, several of them were for bringing in the defendant E. Canning not guilty, alledging that they did not believe her guilty of wilful and corrupt perjury, or of any other perjury or crime, than that of her variations in her several examinations in regard to the time of her having drank up her water as aforesaid: but the foreman of the jury declaring they could not bring in the said E. Canning not guilty, because they had already found her guilty of perjury; it was upon that account, and for that reason, and no other, as this deponent believes, agreed by the said jury, by their said second verdict, to bring in the defendant E. Canning guilty of a perjury (no other reason, argument or motive whatsoever being mentioned, to the best of this deponent's knowledge, remembrance or belief, by any one of the said jury.) And this deponent further saith, that he should not have been induced to join in and agree to such verdict, had he known or considered that it is the act of the mind, and not an undesigned mistake (to which every one from the imperfection of human nature is liable,) that constitutes the offence whereof the said E. Canning was indicted; or if he had then considered (as he ought,) that whether the last or remainder of the water was drank on the Friday preceding the day the said E. Canning escaped from Enfield-Wash, or but a few hours before she made her escape, it could have no tendency to prove the said M. Squires guilty; or if she was guilty, could not aggravate or lessen her guilt. And this deponent further saith, that when the jury agreed to such second verdict, they agreed earnestly to recommend E. Canning to the mercy of the Court (which recommendation was unanimously agreed to by all the jury, and not objected to by any one, to this deponent's knowledge or belief.) And this deponent further saith, that whilst the jury were considering of their said verdicts, he doth not remember to have heard, nor doth he believe, any one of the said jury declared his belief, that the said defendant E. Canning was guilty of wilful and corrupt perjury, the crime whereof she stood indicted: and that he this deponent would not,

nor hath he any reason to apprehend or believe, that any one of the said jury would have agreed to their said first verdict; or upon bringing in of the second, would (in pursuance of what was previously and unanimously agreed to as aforesaid) have recommended the said E. Canning to the mercy of the Court, had they believed her guilty of a crime so heinous in its nature, and so dangerous in its consequences, as wilful and corrupt perjury, with an intent to take away the life of an innocent person, which, in the opinion of this deponent, deserves a more severe sentence than that passed on the said E. Canning, rather than a mitigation thereof. And this deponent further saith, that after the said jury had delivered in their said second or last verdict, and before they came out of court, Thomas Ford, clerk of the arraigns, asked him, this deponent, what he thought of it now? To whom this deponent immediately declared, that he this deponent believed the girl (the said E. Canning) was wronged at Enfield-Wash more than ever he did before: which circumstance he this deponent repeated in court on the 13th day of May last, when he made his first affidavit relating to the verdict of the said jury, in the hearing of the said Thomas Ford, who in no wise contradicted the same. And this deponent further saith, that the said William Parsons, on the 12th day of May, declared, in the hearing of Richard Frome, one of the said jury, Thomas Hunt, and him this deponent, that the sentiments of him the said William Parsons, respecting the said E. Canning and the said verdicts, were the same as those of this deponent as above stated; but that the said William Parsons had consulted a friend, who had advised him not to make any affidavit, for which reason he declined it, or to that effect. And this deponent further saith, that he this deponent is an utter stranger to all the persons who have had, or now have, the direction and management of the defence of E. Canning (the said Thomas Hunt only excepted, whom this deponent knew during his clerkship, being then his neighbour, but had not spoken to the said Thomas Hunt during E. Canning's trial, or for twelve months before:) but he had been with the mother of the said E. Canning, and had declared to her, and in public, his dissatisfaction and concern at the said verdict of the said jury, and his utter ignorance of the import and consequence thereof at the time he joined in the same: after which the said Thomas Hunt came to him this deponent, in order to draw up and settle the affidavit made by this deponent and Richard Frome, another of the jury, on the said 13th day of May last: and saith, his making the present affidavit proceeds from his own motion and free-will; and that it is made with a strict regard to truth, as well as a sincere desire to prevent, as far as in him lies, the said E. Canning's suffering that infamy and punishment which he is fully satisfied she has in no wise merited. Jo. RUSSELL."

"Sworn the 10th day of June, 1754,
before me, at my house, ROBERT SCOTT."

There were several pamphlets published at that time *pro* and *con*, and several advertisements and paragraphs published in the public news-papers, relating to this mysterious affair ; the substance of which in general were,—Some asserting not only the improbability, but the impossibility of her story.—Others, that she was with child, and concealed herself whilst she lay in : some, that she was an enthusiast, and inflamed with wine, whilst in Newgate :—others, that she would have discovered the whole secret, if she had not been tutored and buoyed up by the Methodists, &c.—And some, that it was a scheme laid and contrived by some artful person, to raise money.—However, no one put their names to these publications against her, yet it drew the two following advertisements ; one from the clergyman that attended her in Newgate, and the other from herself.*

“ June 7, 1754.

“ The many falsities daily propagated in relation to the story of Elizabeth Canning, oblige me to acquaint the public, that soon after the commitment of that unhappy girl to Newgate, I was requested by one of her friends to visit her as a clergyman. I have visited her often, without giving notice of my coming ; and always found the appearance of order, decency, and sobriety, both in the prisoner and her few attendants. I have conversed with her alone, and in the presence of her friends, on the crime for which she was indicted : I have read to, and prayed with her and them ; and as she professed herself a member of the church of England, she always joined cordially and earnestly in the devotional offices of the liturgy ; nor have I been able to discover any thing that could give occasion to a charge of enthusiasm. On the contrary, the appearance, the conversation, and the behaviour of Elizabeth Canning have, to the best of my observation, been always such, as indicated a mind not unsettled in the principles of religion, or conscious of flagrant guilt.—WILLIAM REYNER, rector of St. Mary Magdalen, Old-Fish-street.”

“ June 27, 1754.

“ After being forced, by the most confident assertions, to summon a physician and a midwife upon my trial, to clear my character from the foulest aspersions, whose examination was made unnecessary by the testimony of a midwife called on the part of the prosecution ; after being prevented examining the far greater number of the cloud of witnesses ready to appear to my character, by the express declarations of counsel retained against me, that they had nothing to alledge to my prejudice but the single crime for which I was indicted ; after the public has been assured that Elizabeth Knott, who was convicted of single felony, was a principal witness to prove my return from Eufield, when she was not subpoenaed or

examined, or intended to be subpoenaed or examined, to that or any other fact ; after having been represented by the Inspector,* as a person inflamed with wine, and made drunk with enthusiasm, and as rising from my seat, and coming towards a justice of the peace, with all the appearance of beginning an instant and full confession ;† assertions that have been publicly proved to be false : after these things, there seemed some room to hope, that the torrent of abuse against me would have stopped of itself. But being informed that a report has been diligently propagated and prevailed, that I had squeaked, and declared I would confess or reveal the whole, upon condition I was pardoned, and permitted to conceal names ; and that I had for answer, if I expected any mercy, I must name names ; I am compelled to declare, and do in the most serious manner, and with the strictest regard to truth, hereby declare, that I remain at this instant of time fully persecuted, and well assured, that Mary Squires was the person who robbed me ; that the house of Susannah Wells was the place in which I was confined twenty-eight days ; and that I did not in my several informations or examinations before the different magistrates, or in my evidence on the trial of the said Mary Squires and Susannah Wells, knowingly, in any material, or even in the most minute circumstance, deviate from the truth. As witness my hand this 24th day of June, 1754.

“ ELIZABETH CANNING.”

“ Witness, BENJ. DRAYTON.”

However, the jury's recommending her to mercy had no effect ; for Elizabeth Canning was transported in August 1754 (at the request of her friends) to New-England.

THE CASE OF ASHLEY AND SIMONS‡ THE JEW, QUOTED IN THE FOREGOING TRIAL.

HENRY SIMONS, a native of Ostrog in Volhinia, near the Ukraine, in Poland, landed at Harwich in Essex, August 8, 1751, from Holland, with one Hyam Levi and another Jew ;

* A newspaper published at that time.

† Two justices went to Newgate, after the verdict, to examine her, viz. Mr. Thomas Smith and Mr. Lediard (two Westminster justices). But she said, she did not chuse to answer them any questions. See the Refutation of sir Crisp Gascoyne's Address to the Livery, page 48.

‡ The Case of Ashley and Simons, being a very extraordinary one, quoted in the last trial, and probably may again, on some future occasion, we shall give the indictment, and the affidavits of the jurymen, to shew how a new trial came to be granted in a criminal case ; but previous thereto, we shall insert the case of Simons and Goddard, as an introduction to it, to render the whole affair complete. *Former Edition.*

* Vide the Refutation of sir Crisp Gascoyne's Address to the Livery, page 47, 49.

but before they were permitted to go on shore, were examined by the proper officer, and on a belt round Simons's body, with a purse fastened to it, were found a large quantity of ducats, with which he was permitted to pass to London; and after staying some days in that city, in order to buy goods, he set out in his Polish dress, on the 28th for Bristol, to traffic there. The first night he reached Cranford bridge, (beyond Hounslow) in Middlesex, and put up at the White-Hart inn, kept by one Goddard; where Simons ordered some bread, butter, and beer for supper, and then told the people of the house in the best manner he could (for he spoke very bad, if any, English) that he wanted a lodging, and would pay for it; and shewed them his arms and bosom, that he was clean, and pulled out money, to shew they need not fear their reckoning; whereupon a bed was ordered for him; and, being fatigued, he went early to bed, and the maid locked his chamber door; but very early in the morning he was robbed of five hundred and fifty-four ducats, by two men, who held a knife to his throat, and threatened to kill him if he made a noise. On coming down stairs that morning he complained heavily of his being robbed and ruined, but was only laughed at and ridiculed by the servants of the house; on which he returned penniless to London; and acquainting some friends of it, they got a warrant to apprehend Goddard for robbing him; but on going down to take Goddard, found he was gone out of the way to avoid being apprehended; but he surrendered against the sessions; and at the Old-Bailey in 1751, in alderman Cokayne's mayoralty, Goddard was indicted, for "that he, in his own dwelling-house, on Henry Simons did make an assault, putting him in corporal fear, &c. and stealing from him one leather girdle, value one penny, and five hundred and fifty-four pieces of foreign coin, called ducats, value 250*l*." Simons swore, that Goddard was one of the two men that came into his chamber, took hold of him in bed, and assisted in the robbing of him; but on the evidence of Goddard's niece, his servants in the house, one Thomas Ashley, a gardener,* and several neighbouring gentlemen and inn-keepers appearing, and giving him a good character, he was acquitted.

Upon Goddard's acquittal, he (that September sessions) preferred a bill of indictment at Hicks's hall against Simons for perjury, in swearing an information before justice Chamberlayne, for a robbery against the said Goddard; which bill was found by the grand jury

of Middlesex. Whereupon a warrant was obtained from sir Crisp Gascoyne, alderman of London, for apprehending him in London, which warrant lay dormant till October 7 following; though he was publicly seen about London, asking alms in his Polish dress, and had charity collected for him. On October 6, Simons set out for Harwich, in order to get over to Holland, with a mere trifle in his pocket (poor Jews paying nothing for their passage) in his way home to Poland; how he was apprehended and brought to trial by Mr. James Ashley for a misdemeanour, will appear afterwards.—In the mean time, it may be sufficient to mention, that some friends of Simons removed the indictment against him for perjury, by Certiorari, into the court of King's-bench, at Westminster; where on the 10th of December, 1751, he was tried for perjury by a special jury of gentlemen of the county of Middlesex, and acquitted.

The warrant for apprehending Simons on this charge of perjury lay dormant (as before-mentioned) in Goddard's solicitor's hands, till October 7, when it was called for by Mr. James Ashley, an acquaintance of Goddard's, who saw Simons on the road near Ilford in Essex, on the 6th.—This warrant, on the perusal of it, being found for London only, the words 'Essex and' were added to it, to make it of force both in Essex and London; and with this warrant Mr. Ashley set out, with Mr. Newman, and apprehended Simons near Witham in Essex, and brought him to Chelmsford, where it was discovered, that sir Crisp Gascoyne was no justice of the peace for Essex; and therefore the apprehending Simons on that warrant in Essex illegal: however, the warrant (after erasing 'Essex and') was backed by the Rev. Mr. Tindall, a justice of the peace for the county of Essex (on alderman Gascoyne's hand being proved), though Mr. Tindall declined committing him, but advised Ashley to carry him to the original jurisdiction: whereupon Simons was carried to London, and committed to New Prison on the charge against him of perjury; and whilst there, Mr. Ashley lodged a detainer against him, for putting into his pocket, at the Saracen's head inn in Chelmsford, three pieces of foreign gold, called ducats, with an intent to charge the said Ashley with a robbery. However, after Simons's acquittal of the perjury, he was bailed out on Ashley's detainer; and at the Lent assizes at Chelmsford in Essex, March 12, 1752, the trial of Simons came on before Mr. Justice Foster, on the following indictment.

Essex. The Indictment sets forth, 'That Henry Simons, on the 5th of September, in the 25th year of his majesty's reign, did, in form of law, before Richard Chamberlayne, esq. one of his majesty's justices of the peace for the county of Middlesex, make his information in writing, by which he did, amongst other things, charge and accuse one Joseph Goddard, and one other person, by the description of another person unknown, of the

* This Thomas Ashley, the gardener, a witness for Goddard on his trial, was himself tried in April 1752, in alderman Winterbottom's mayoralty, for perjury, for the evidence he gave at that trial, and was found guilty, and sentenced to stand once in the pillory at the Sessions-house gate for one hour, to be imprisoned for twelve months, after which to be transported for seven years. *Former Edition.*

‘ crime of felony and robbery, to wit, That the said Joseph Goddard, and the same person unknown, had lately before feloniously stolen and carried away from the said Henry Simons, in the dwelling-house of the said Joseph Goddard, five hundred fifty-four ducats.

‘ Count I. That the said Henry Simons, wickedly devising to vex and aggrieve one James Ashley, of London, merchant, on the 8th of October, in the same year, with force and arms, at Chelmsford, in the county of Essex aforesaid, did, secretly and subtilly, put and convey into the right-hand pocket of the coat which the said James Ashley had on and wore, three pieces of foreign coin of gold called ducats; and the said Henry Simons did afterwards, in the presence of divers of his majesty’s subjects, falsely charge and accuse the said James Ashley, that he was the same person, who, with the above-named Joseph Goddard, was so, as aforesaid, supposed to have committed the felony and robbery above specified, and to have stolen and carried away the said five hundred and fifty-four ducats from the said Henry Simons, with intention unjustly to cause the said James Ashley to be apprehended, and to have it believed, that he was the same person, who, with the said Joseph Goddard, was so, as aforesaid, supposed to have committed the felony and robbery aforesaid.

‘ II. That the said Henry Simons, on the said 8th of October, at Chelmsford aforesaid, further wickedly intending to aggrieve the said James Ashley, did privily and subtilly, put and convey into the right-hand pocket of the coat which he then wore, three other pieces of foreign gold coin, called ducats; and the said Henry Simons did afterwards falsely charge and accuse the said James Ashley, that he had feloniously taken from him the said Henry Simons, the same three ducats last mentioned, and divers other ducats, with intention to cause it to be believed and suspected, that the said James Ashley had been guilty of felony; and to cause him to be apprehended and arrested for the same.

‘ III. That the said Henry Simons, on the same day and year last aforesaid, at Chelmsford aforesaid, with force and arms, did make an assault upon the said James Ashley, and into the right-hand pocket of the coat which he then had on and wore, three other pieces of foreign gold coin, called ducats, he the said Henry Simons did then and there privily, and without the knowledge of him the said James Ashley, unlawfully put and convey, and cause to be put and conveyed, with a most malicious, wicked, and cruel intention, then and there falsely to charge and accuse, and to cause it to be thought and believed, that the said James Ashley had robbed him the said Henry Simons of the same.

‘ IV. That the said Henry Simons, on the same day and year last above-mentioned, with force and arms, at Chelmsford aforesaid,

‘ upon the said James Ashley did make an assault, and into the right-hand pocket of the coat which the said James Ashley then and there had on and wore, three other pieces of foreign gold coin, called ducats, did privily, and without the knowledge of him the said James Ashley unlawfully put and convey, and cause to be put and conveyed; and that he the said Henry Simons did afterwards, then and there, most falsely and maliciously charge and accuse the said James Ashley with having robbed him the said Henry Simons of the said three ducats, with intent unjustly and wrongfully to subject the said James Ashley to the pains and penalties inflicted by the laws of this kingdom for such like offences.’

To this indictment Henry Simons pleaded, Not Guilty.

Simons had before moved the Court of King’s-bench for a special jury, which were as follows :

THE SPECIAL JURY.

John Morley, of Halstead, esq.
John Godsolve, of Great Baddow, esq.
Robert Clarke, of Little Baddow, esq.
Daniel Stratton, of Bromfield, esq.
John Olmuis, of Boreham, esq.
George Dodson, of Shenfield, esq.
Thomas Brograve, of Great Baddow, esq.
John Hornby, of Ingatestone, esq.
Samuel Ruggles, of Bocking, esq.
Peter Godfrey, of Woodford, esq.
Poulton Allen, of Barking, esq.
Henry Hall, of Hutton-hall, esq.

And on the evidence of Mr. Ashley, Mr. Newman, Isaac Hubbard the constable, Richard Taylor, and others, he was convicted after a trial of twelve hours; the jury going out about nine at night, and not returning till two in the morning.

Henry Simons thus found guilty, and being upon bail, his friends, instead of bringing him into court within the four first days of the next Easter term, which began the 15th of April, according to the condition of the recognizance, moved the Court of King’s-bench, that judgment might be respited; and prayed for a rule, that the prosecutor might shew cause, why a new trial should not be granted: which the Court did not then come into, there not being then sufficient reason shewn. Whereupon the following affidavits were made soon after :

The Jurymen’s AFFIDAVITS at large.

1. *John Morley*, of Halsted, in the county of Essex, esq. saith, he served on the jury at the trial of this cause, at the last assizes, held, &c. as foreman of the said jury; and this deponent on the evidence given on the said trial, was of opinion, that the defendant did put three ducats into the prosecutor’s pocket; but did not find the same was done with any intent whatsoever.—The deponent saith, the jury did agree to give their verdict, that the deponent

was guilty of putting the said three ducats into the prosecutor's pocket, by reason it was sworn to that effect; and such was the verdict intended to be given: but the deponent hath lately been informed, that the verdict of the jury recorded finds the defendant guilty upon the third count in the indictment, which, the deponent is also informed, is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket with a most malicious, wicked, and cruel intention, falsely to charge, and cause it to be believed, that the prosecutor had robbed the defendant of the said three ducats: whereas this deponent and the rest of the jury, did not find the same was done with any such intent, or any intent whatsoever.—The deponent saith, that the said verdict, as it now stands, is contrary to the intent of the deponent; and therefore the deponent hath made this affidavit.

2. *John Godsolve*, of Great Baddow, in the county of Essex, esq. saith, he served on the jury at the trial of this cause, &c. That the deponent, on the evidence given to him on the said trial, was of opinion, That the defendant did put three ducats into the prosecutor's pocket; but the same was not done with intent to charge the prosecutor with felony, or robbery, or other offence, with any evil intent.—The deponent saith, That the jury did agree to give a verdict, that the defendant was guilty of putting the said three ducats into the prosecutor's pocket, by reason it was sworn to that effect; and such verdict was intended to be given: the deponent apprehended, that he and the rest of the jury had given such verdict: but the deponent hath since been informed, that the verdict recorded finds the defendant guilty on the third count in the indictment, which, the deponent is also informed, is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious, wicked, and cruel intention, falsely to charge, and cause it to be believed, that the prosecutor had robbed the said defendant of the said three ducats: whereas the deponent and the rest of the jury did not find, that the same was done with such intent, or any intent whatsoever.—The deponent saith, That the said verdict, as it now stands, is contrary to the verdict then given in court.—Saith, he could not rest satisfied with such verdict, and therefore the deponent made this affidavit.

3. *Robert Clarke*, of Little Baddow, in the county of Essex, esq. saith, That he served on the jury at the trial of this cause last assizes, held at Chelmsford, in the county of Essex; and that he was of opinion, that the defendant put three ducats into the pocket of the prosecutor; but that the same was not done with intent to charge the prosecutor with robbery, or felony, or any other offence, or with any evil intent. The deponent saith, That the jury did agree to give their verdict, that the defendant was guilty of putting the said three

ducats into the prosecutor's pocket, by reason it was sworn to that effect; and such was the verdict intended to be given: that the deponent apprehended he and the rest of the jury had given such verdict: but the deponent hath been informed, that the verdict, as taken down and recorded, finds the defendant guilty upon the third count in the indictment, which, the deponent is informed, is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious, wicked, and cruel intention, falsely to charge, and accuse, and cause it to be thought and believed, that the prosecutor had robbed the said defendant of the said three ducats: whereas the deponent and the rest of the jury did not find, that the same was done with such intent, or any intent whatsoever.—The deponent saith, That the verdict, as it stands, is contrary to the intent of the deponent.—The deponent saith, he could not in his conscience rest satisfied with such verdict: therefore the deponent made this affidavit to explain what verdict he did intend to find.

4. *Daniel Stratton*, of Bromfield, in the county of Essex, esq. saith, he served on the jury at the trial of this cause, at the last assizes, held, &c. That this deponent, on the evidence given to him on the said trial, was of opinion, that the defendant put three ducats into the prosecutor's pocket; but that the same was not done with intent to charge the prosecutor with robbery, or felony, or any other offence, with any evil intent.—The deponent saith, That the jury did agree, that the defendant was guilty of putting the said three ducats into the prosecutor's pocket, by reason it was sworn to that effect; and such was the verdict intended to be given. The deponent apprehended he and the rest of the jury had given such verdict: but the deponent hath lately been informed, that the verdict recorded finds the defendant guilty on the third count in the indictment, which, the deponent is also informed, is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious, wicked, and cruel intention, falsely to charge, and cause to be believed, that the prosecutor had robbed the defendant of the said three ducats: whereas the deponent, and the rest of the jury, did not find the same was done with such intent, or any intent whatsoever. The deponent saith, the verdict, as it now stands, is contrary to the intent of the deponent. Saith, he could not rest satisfied with such verdict; and therefore the deponent made this affidavit.

5. *John Olmius*, of Boreham, in the county of Essex, esq. saith, he served on the jury at the trial of this cause, &c. That this deponent, on the evidence given on the said trial, was of opinion, That the defendant did put three ducats into the prosecutor's pocket; but the same was not done with intent to charge the prosecutor with robbery, or felony, or any

other offence. Saith, That the jury did agree, that the defendant was guilty of putting the said three ducats in the prosecutor's pocket, by reason it was sworn to that effect; and such only was the verdict intended to be given. The deponent apprehends such verdict was given: but the deponent hath been informed, that the verdict as recorded, finds the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious and cruel intention, falsely to charge, and cause it to be thought and believed, that the prosecutor had robbed the said defendant of the said three ducats: whereas the deponent and the rest of the jury did not find the same was done with any ill intent whatsoever. The deponent saith, when the jury came into court, there was such a crowd and noise within and without the court, that the deponent could not hear distinctly what the judge, who tried the cause, said or explained to them. Saith, that he did not understand the nature of the third count of the said indictment. Saith, that the verdict, as it stands, is contrary to the intent of this deponent. The deponent saith, he could not in his conscience rest satisfied with such verdict; and therefore did, together with Peter Godfrey and Poulton Allen, esqrs. two others of the jury, lately wait on the judge, who tried the cause, and explained to him what verdict they intended to find: and also acquainted him, that, by reason of the noise in court, the deponent could not understand the judge's explanation of the said third count of the said indictment, or the nature thereof.

6. *George Dodson*, of Shenfield, in the county of Essex, esq. saith, he served on the jury at the trial of this cause, at the last assizes, held, &c. That this deponent, on the evidence given him on the said trial, was of opinion, that the defendant put three ducats into the prosecutor's pocket; but the same was not done with intent to charge the prosecutor with robbery, or felony, or any other offence, with any evil intent.—The deponent saith, the jury did agree to give their verdict, That the defendant was guilty of putting three ducats into the prosecutor's pocket, by reason it was sworn to that effect; and such was the verdict intended to be given: the deponent apprehended he, and the rest of the jury, had given such verdict: but the deponent had lately been informed, that the verdict recorded finds the defendant guilty on the third count in the indictment, which, the deponent is also informed, is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious, wicked, and cruel intention, falsely to charge, and cause it to be believed, that the prosecutor had robbed the said defendant of the said three ducats: whereas the deponent, and the rest of the jury, did not find the same was done with such intent, or any intent whatsoever. And the deponent saith, that when the judge, who tried the cause, did explain to the deponent, and the rest of the

jury, the nature of the indictment, the deponent did reply, We find guilty of no intent; but cannot say whether the judge heard him. The deponent saith, that the verdict, as it now stands, is contrary to the intent of this deponent. Saith, he could not rest satisfied with such verdict; and therefore made this affidavit.

7. *Thomas Brograve*, of Great Baddow, in the county of Essex, esq. saith, That he served on the jury at the trial of this cause, at the last assizes, held at Chelmsford, for the county of Essex; and this deponent, on the evidence given to him and them on the said trial, was of opinion, that the defendant did put three ducats into the pocket of the prosecutor; but that the same was not done with an intent to prosecute the said James Ashley for felony or robbery: the deponent apprehended he and the rest of the jury had given such verdict: but the deponent hath lately been informed, that the verdict of the jury, as taken down and recorded, finds the defendant guilty upon the third count in the indictment, which, this deponent is also informed, is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious, wicked, and cruel intention, falsely to charge and accuse, and cause it to be thought and believed, that the prosecutor had robbed the said Henry Simons the defendant of the said three ducats: whereas the deponent and the rest of the jury did not find, that the same was done with intent as aforesaid. The deponent, saith, that the said verdict as it now stands, is contrary to the true intent of this deponent: therefore the deponent maketh this affidavit to explain what verdict they did intend to find.

8. *Joseph Hornby*, of Ingatestone, in the county of Essex, esq. saith, he served on the jury at the trial of this cause, &c. And that it appeared to the deponent, on the evidence given on the said trial, that the defendant did put three ducats into the prosecutor's pocket; but on the evidence given to the deponent by Crisp Gascoyne, esq. alderman of London, it appeared to the deponent, that the same was not done with a malicious, wicked, and cruel intention, falsely to charge, and cause it to be believed, that the prosecutor had robbed the defendant of the said three ducats, or with any evil intent. The deponent saith, that the jury agreed to give their verdict, That the defendant was guilty of putting the said three ducats into the prosecutor's pocket, by reason it was sworn to that effect; and such was the verdict intended to be given: and the deponent apprehended, that such verdict was given. The deponent saith, that when the jury came into the court to bring in their verdict, there was such a crowd and noise in the court, that the deponent could not hear what the judge, who tried the cause, said or explained to them. Saith, he did not understand the nature of the third count of the indictment, for the reasons aforesaid.

9, 10. *Peter Godfrey*, of Woodford, and *Samuel Ruggles*, of Bocking, in the county of Essex, esquires, severally make oath, that they severally served on the jury at the trial of this cause, the last assizes, &c. and say, that these deponents, on the evidence given them on the said trial, were of opinion, that the defendant did put three ducats into the prosecutor's pocket, but the same was not done with intent to charge the prosecutor with robbery, or felony, or any other offence, or any evil intent. The deponents say, the jury did agree to give their verdict, that the defendant was guilty of putting the said three ducats into the prosecutor's pocket, by reason it was sworn to that effect.—The deponents apprehended, that they, and the rest of the jury, had given such verdict: but the deponents have been informed, that the verdict of the jury, as is recorded, finds the defendant guilty on the third count in the indictment, which, the deponents are also informed, is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious, wicked, and cruel intention, falsely to charge, and cause it to be believed, that the prosecutor had robbed the defendant of the said three ducats: whereas, when these deponents, and the rest of the jury came into court, there was such a crowd and noise, that the deponents could not hear distinctly what the judge, who tried the cause, said or explained to them. Say, that they did not understand the nature of the third count of the said indictment, for the reasons aforesaid; the deponents say, that the verdict, as it now stands, is contrary to the intent and meaning of these deponents. This deponent, *Peter Godfrey*, for himself, saith, he could not rest satisfied with such verdict; therefore this deponent did, together with *John Olmuis* and *Poulton Allen*, esquires, two others of the jurors, wait on the judge who tried the cause, and explained to him what verdict they intended to find; and also acquaint him, that, by reason of the noise in the court, this deponent could not understand the judge's explanation of the said third count of the said indictment, or the nature thereof.

11. *Poulton Allen*, of Barking, in the county of Essex, esq. saith, that the deponent served on the jury at the trial of this cause, &c. That the deponent, on the evidence given to him on the said trial, was of opinion, that the defendant did put three ducats into the prosecutor's pocket; but the same was not done with intent to charge with robbery, or felony, or any other offence. The deponent saith, that the jury did agree to give a verdict, that the defendant was guilty of putting the said three ducats into the prosecutor's pocket, by reason it was sworn to that effect.—The deponent apprehended, he and the rest of the jury had given such a verdict: but the deponent hath lately been informed, that the verdict, as is recorded, finds the defendant guilty on the third count in the indictment, which, the deponent is also informed,

is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious, wicked, and cruel intention, falsely to charge and accuse, and cause to be believed, that the prosecutor had robbed the said defendant of the said three ducats: whereas the deponent, and the rest of the jury, did not find the same was done with such intent, or any ill intent whatsoever.—The deponent saith, when the jury came into court to give their verdict, there was such a crowd and noise, that the deponent could not hear distinctly what the judge, who tried the cause, said to them.—The deponent saith, he did not understand the nature of the third count of the said indictment, which the deponent could not, for the reasons aforesaid, hear the judge explain.—The deponent saith, that the said verdict, as it stands, is contrary to the meaning of this deponent.—The deponent saith, that he could not be satisfied with such verdict: therefore the deponent did, together with *Peter Godfrey* and *John Olmuis*, esquires, two other of the jurors, wait on the judge, who tried the cause, and explain to him what verdict they intended to find; and also acquaint him, that, by reason of the noise in the court, the deponent could not understand the judge's explanation of the said third count of the said indictment.

12. *Henry Hall*, of Hutton Hall, in the county of Essex, esq. saith, he served on the jury at the trial of this cause, the last assizes, &c. That the deponent, on the evidence to him given on the said trial, was of opinion, that the defendant did put three ducats into the prosecutor's pocket, but the same was not done with intent to charge the prosecutor with robbery, or felony, or any other offence, with any evil intent.—The deponent saith, that the jury did agree, that the defendant was guilty of putting the said three ducats into the prosecutor's pocket, as sworn to that effect; which was the verdict intended to be given. The deponent apprehended, he and the rest of the jury had given such verdict; but the deponent hath been informed, that the verdict recorded finds the defendant guilty on the third count in the indictment, which, the deponent is also informed, is finding the defendant guilty of putting the said three ducats into the prosecutor's pocket, with a most malicious, wicked, and cruel intention, falsely to charge, accuse, and cause it to be believed, that the prosecutor had robbed the defendant of the said three ducats: whereas the deponent, and the rest of the jury, did not find the same was done with any such intent, or with any intent whatsoever.—The deponent saith, that the said verdict is contrary to the intent of this deponent.—The deponent saith, he could not rest satisfied with such verdict; and therefore he made this affidavit.

John Morley, of Halsted, *Robert Clarke*, of Little Baddow, *Thomas Brograve*, of Great Baddow, and *John Godsalve*, of Great Baddow, esqrs.—Sworn 23d of April, 1752, by

Richard Rayment, commissioner, at their own houses.

John Olmius, of Boreham, and Daniel Stratton, of Bromfield, esqrs.—Sworn the same day, by the said commissioner, at the Saracen's Head inn, Chelmsford.

George Dodson, of Shenfield, and Henry Hall, of Hutton Hall, esqrs.—Sworn 22d of April, by Brown Chambers, commissioner, at their own houses.

Poulton Allen, of Barking, Peter Godfrey, of Woodford, and Samuel Ruggles, of Bocking, esqrs.—Sworn 22d of April, before judge Wright.

John Hornby, of Ingatstone, esq.—Sworn 27th of April, in court.

An AFFIDAVIT tending to prove the Jury's due recording Henry Simons's Conviction in public Court.

Cornelius Norton, of Red-Lion-street, Clerk-enwell, in the county of Middlesex, solicitor for the prosecutor in this cause, maketh oath, and saith, he was present in court when the jury, who tried this cause, publicly delivered their verdict: the deponent saith, the account thereof, and the whole transaction relating thereto, is hereafter impartially set forth, according to the best of the deponent's knowledge and belief.—First, the deponent saith, that about one of the clock of the next day, after this cause was tried, the jury, who tried the same, having assembled together, came into open court, and, having been called over, respectively answered to their names; they were asked by the associate, whether they did abide by the verdict they gave his lordship in private? To which the foreman of the jury, or one of them, answered, they did. Upon which the associate replied, then this is the verdict, you find the defendant guilty. By which this deponent understood, they found the defendant guilty generally on the indictment. For immediately thereon, the honourable Mr. Justice Foster, who tried the cause, got up, and told the jury, that he apprehended they could not find the defendant guilty of the whole indictment; for that the prosecutor had not given evidence to support the first and second count laid in the indictment: but he thought there was evidence to support the third count: and then the said Mr. Justice Foster took great care and pains to explain the difference between the several counts, and declared it as his opinion, that, if they found the defendant guilty of the said third count, they should acquit him of the rest.—Whereupon George Dodson, esq. who was one of the jury, declared himself to the Court, that they found the defendant guilty of no intent, or to that effect.—To which the honourable judge replied, then you must acquit him; for it is the intent constitutes the offence, or to that purpose: and recommended it to the jury to go out, and re-consider of their verdict.—In answer where-to one of the jury replied, My lord, we have considered it as much as we could consider it.

—The deponent saith, he believes that thereupon the judge read, or ordered to be read, the said third count; and asked the jury, if they believed the witnesses? and some one or more of them answering, they did; the judge said, gentlemen, you must connect the whole evidence together. Whereupon the jury appeared to the deponent to consider of what the judge said to them; and in a short time, as the deponent apprehends, brought the defendant in guilty of the third count in the indictment, and acquitted him as to the rest: and the verdict recorded in that manner.—The deponent saith, that, after the verdict so recorded, they were desired to hearken to it: the associate said, Gentlemen of the jury, you find the defendant guilty of the third count in the indictment, and acquit him of all the rest.—In answer to which, they some one or more of them answered, Yes; and withdrew from the bar seemingly well satisfied.—Saith, he stood very near to the jury, when they delivered their verdict, and heard distinctly the whole that passed on that occasion: and the deponent does not remember, in his conscience, that there was a great crowd or noise in the court at that time.—Saith, that the whole transaction above related is impartially set forth, as the deponent believes: and that, if the deponent hath made any mistake therein, positively saith, it is not by design: and humbly submits the truth thereof to the honourable judge who tried the said cause.

C. NORTON.

Sworn before Judge FOSTER.

These affidavits of the jury being obtained, another application was made to the Court of King's-bench; whereupon the Court was pleased to make a rule for Mr. Ashley to shew cause, why a new trial should not be granted? Which being spoke to by nine several counsel, who took up the Court several days in the hearing, the Court was pleased to adjudge a new trial.*

Accordingly a second trial came on for the same fact, at Chelmsford assizes, July 12, 1752, before Mr. Justice Denison, by a Special Jury, on the same indictment.

* "Which (says J. Ashley) is the first precedent of the kind to any person who had been convicted of a criminal offence." See Ashley's Case and Appeal, page 23. In the same page he adds, "In the mean time, actions having been brought (by Simons) against me (J. A.) as the prosecutor, Isaac Hubbard the constable, Richard Taylor and John Newman, on account of altering the warrant, and thereby ignorantly detaining the said Henry Simons in custody, till the warrant was properly backed (by a justice of peace for the county of Essex,) this cause was tried before the lord chief justice Lee, at Guildhall, London, July 9, 1752; when the jury gave a verdict for 200*l.* against me, (J. A.) Richard Taylor, and John Newman; and the costs were taxed at 70*l.*" *Former Edition.*

533. The Trial of TIMOTHY MURPHY,* for Felony and Forgery, on Saturday the 13th Day of January, before the Right Hon. Sir Crisp Gascoyne, knt. Lord-Mayor of the City of London, the Right Hon. the Lord Chief-Baron Parker, and others of his Majesty's Justices, &c. at Justice-Hall, in the Old-Bailey, for the City of London : 26 GEORGE II. A. D. 1753.

Cl. of Arr. CRYER, make proclamation.

Crier. Oyez! Oyez! Oyez! You good men of the city of London, summoned to appear here this day, to try between our sovereign lord the king, and the prisoners that shall be at the bar, answer to your names as you shall be called.

Then the Jury were called over.

Cl. of Arr. Set Timothy Murphy to the bar. (Which was done.)

Cl. of Arr. How sayest thou, Timothy Murphy, art thou guilty of the felony whereof thou standest indicted, or not guilty?

Prisoner. Not Guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Prisoner. By God and my country.

Cl. of Arr. God send thee a good deliverance!

You, Timothy Murphy, the prisoner at the bar, hearken to what is said to you.

These good men, who are now called, and do here appear, are those that are to pass between our sovereign lord the king and you, upon your life and death; if therefore you will challenge them, or any of them, you must challenge them as they come to the book to be sworn, before they are sworn; and you shall be heard.

Cl. of Arr. Call Thomas Batten. (Who appeared.)

Cl. of Arr. Crier, give the book to Mr. Batten.

You shall well and truly try, and true deliverance make, between our sovereign lord the king, and the prisoner at the bar, whom you shall have in charge, and true verdict give, according to your evidence: So help you God!

In like manner the other eleven were sworn.

JURY.

| | |
|-------------------|-------------------|
| Thomas Batten, | Edward Pope, |
| Robert Holaday. | William Bitherny, |
| Thomas Godenough, | Gilpin Russel, |
| Peter Bredal, | Richard Pargiter, |
| John Goldsmith, | Robert Nash, |
| James Callings, | James Elliot. |

Cl. of Arr. Count these. (They were counted.)

Crier. Are you all sworn, gentlemen?

Jury. Yes.

Cl. of Arr. Make proclamation.

Crier. Oyez! Oyez! Oyez! If any of you can inform my lords the king's justices, the king's serjeant, the king's attorney-general, or this inquest now to be taken, of the felony and forgery of which the prisoner at the bar stands indicted, let them come forth, and they shall be heard, for now the prisoner stands at the bar upon his deliverance.

Cl. of Arr. Timothy Murphy, hold up thy hand. (Which he did.)

Gentlemen of the jury, look upon the prisoner, and hearken to his cause: he stands indicted by the name of Timothy Murphy, late of London, yeoman, for that he, after the 29th of June, 1729, to wit, on the 9th of February, in the 24th year of his present majesty's reign, with force and arms, at London, viz. in the parish of St. Benedict, near St. Paul's wharf, in the ward of Castle-Baynard, in London aforesaid, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting, a certain Will and Testament, purporting to be the last Will and Testament of John Wilkinson: the tenor of which said Will and Testament is as follows, that is to say,

'In the name of God, Amen. John Wilkinson, late of the Princess Amelia, being of sound and disposing mind and memory, make this my last will and testament; first and principally commend my soul into the hands of the Almighty God, hoping for remission of all my sins, through the merits of Jesus Christ, my blessed Saviour and Redeemer, and my body to the earth or sea, as it shall please God; and as for such worldly estate and effects which I shall be possessed of, or tiled (meaning entitled) unto at the time of my decease, I give and bequeath the same followeth, that is to say, unto my loving friend John Daunt, of Lisbon, in the kingdom of Portugal, victualler, all such salary or salaries, prize-money, bounty-money, wages, tickets, short-allowance-money, smart-money, and all other sum or sums of money that shall be due to me at my decease: and I do hereby grant the said John Daunt, whole and sole executor of my last will and testament, and I do hereby revoke and disannul other wills, at any time by me before made:

* Taken, with leave of the Court, by T. Gurney, short-hand writer, at the Sessions-house in the Old-Bailey.

'and I do hereby nominate, constitute, and appoint the said John Daunt, executor (meaning executor) of this my last will and testament; and I do give and bequeath unto my said executor, all the rest and of my estate whatsoever, both real and personal, hereby revoking and making void all others and former wills by me heretofore made as aforesaid, declare this to be my last will and testament. In witness whereof, I have hereunto set my hand and seal, this 5th day of May, in the year of our Lord, 1747.

'JOHN WILKINSON.'

'Signed, sealed, published, and declared, by the said John Wilkinson, (meaning by L. S. the said John Wilkinson) as and for his last will and testament, in the presents (meaning presence) of us who have hereunto subscribed our names, as witnesses, in the presents (meaning presence) of the testator. THOMAS CARTY.
'DINISH COLLINS.'

With an intent to defraud Thomas Noads, against the form of the statute in such case made and provided. There are several other counts in the indictment for publishing the said forged Will, with the like intention to defraud the said Noads, &c.

Upon this indictment he hath been arraigned, and thereunto hath pleaded Not Guilty, and for his trial hath put himself upon God and his country, which country you are; your charge is to inquire whether he be guilty of the felony and forgery whereof he stands indicted, in manner and form as he stands indicted, or not guilty.

Mr. Bamber Gascoyne having opened the indictment,

The Honourable Mr. Hume Campbell (brother to the earl of Marchmont) spoke as follows:

May it please your lordship, and you, gentlemen of the jury, I am counsel on the side of this prosecution. You have heard from the indictment, that the person who now stands a prisoner before you, is charged with the forgery of a pretended will of one John Wilkinson, in order to defraud Thomas Noads of a considerable sum of money. And, gentlemen, was there nothing more requisite in this case, than to open the evidence which shews the prisoner's guilt; had no artifice been used, no extraordinary attempts been made, to prevent or to prejudice this trial, I should scarce have appeared here to give you any trouble at all. And now I am here, I should have been glad, if the conduct of a person acting for the prisoner, and who now hears me, had permitted me to state only such facts, as prove the justice of the prosecution. But from what happened this session as well as the last, in relation to this trial; from an intimation that the baffled attempt to try the prosecutor on the evidence of the prisoner, would be turned into an endeavour to avoid or discredit the testimony of that pro-

secutor; it becomes necessary for me to relate facts of an earlier date than I should otherwise have done, and circumstances I should have wished not to mention: these will prepare you for, what may arise in the course of the trial, and enable you to understand what, I guess, the learned gentlemen I see here on the other side will insist on.

You all, doubtless, have heard, that some years ago, in the time of war, several privateers, four in number, were fitted out by the merchants of Bristol and London, by the name of the Royal Family: on board one of these ships (the Princess Amelia) one John Wilkinson entered as a midshipman: the ships put to sea, and having taken prizes of great value, Mr. Henry Casamajor of Bristol was appointed agent for the payment of the sailors, for whom it was thought most convenient they should be paid at Bristol; but as some persons might have occasion to call for their money in London, Mr. Casamajor employed a person in town, who was to write to him, that money might be remitted to pay them; that person was Thomas Noads, a gentleman who has unfortunately, by that situation, brought his name into question in this place, and is become (God only knows why) the object of the resentment of a man whose name I must presently mention to you, though much to his discredit and dishonour.

Mr. Noads being thus employed, and in August 1750, notice having been given that all the sailors might receive their prize-money of the proper agent; in the February following the prisoner at the bar conceived he might get money by setting up the forged will and power of a person he probably thought would never appear to call it in question, or at least that he had so much art as to avoid a discovery, or evade the justice and laws of his country.

The prisoner happened to be at a house near Charing-Cross, a house of bad fame, with a man whose true name now comes out to be Thomas Williams: to him the prisoner applied, and desired he would co-operate with him, telling him he would get him money enough; that he should wear a sword, and live like a gentleman: the man did not very well understand in what manner this was to be contrived; but Murphy, who it seems is pretty ready at invention, disclosed his method of executing his scheme in this manner: if you will, says he to Williams, appear as the executor, I will forge the will of John Wilkinson: we shall go together, you as recently arrived from Portugal, and I as your acquaintance: we shall get the money without suspicion. Williams was a novice, and terrified at that which might reach his life, he did not care to join in what the prisoner proposed. You don't know, says the prisoner, how many there are in London that live by forging wills and powers: why, you may dress like a gentleman, appear in good company, and wear a sword. Go down stairs, continues the prisoner, and I'll make a will and power for this John Wilkinson, that shall intitle you to

his prize-money: your name shall be John Daunt. John Daunt! Who is John Daunt? replied Williams. He is a man, answers the prisoner, whom I knew when at Lisbon with the privateers; he kept a public-house there, where Wilkinson, myself, and others, used to resort; this will make the story tell; for we will say, that you, John Daunt, of Lisbon, a house-keeper, are come over with this will and power of Wilkinson, in order to get the money, and that he made his will to you on the account of a debt of about seventeen moidores; and I'll go along with you as a friend, and shall get the money. By this artifice, and some threats, Williams was prevailed on to assent, and left Murphy to do as he pleased. Soon after, Murphy called him up, and read over to him the will he had made. The will, gentlemen, is here to be shewn to you, with two witnesses names to it. Then Murphy said to Williams, Now, you are John Daunt, the executor. After he had read over both the will and power, fresh forged, he conducted him to the lodgings of Mr. Noads, where the money was to be received. The letter of attorney was first produced. Mr. Noads asked a very natural question, viz. Where is this Wilkinson? Here Murphy made a mistake, by producing the power first; but, I suppose, they thought to get it upon the letter of attorney; but finding that would not do, Murphy answered, Wilkinson went from Lisbon to the coast of Guiney, and there he died. Then, says Noads, I can't pay the money on a letter of attorney. But we have his will as well as power, replies Murphy; and then the will in question was produced, and Williams passed at this time for Daunt the executor. Mr. Noads told them, the will was nothing until proved. Daunt was to pass for a stranger, and as unacquainted with what was to be done in this country; and therefore the prisoner took upon himself the conduct of the whole, and asked Noads where they were to go to prove the will, who recommended them to Mr. Crespigny, (a gentleman of very great character in his profession, and employed by the managers as their proctor); therefore they desired Mr. Noads to write the name on the back of the will, and he wrote Crespigny accordingly; then Murphy, and Williams, by the name of Daunt, (for at this time neither Mr. Crespigny nor Mr. Noads had the least suspicion that he bore any other name) went to Mr. Crespigny, where they produced this will again as the will of John Wilkinson, who, they said, was dead on the coast of Guiney. Mr. Crespigny's clerk wrote it down, and went with them before a learned doctor, where Williams (as Daunt) took the oath usual on such occasions, and the probate was granted; but not being able to pay for the probate, they told Mr. Crespigny's clerk that they were poor sailors, and had nothing but what they were to get by the will, and therefore they could not pay him then; but if he would be so good to send the probate to Mr. Noads, the money should be paid out of the prize-money. After

this they came again to Mr. Noads to receive the money. The necessary form was to give Mr. Noads a letter of attorney, to receive it in the name of Daunt, and then he was to pay it to them: Mr. Noads wrote to Mr. Casamajor at Bristol, to let him know of the application made to him; and as Mr. Casamajor was always desirous to avoid clamour, on account of detaining any prize-money, he immediately remitted to Mr. Noads what was due for Wilkinson's share; but the letter of attorney made to Noads not being executed before a magistrate, Murphy, with Williams, by the name of John Daunt, went before the then lord-mayor of this city, and Williams (as Daunt) there re-executed the letter of attorney, to which Murphy was a witness: they then returned to Noads, and received the whole money due to Wilkinson, amounting to thirty-seven pounds; and having given Noads a guinea for his trouble, and paid Mr. Crespigny's clerk his bill for the probate of the will, a receipt was given, and signed John Daunt, executor, in the presence of Murphy. Dated the 20th of February, 1750-1. It is in these words:

Received of Thomas Noads 37l. 12s. 6d. being so much he received from Mr. Casamajor, per probate of the will of John Wilkinson, in full balance of his account.

(Signed) JOHN DAUNT, Executor.

You will observe the date, it is the 20th of February, 1750-1. Thus the matter rested without suspicion. Mr. Noads had paid the money, little imagining what he had been thus transacting as a servant, was paying 37l. out of his own pocket, in his own wrong, or that he should, by the artifice of any man, be called in question, not only for his character, but even for his life; yet such a man there is in this country: but I trust in God it will not be long before vengeance overtakes him.

There was not a suspicion of the transaction till January 1752, or thereabouts, when John Wilkinson, whose will was proved as dead, and his prize-money paid, arrived in England. Then Mr. Noads found he had been cheated, and therefore he determined to do, what every body will commend him for, to discover and bring to justice the contrivers and perpetrators of this iniquity, little imagining, that he should by that means incite a capital prosecution against himself. Murphy, at the time of the transaction, in order to impose upon Noads, pretended that he acted only as a friend to assist a stranger from Lisbon, and therefore, in the presence of Noads, demanded half a guinea of Daunt for his trouble. You perceive, gentlemen, the artifice of the prisoner: from this small demand it was natural for Mr. Noads to think that Mr. Murphy acted as a friend and assistant only; but as soon as he got out of Noads's house, he made a very different demand; he insisted upon half the money received, besides two guineas for making the will, and he threatened Daunt with hanging, if he refused to pay it.

Mr. Noads was now endeavouring to find out the men, and bring them to justice. He enquired of all the sailors whom he knew. Murphy had gone by his own name, but John Daunt had imported his from Lisbon; therefore it is plain, Murphy might be discovered, though Daunt might long lie hid: accordingly, Mr. Noads having got information that Murphy was in London, (this was about two years after the forgery) he instantly applied to one of the worthy aldermen of this city for a warrant to take him up; but the bird was flown, not to be found in that jurisdiction. He got at last intelligence that he was in Surry, and immediately had the warrant backed by a justice of the peace of that county, put it into the hands of a constable, who with other assistants secured him. Murphy knew not at first for what he was taken; perhaps he flattered himself that this iniquity, committed so long ago, was not discovered; but as soon as Noads appeared, which was after he was in hold, his conscience struck him; he then knew what the matter was, that it was a capital offence, and therefore broke from the officer and ran away; but he was soon taken again, and brought before the sitting alderman at Guildhall; and upon the oath of Mr. Noads, upon his charge, and at his prosecution, he was committed for the forgery now to be tried. The defence he then made, was not that he was persuaded by his prosecutor to commit this forgery, but that he was innocent, and went only as a friend of John Daunt's, whom he knew at Lisbon, to receive of Noads what Daunt pretended to be due to him as executor of Wilkinson; that he knew nothing at all of any forgery, and therefore it was a very cruel case, and hard upon him. However, he was committed to the Compter. He had not long been there, before a person got access to him, whose profession I know not, but his business was to persuade Murphy, that it was in his power to pervert the laws, to screen the guilty, and spill innocent blood. This person's name is Goddard. What was the artifice made use of? It makes me tremble to think of it; it was an attempt to make the prisoner a witness against his prosecutor, and punish him for the other's guilt. If this should be suffered to prevail, farewell all prosecutions for iniquity. If such a person can have the ear of a magistrate, and get a prisoner admitted an evidence against his prosecutor; if a felon may be allowed to charge his prosecutor with the very felony he stands committed for, the law is made in vain, and magistracy will only be a terror to the injured.

This attempt Goddard conceived and perpetrated. He procured the prisoner to be carried from the gaol to turn evidence against Mr. Noads. One would scarce believe any justices could be found to join in such a scheme; yet he imposed on two justices so far, that they not only admitted the information of the felon, but went in person to the grand jury to procure a bill to be found to hang that man who had been injured, who had seized and prosecuted

that evidence. Shocking as this is, yet such was the attempt, and it is this strange iniquity which calls me to this place.

Thus far iniquity prospered: but there is a superintendent power, and we may thank the Almighty for it, who here stopped its progress.

Mr. Noads continued his inquiry after Daunt, for Murphy never would inform him who he was: at last he providentially discovered, that John Daunt's true name was Thomas Williams, and that he was confined in the gaol of Corke in Ireland: from thence he has been brought, and is now here to be produced as a witness before you.

After Goddard and his associates had got information that Williams was discovered, and might be produced; that Mr. Noads was a person whose character could be established beyond the power of any stain from Goddard, (though I am informed he has attacked many higher characters) the next contrivance was to defeat all the evidence; and for this purpose a bill of indictment was procured against Mr. Noads, the original prosecutor; against Williams, a witness they knew for the king; and against another man, who knew nothing of the offence; but conscience told them he might be a witness, as he was acquainted with Murphy's band; he was therefore clapped into the indictment. Having effected this stratagem, of putting the king's three witnesses into one indictment, for the identical offence with which the prisoner is charged, they endeavoured to impose upon this Court, and struggled hard to get these three men tried first upon the evidence of Murphy.

It came before the Court the last sessions, and the Court did that which was just. The present indictment was ordered to come on first, that you, gentlemen, might have the whole of this case laid before you by those who were the original prosecutors, and who brought this transaction to light. And it will be proved to you, with this additional circumstance, that when the other indictment was found against Noads, Williams, and Carter; the will being produced from Doctors-Commons; and Murphy having declared before Goddard, and other persons then present, that it was all of his own hand-writing; Goddard soon after had the assurance to apply to Peter Edwards, (who brought the will from the Prerogative-Office, and heard Murphy's declaration) and importuned him to conceal that part of his evidence.

This, gentlemen, is the nature of the case. You are only to try whether the prisoner forged the will of John Wilkinson, with intent to defraud Mr. Noads, whom he has defrauded of 37*l*. We shall produce the will, and prove the actual doing of it by the prisoner, his confession of its being his own hand-writing, and that Wilkinson is now alive.

When that is done, I make no doubt but you will be satisfied that you ought, according to your oaths, to find the prisoner guilty.

I have said nothing, I hope, to bear harder upon him than the facts will warrant.

As to that man Goddard, whom I have so often named to you, I could not do less than place him in the light I have done. If I guess right, the question will not be, whether the prisoner is guilty or not, but whether the artifices which Goddard has used shall be sufficient to stifle the evidence, and prevent its being offered for your consideration. For that reason I have stated the case at large.

My lord will give us an opportunity, I doubt not, to support the character of Mr. Noads, if they attack it, I have not the least doubt but they will repent it, if they do, as I hope they will every part they have acted in this affair. We shall now proceed to call our witnesses.

Peter Edwards sworn.

Edwards. I am an officer in the Commons in the Prerogative-Office. [He produces a will of John Wilkinson.]

Counsel. Where had you that?

Edwards. I had it out of the Prerogative-Office, it was filed there.

Counsel. Who delivered it to you?

Edwards. It was delivered to me by the Record-keeper's clerk; he has them wills in his custody always.

Counsel for the Pris. Did you see the Record-keeper's clerk take it off the file?

Edwards. Yes, I did. [It is read in court to this purport.]

'In the name of God, Amen. John Wilkinson, late of the Princess Amelia, being of sound and disposing mind, &c. [as set out in the indictment.] In witness whereof I have hereunto set my hand and seal, this 5th day of May, in the year of our Lord 1747.

JOHN WILKINSON.'

'Signed sealed, published, and declared, by the said John Wilkinson, as and for his last will and testament, in the presents of us who have herenunto subscribed our names, as witnesses, in the presents of the said testator.

THOMAS CARTY, DINISH COLLINS.'

Counsel. Has the prisoner seen this will?—

Edwards. He saw it the last sessions, I was present, it was at the coffee-house in the Old-Bailey.

Who delivered it to him?—I gave it to Mr. Goddard, and Mr. Goddard handed it to him.

Did he read it over?—He looked it over, and owned he wrote the body of the will.

What were his words?—He said he wrote the body of the will, but that Noads either signed the name John Wilkinson, or one of the witnesses names.

Did he say Thomas Noads?—He said Noads, I cannot be positive whether he mentioned Thomas.

Did Mr. Goddard come to you afterwards, and what was the conversation?—He came to the office some time afterwards, I believe the next week after, and told me not to take any notice of what passed: that I only attended with the will as an officer of the court; and he

desired me not to take in the conversation at any time.

Did he give you any reason?

[Here his lordship interposed, because what Goddard said, was not evidence to affect the prisoner.]

Cross-examination.

Counsel for the Pris. Did you attend as an officer of the court last sessions?—*Edwards.* I did, I attended with the will before the grand jury, when the prisoner at the bar was there as a witness.

What did you attend for?—To produce the will as I have done now.

Was it before or after you went to the grand jury, you heard the prisoner own he wrote the body of the will?—Before I went to the grand jury, the prisoner spoke to Goddard, and then he confessed writing the body of the will.

Which name did he confess he wrote?—I cannot be certain; if I could, I would tell it.

How do you know that a probate has been granted?—Here is a memorandum of a probate being granted on the back of it.

What is the other mark on the back for?—It is that the testator was late belonging to his majesty's ship the *Amelia*.

Have you seen the probate?—No, I have not.

Whose hand-writing is that memorandum?—It was Mr. Crespigny's clerk. That is filled up by the proctor's clerk, in order to fix the seal. Before it is sealed, there is an entry made by some officer, to shew that this is a person that died beyond sea.

Coun. for the Crown. What is that entry made on the back of it for?—*Edwards.* That is the foundation of granting out the administration.

Thomas Noads called.

Prisoner's Counsel, Mr. (afterwards Serjeant) Nares.—My lord, though I am of counsel in this case with the prisoner at the bar, I shall think myself no farther bound to defend him, than he shall actually appear to be, or at least may be presumed to be, innocent of this accusation. (On which side soever the villainy is, I sincerely wish it may be detected; and if I knew, or was at liberty to presume, that the facts now stated by Mr. Hume are as he represents them, I would throw up my brief directly.

But every man, my lord, is by law presumed to be innocent, till he is proved to be guilty; therefore it would ill become me, who am of counsel with the prisoner, to presume him otherwise; and therefore your lordship will excuse me, if I take such objections in point of law, in the course of this trial, as either are, or at least any weak judgment induces me to believe, may be of service to the prisoner.

In the first place, my lord, Noads, who is now offered as an evidence on behalf of the prosecution, stands indicted for the same crime for which the prisoner at the bar is now on this

trial. The indictment is found, and principally, if not solely, upon the prisoner's evidence; therefore I must first desire the indictment may be read. [It is produced.]

I must submit it to your lordship, that Noads in this case is not a witness. I will not take upon me to say, that no accomplice can be a witness; to be sure it is laid down in many cases that he may, and it is often absolutely necessary he should be so; therefore I shall not take up your lordship's time in insisting on a point which seems now to be settled: but it seems to me by no means settled, that an accomplice, against whom an indictment is found, is admissible as a witness; therefore I beg leave to state what are my reasons why the law appears to be doubtful in this particular.

I shall very candidly own, that in Hawkins's *Pleas of the Crown*,* it is said, that although an accomplice be indicted, he may be a witness; but then it is likewise said, in the same paragraph, that he may be a witness, if he is not indicted; and that Mr. Serjeant Hawkins seems to lay down in the first place as law, and cites authorities for it; and from the expression, if he be not indicted, this conclusion seems plainly to be deduced, that if he is indicted he cannot be a witness.

Supposing then the authorities are both ways, I shall think myself justified in saying, there is a doubt in the case; and if it should remain a doubt with your lordship, I dare say your lordship will determine on the merciful side, in favour of life.

My lord Hale, in his first volume of his *History of the Pleas of the Crown*, 305, takes notice of the same doctrine that is laid down by Mr. Serjeant Hawkins, and after stating the several instances in which an accomplice may be admitted, he goes on and says, "But that person must never be indicted;" and speaks of his capacity of being a witness, in case he is indicted, with so much diffidence, that he seems to have a great doubt whether he is to be admitted or not; and I cannot help saying, that there is, in point of reason, great weight in such an objection; for it seems exceeding strange to me, if not absurd, to say, that in point of law, the most minute pecuniary interest in the world, though ever so remote, shall take off a man's testimony, and render him incapable of being a witness, as not being unbiassed and impartial, and at the same time to say, a person can be an unbiassed and impartial witness, who is indicted for the same crime, and is swearing to save his own life (which must necessarily be the consequence in the present instance,) for if the prisoner is convicted, there can be no evidence against the witness.

As to the minuteness of a pecuniary interest to take away a person's capacity of being a witness, I shall only mention one instance, which I have known in practice; which is,

* Leach's *Hawkins's Pleas of the Crown*, book 2, c. 46, s. 95.

that on an indictment for stopping up or obstructing an highway, which is laid to be used for carts and carriages, no one of the inhabitants, who are bound to repair, can be admitted as a witness to prove it is not a way for carts and carriages, but only for horses; because it is to diminish an expence to which he is liable. And this rule holds, though the number of inhabitants who contribute to the repairs amount to ten thousand.

But supposing your lordship should think that the view of saving life, or securing personal safety, though immediate, is not considered, in point of law, as having the same influence on a witness, as so small and so remote a pecuniary interest as I have mentioned, there is an objection to Noads's being an evidence arising from such an interest.

It has been opened by Mr. Hume, and Noads is now called to prove, that he hath been defrauded of 37*l.* which sum he paid out of his own pocket, by an imposition put upon him by the forgery of this will, it being produced to him as the will of John Wilkinson, who was on board the *Amelia* privateer, by his pretended personal representative; and it is likewise laid in the indictment to be to Noads's damage.

And I must submit it to your lordship, that it is a rule of evidence, that no person can possibly be admitted as a witness to overturn a fact, the overturning of which may be anyways beneficial to himself.

In order to state this objection as fully as I can, I beg leave to mention the words of Hawkins's *Pleas of the Crown*, 433, and apply what is there said to the present objection.

It is there laid down as a good exception against a witness, that his interest is concerned; "That he is either to be a gainer or a loser by the event of the cause, whether such advantage be direct and immediate, or consequential only: and this seems to be the reason, why he who is bail for the defendant cannot be a witness for him without consent. Also upon the same ground it is agreed, that he who borrows money upon an usurious contract, cannot be a witness upon an information for the usury, unless he hath paid the money, whether such information be brought by himself, or any other; for, if in such case a man might be a witness, he would in effect swear for himself, by proving a matter which may avoid his own contract. And upon the like reason it hath been ruled, that he who has been imposed upon by a sleight, to set his hand to a note for more money than he intended, is no witness on an information for the cheat, because a conviction may be a means to avoid the note, by being made use of as a motive to influence the jury: and for the like reason it is generally agreed, that he whose property may be prejudiced by a forgery, is no evidence to prove it: and it hath been adjudged, that he, against whom a verdict is given, cannot be a witness to prove perjury in the evidence; so that, if there be but the remotest possibility even of its being thrown out to a jury, that the witness can avoid him-

self by his testimony, he can be no legal witness."

These are the words of the book: let us then apply the doctrines here laid down to the present case.

It is very plain, Noads, as it has been opened, has paid 37*l*. upon this will being produced to him as a real will. This certainly was an imposition on him. Now the question is, how far any advantage can arise to Noads one way or the other, from the consequence of this conviction: the money was paid to Williams, who personated one Daunt, the pretended executor of Wilkinson's will: Noads might bring an action for the money against Williams, as money had and received to his use, being procured by a deceit: in order to prove the deceit, it may be necessary to shew the will, of which Williams pretended to be executor, and by colour of which he received the money, was forged; and though I will not contend that verdicts in criminal prosecutions are in general to be given in evidence in actions, yet I cannot see why the copy of the indictment, in which the will is set forth, and of the conviction in consequence of it, might not be a proper, if not necessary evidence to prove the deceit; if not, the mentioning it to the jury would have a great influence on them; and if that is law which is laid down in Hawkins, an advantage, even of that sort only, would be sufficient, in point of law, to take away a man's testimony.

For these reasons, my lord, I beg leave to insist that Noads is not a proper witness, as being an accomplice indicted; and if he is as such, yet if he hath that interest or advantage arising to him from the consequence of this trial, in respect of the money he has paid, as I have hinted at, that will be sufficient to destroy his testimony.

Second Counsel for the Prisoner, Mr. (afterward Serjeant) Dwyer. I do assure your lordship, the matter hinted at by Mr. Hume is entirely new to us, and if we had any reason to believe it to be truth, your lordship would not have been troubled with the appearance of either of us here; and without doubt, we cannot be justified in deserting the prisoner, as he is to be tried for his life, so he may be sure of all the assistance we can give him under your lordship's directions.

Where a man is at all influenced in the evidence he is to offer to your lordship, by any interest he may receive, either pecuniary, or any advantage he may have in escaping punishment, or what not, it will be such a bias, that will take off that credit to his testimony, and therefore be the cause of his rejection.

The first objection is, that he himself stands indicted. I take this to be a rule, that if he had been indicted in the same indictment, he might come in as a witness, supposing he would confess himself guilty, as in *sir Peter Crosby's Case*, 1 Hale's P. C. 303. It was held in the Star Chamber, That if two defendants be charged for a crime, one shall not

VOL. XIX.

be examined against the other to convict him of an offence, unless the party examined confess himself guilty, and then he shall be admitted.

This will account for the distinction made by my lord chief-justice Hale, mentioned by Mr. Nares; for my lord Hale's idea of it is, that no man can turn evidence for himself; if that is so, your lordship will see whether there is any distinction in the case, when there are two indictments in the same case.

This will come still stronger, when it is considered that the prisoner stands as an accuser on the back of that indictment which is found against Noads, and that which Noads is by and bye to be tried for. If he can give evidence against Murphy, and convict him, he will prevent that: no interest can be more immediate, than that he should give evidence to take off the testimony of another man from convicting him of a capital crime immediately.

The order was, Murphy being first indicted, should be first tried: your lordship will observe who squeaked first. This indictment against Murphy was never found till such time that there was a charge against Noads for this very forgery: and, my lord, this objection comes in some measure stronger by the evidence of Mr. Edwards: he has been called in to prove a kind of confession of the prisoner of this forgery. Now all confessions must not be taken in part, but together: the same evidence proves Noads also to have a hand in it, because Murphy confessed he wrote the body of it, and Noads either the attestation or another name. An objection will come here in point of interest: Mr. Noads is the person charged in the indictment to have been defrauded by this Murphy; for so it has been opened by the gentlemen on the part of the prosecution: can't he avail himself of this afterwards? and as he is immediately concerned in this to save his own life, he will disable Murphy by his conviction, who is prosecutor against him in the other indictment; and under such a bias he ought not to be received as a witness.

The case in Hawkins, about a woman who had indicted her son for fraudulently obtaining from her a note of 100*l*. intending to give her 50*l*. Lord Hardwicke in the case of the king and Bray mentions that case; my lord Hardwicke's words are, That nothing but that great authority could support it; but he says this too in that case of the king and Bray, That nothing is more unsettled than the rule of evidence: the determinations often turn upon some right or wrong application of that rule I have mentioned, and that is, the bias witnesses are under when they come to give evidence.

Whether Noads is not under such a bias, is not the question; but whether that bias is not so strong, that it is a material objection to his being received as a witness, I leave to your lordship.

Mr. Hume Campbell's Reply.

My lord, I should scarce think it justifiable
2 Z

to take up any of your lordship's time to answer the objections, which the gentlemen, by stating with so much candour, have really answered themselves, was it not that the present question is of the utmost importance to futurity, in the attainment of the great ends of protection and justice. We are now to consider it as a matter of doubt, whether every criminal by turning the charge against his prosecutor, may not evade justice, and prevent the Court from having any evidence produced on the part of the crown.

There are always two ways in which objections to evidence are made: one is to the competency of a witness, which is a total rejection of his testimony; and the other is to his credit, which is proper only for the consideration of the jury.

In the present case, the gentlemen don't chuse their objection should be directed at Mr. Noads's credit; that would not answer their purpose, because we can establish his credit beyond a doubt. Their attempt therefore, is totally to reject his testimony; nothing less can afford a possibility of supporting the scheme of turning the prisoner's evidence against his prosecutor, or of making the extraordinary behaviour of the two justices, to bring this matter about, of any effect.

I have watched to hear if they could produce an instance, wherein it was ever held, that a prosecutor's testimony should be rejected, to receive that of a prisoner charged and committed originally upon such prosecutor's oath; and my learned friends have not offered to state to your lordship a single authority for it: the authority quoted out of Hawkins is strongly against them: my lord chief-justice Hale puts it rightly; it may go to his credit, and may be weighed by the jury, but it never can go to the total rejection of his evidence. There is no colour therefore, why your lordship should not hear the witness.

The next objection is very singular; it is, that because, by a forged will of a living man, Williams has defrauded Noads of 37*l*. and Noads may bring an action against him for imposing upon him, therefore Noads cannot be a witness to prove Murphy guilty of forging that will, which, whether counterfeit or genuine, leaves Mr. Noads equally defrauded.

I submit it to your lordship, that there is not a sufficient foundation to support either of the objections, which, your lordship observes, may be attended with those perilous consequences which I pointed out, and endeavoured to prepare the Court for, in the opening of the Case.

Mr. (afterwards L. C. J.) Pratt's Reply.

In a common case, I think, I should hardly have thought it worth while to give your lordship any trouble; but the present objection is of the last consequence to the justice of this kingdom; for, if it prevails, it will teach every criminal a method how to screen himself from the law, and no prosecutor will ever be able to

apprehend a felon, without running the risk of putting his own life in danger.

This therefore is a point which deserves a very serious consideration. Murphy, who appears now the prisoner on this present indictment, was, upon hearing counsel on both sides, ordered to be tried first in favour of Mr. Noads. Now, if the objection prevails, it will not only go to Noads, but likewise to Williams and Carter, who are both indicted with Mr. Noads by the prisoner, and these are all the witnesses who are capable of proving the forgery upon him; the consequence then will be that not only the present prisoner must be acquitted for want of the king's evidence being heard, but Mr. Noads must be tried immediately after, and this very prisoner's evidence must be admitted against him. Your lordship will observe, what strange perverted proceedings there would be upon these occasions, if, where two cross indictments are depending, one brought by the prosecutor, and the other by the criminal himself, it should be held just to render the prosecutor's testimony incompetent upon the first indictment that comes to be tried. If this be the case, Mr. Noads would have done right to have come to the court, and desired to have been first tried; because then, the prisoner being set aside as having been indicted for the same offence, Mr. Noads would have been clearly acquitted, and upon the second indictment, being clear of objection by the acquittal, must have convicted the prisoner.

But to consider the principle of law upon which this kind of testimony stands. This then I take to be a clear maxim and ground of law, and is universal, that every man in this kingdom is a competent witness on an indictment in behalf of the crown, unless he is convicted or attainted of some scandalous offence. There must be a conviction before the witness can be disqualified; which proves that a mere accusation or indictment cannot render him incompetent, however it may affect his credit; for, in point of law, every man is presumed innocent till he is proved guilty: nor is this denied, but admitted by my lord chief justice Hale, though what has been cited upon the present occasion, is confined to cases of confessed accomplices and joint indictments; as to which his words are, that such persons, though indicted, may be admitted as witnesses if they confess themselves guilty, but their testimony is not conclusive to the jury; for they may as well consider the credibility or not credibility of the witness, as the matter he swears. And this is all the distinction he makes even in this case, that though one be indicted, it is not an objection to his competency, but may be to his credit. Nay, in cases of treason, he is clear, that such a person is not barely a competent witness, but may be one of the two witnesses required by the statute to an overt-act of treason. The only qualification to the rule is this, that such a witness, so indicted, should confess himself guilty of the crime for which he stands indicted, which undoubtedly is right;

for, if the Court was to admit him a witness to prove his own innocence, that would be a clear objection to him; but, if he confesses, he comes only to charge another, and not to clear himself. But these are not like the present case. What is the case here?

Mr. Noads is the original prosecutor, and preferred the first indictment. The prisoner afterwards indicts the same Mr. Noads, by a separate indictment, for the same offence. Mr. Noads does not come here to give evidence that he in conjunction with the prisoner forged this will; he does not come under the light of an accomplice, but insists upon his innocence, and must at this time be deemed in law as innocent, with regard to this fact, as any man in court. This then is a material difference between joint and separate indictments; to which purpose my lord Hale in that very book puts this case, that if A, B, and C, are separately indicted, A, one of the persons indicted, may be evidence for B and C, and they may both be acquitted on his testimony. Mr. Noads is indicted in one separate indictment, and the prisoner in another. Can there be any ground to say, that Mr. Noads, the person defrauded, and the first indictor, shall be no witness against the prisoner, for this reason only, because he has been afterwards indicted by him? Was ever a case like this before? That six weeks after the prisoner had been committed he should be permitted to turn evidence against Mr. Noads, who was the only person defrauded, in the first instance, by the forgery; who took him up, and confronted him before the alderman; who charged him upon his own oath with this offence uncontradicted; who caused him to be committed, who indicted him? Shall this prisoner now, to save his own life, give evidence against his prosecutor (for the second indictment is the evidence of the prisoner), to set aside that indictment upon which he himself is to be tried? If this be the case, the Lord have mercy upon every man that attempts to prosecute a felon for the sake of justice! for, if this should be allowed, no man, except the prosecutor, will ever be convicted.

[Mr. Moreton was going to enforce what had been said, when his lordship declared it was unnecessary, and that the Court was clearly of opinion, Mr. Noads ought to be admitted a witness, and therefore over-ruled the objections to his competency.]

Thomas Noads sworn.

Noads. The prisoner at the bar was one of the sailors on board one of the Royal-Family privateers; he came to me in the beginning of February 1750-1, about the 3d or 4th, with a person by the name of John Daunt.

Where did you live then?—I lived then in the New-Buildings, Coleman-street.

What is your business?—I act as a book-keeper or clerk to the managers of the Royal Family privateers.

Had you seen the prisoner before February

1750-1?—He has been frequently at our office: I was by when he received his own part: the first of his coming was to solicit for 20*l.* before the accounts were settled.

Had you ever seen that person before, that came in the name of John Daunt?—No, I never had.

What did they come about?—The prisoner brought Daunt, and a will and power, and told me it was the will and power of John Wilkinson. I knew by our book there was such a person on board. The prisoner told me that Daunt kept a public-house in Lisbon, and that he had frequently drank at his-house at Lisbon with Wilkinson; and said it was a house that he and several other sailors used while the ships lay there; and that he knew Daunt to be a very honest and worthy man: he desired I would write to Mr. Casamajor of Bristol, (who was the agent appointed to pay the people for their services on board) for the money due to John Wilkinson for his service on board the Royal-Family privateers. I asked him some few questions with regard to the ships: both of them told me, that John Wilkinson lodged with John Daunt at Lisbon, at the time the ships were fitting out for a second cruize. I asked them, what was become of Wilkinson, that I had heard nothing of him for upwards of two years; Murphy replied, he died on the coast of Guiney: I should otherwise have paid them the money on the power of attorney, which they had first produced; but as I understood the man was dead, I could not then pay the money upon the power. Murphy then immediately proposed to go to the Commons to prove the will, saying, at the same time, he knew very well how to go about it; for that he had proved the will of one Miles Masterson, I think the name was; he then mentioned some proctor's name, I think it was Hughes; I then told him he might as well go to Mr. Crespigny.

Do you know the day of the month you had this conversation?—I believe this was the 9th of February. They were several times with me from the beginning of February to the 9th. In the afternoon the same day they returned to me, and told me that the will was proved, and desired me to make out a power of attorney for me to receive the money of Mr. Casamajor, he living at Bristol. I made one out accordingly, Murphy was a witness to it. (He produces it.) They went away from me, and came in two days after. I believe this was on Saturday, and they returned on the Monday, and brought it re-executed before the then lord mayor. I then wrote to Mr. Casamajor, and he remitted me the money on the 18th or 19th of February; they both called again on the 30th, and on that day I paid the money to Thomas Williams, the man who calls himself John Daunt: I took a receipt for it; [He shewed a receipt], this is it. Thomas Williams signed it by the name of John Daunt, and Murphy was present at the time. I paid down the whole money on the table, 37*l.* 12*s.* 6*d.*

They paid back the deductions which was about 40s. for proving the will; they had not money to pay for the proving the will, so Mr. Crespigny's clerk sent the will to me, to take the money for him.

What did they give you for your trouble?—I believe they gave me about a guinea; it was not more than 25 shillings, for the trouble I had in writing letters, paying postage, and drawing the letter of attorney.

Who received the money of you?—It was received by the person who went by the name of Daunt, in the presence of Murphy. Murphy at that time desired that Daunt would give him something for his trouble in shewing him the way to Doctors Commons, so Daunt gave him half a guinea; Murphy muttered and grumbled, and said it was too little; then they went out of the house.

Had you ever seen the will of Wilkinson, or power of attorney, before that time they brought it in February?—No, I had not.

Who wrote Crespigny at the back of the will?—I might write it very likely, but it is so much erased that I can't say. I should have in course sent them to Mr. Crespigny; I sent every body that came to have any thing done in his way to him; he is the person employed by the gentlemen as their proctor.

Have you seen Wilkinson since that time?—I have: I believe him to be the same that was on the books.

Has there been any demand by him for this money since?—No, there has not, neither by him, or any body else.

When did you first hear that Wilkinson was living?—I heard it when the cause came on in chancery about a year ago, then he appeared.

Have you seen him?—I saw him in this court in the parlour with Mr. Goddard, the sessions before last.

Did you ever see him before?—I have seen him at Lisbon among the ships crews, and I talked with him since about his being there, and about two or three of the ships, and believe him to be the man.

How long was it after you paid the money, when you saw him first?—It was a year and a half after, and that was at this court, as I mentioned before.

To which ship did he belong?—He was one of the crew of the *Princess Amelia*.

Upon your hearing he was alive, and you having paid the money, what was the first thing you did?—I made inquiry after this Daunt, but could not find him. I then began to inquire for Murphy; and one Carter, who had been intimate with Murphy, and was on board the privateers commanded by commodore Talbot, was the first person that gave me any information of him: he at first thought I wanted to arrest him, till I told him the whole affair. Carter went to several places to make enquiry after him. When we got an account of him, which was in about a fortnight, I got a warrant from Mr. Alderman Ironside, and then I heard

he was at Tooting; I got the warrant backed by justice Clarke, and went there, and found he had been there, but was gone: then I heard he was at Dulwich; there I got the warrant backed by another justice, and found he had been at the Green Man there, but was gone a few days: I applied to the master of the college, and, by the assistance of a servant to that gentleman, he was taken at Newington on that side the water. After he was taken, I appeared. As they were bringing him round the corner, the prisoner made his escape from the constable, and ran, but was taken again in a few minutes after. We took him into a public house there: he asked what he was taken up for: I told him he might well imagine for what; I said it was for forging such a will, and that I was very confident it was his hand-writing, I had compared it with some of his. He took me to one corner of the room, and said, Dear Sir, (lifting up his hands) do you think I had any thing to do with it? But upon my telling him I was confident it was his hand-writing, and that several people knew it, he said he threw himself at my feet, and hoped I would not take away his life, or to that purpose.

What were his words as near as you can recollect?—He said, I beg my life. I told him I did not want to take his life away, I only wanted to have common justice done.

Did you understand him to mean he wrote the will and letter of attorney?—I did understand him so; he allowed he wrote it, but did not immediately say he did.

During all this conversation which you had with him, did you enquire after John Daunt?—I asked him, if it was not one Thomas Williams that personated John Daunt, because I understood from Carter that it must be him; and he said but very little afterwards, and called for some water, and was ready to faint; he never made me any answer to that, whether it was he or not. We then took him before justice Clarke, and he sent him to Guildhall; there he was committed to the Poultry Compter by Mr. Alderman Chitty, the sitting alderman.

Was you by at his examination before the alderman?—I was.

Who made the charge against him?—I did.

Did you make it upon oath?—I did.

What was the charge?—It was with the forgery for which he now stands indicted. I had several opportunities of comparing hand-writings of his that I had got during the time of my knowing it was a forgery, and the time I took him up; and by several comparisons, I believe the whole to be his hand-writing. When we had him before the alderman, he was asked after Daunt; he said he could prove he lived at Lisbon, but said he could not tell where he then was; afterwards he insisted upon his innocency, and said he knew nothing of the matter; he did own he met Daunt in the street, and said he had seen him at Lisbon, and that Daunt told him he had a right of receiving that money from that will.

When did you prefer a bill of indictment

against him?—I did the very next sessions, which was in September.

Were Mr. Wilkinson and Mr. James Goddard there at that time?—They were: I believe that to be Wilkinson.

Who else were there?—There were Peter Edwards and Anthony Devoyer. That bill was not found.

How long have you been informed that the person who called his name John Daunt was Thomas Williams?—Carter would have it to be him; but I was not confident till I went over to Ireland, after that bill was thrown out, to see whether a man, who I was informed was in Cork gaol, was the man that I paid the money to; I found him to be the same person, I remembered him immediately, and am sure he is the same man that I paid the money to by the name of John Daunt, who was recommended to me by the prisoner as an honest man.

[Cross-examination.]

Coun. for the Pris. Who was you agent to?—*Noads.* I was agent under Mr. Henry Casamajor, I transacted business for him.

Did you know Murphy before?—I had seen him frequently before he came with that person who called his name Daunt; he was one of the seamen on board the Royal Family privateers; he at last got to assist the captain's steward as a kind of cabin-boy.

You say he came to receive his own money, what was it?—The balance of the account came to about 7 or 8*l.* a share was 36*l.* 8*s.* 1*d.* each, and I believe he had a share and a half.

Did he produce the will and power of attorney both together?—He did; I believe he took them out of the other man's hand, and gave them to me.

Did you direct them to make use of your name to Mr. Crespigny?—No, I did not.

Pray recollect yourself, did you write that name on the back of the will or not?—I might, but I don't know; that which is not erased looks like my writing.

Do you know how it came to be scratched out?—No, I do not, nor when it was scratched out.

Did you read over the probate?—No, I did not, I only looked to see whether the name John Wilkinson was there.

Is it not usual to read the probate over?—I don't know that ever I read over one in my life, I don't know that it is customary.

Is this the probate produced here?—This is the very probate.

Had you ever seen Williams before that time he came with the prisoner, as you say, in the name of Daunt?—I never did, as I know of: the first time I saw him was in the beginning of February, 1750-1.

Have you seen him since?—I have several times; I was with him eight or ten times in Ireland.

What was your business when you went to Ireland?—I went on purpose to find him out.

How came you to mistrust him being the person?—I shewed the receipt to Carter, and he said he was very confident the name John Daunt was his hand-writing.

Have you no other witness to prove that than Carter?—No, I have not.

Did you make use of any threats?—No, I did not.

Did you mean the will and power was the hand-writing of Murphy?—The will and power, signing and all; I mean all in general.

Did you think the name Dinish Collins is of a different writing to the other names?—I think it is all the writing of one hand.

What is Carter?—He was on board the privateers, not the same cruize, but the cruize before.

Did you shew him the will?—I did, and he said the name John Wilkinson in particulars was Murphy's hand-writing.

Thomas Williams sworn.

Mr. Hume Campbell to Noads. Do you know this witness?

Noads. This Thomas Williams is the same man that came to me, and received the money in the name of John Daunt.

Mr. Hume Campbell to Williams. Do you know Timothy Murphy?

Williams. I do, it is the prisoner at the bar.

How long have you been acquainted with him?—*Williams.* I was acquainted with him about a month or five weeks before the beginning of February, 1750-1. I met him near Charing-Cross in the street; we went to a house of ill fame there; I believe the man of the house his name is Mullings, he is a Scotchman: this was the month of January; he took me a-walking round the park, and to several places, and told me he had something to relate to me, and if I would be ruled by him, he would do for me, and in the park he swore me to secrecy (not by book but by word). He first swore, then I swore; I told him, if it be any thing except robbery or murder, I'd stand true to him; the next day in the morning we came to this Mullings's house again.

Can you recollect what time in January 1750-1 this was?—It was about the latter end of January. Then he said, Come, Williams, God, I'll do for you now. He took me up stairs, into a large room, and called for a bowl of punch, saying, This is cold weather, we must drink something that will make us warm; he made me drink pretty heartily. At last he pulled out a whole parcel of papers, some of them were prints, some with stamps, and some without; he began to laugh and smile; he said, I told you, I had something to do for you, now I'll do for you, said he; there's one Wilkinson that belongs to the Princess Amelia private ship of war, that is dead on the coast of Guiney, and his money can be taken by any body; and said, I will go for it; said I, I don't understand that way of getting of money; said he, Damn it, what a fool you are, not to consent to get money at so safe a rate!

there are several of my acquaintance (if you were to know as well as I) that get money enough in forging seamen's wills and powers, and receiving wages and prize-money due to them; and if you'll be ruled by me, you shall not want money, for you shall dress like a gentleman, and wear a sword; then he rubbed his hands, and said, Drink t'other glass, and go down and warm yourself by the fire: I went down, and left him with pen, ink, and paper; and in a short time after he called me up stairs again, and told me he had writings drawn up, purporting to be the will and power of John Wilkinson; he made them to me in the name of John Daunt, and he called for a candle, which was brought lighted; he took a piece of sealing-wax, and clapped the seal on it, before the name John Daunt was wrote; then he wrote John Wilkinson, Thomas Carty, and Diniah Collins; then he put a seal on them.

How many seals were there?—I believe there were more than one; there was one to each paper, that is, the will and the power. After he had sealed them, he asked for a pen-knife; I lent him one; he made two or three different pens, and said, that this will not do well, to have these witnesses all of one hand-writing. The names Thomas Carty and Diniah Collins were for two subscribing witnesses.

What were these pens made for?—To write the names with different pens, that they should not look alike.

Did he write all, both on the will and power?—He wrote it all over, every word, both the will and power, and then took and sealed them up, and put them into his pocket.

Did he say anything about Wilkinson owing Daunt any money?—He said John Wilkinson owed John Daunt seventeen moidores; these were the reasons which he gave to me for my going by the name of John Daunt, saying, if a reason should be required why it was left to me, it should be represented, that this Wilkinson was indebted to me these moidores. After this we went to some other house of his acquaintance, where we drank that afternoon, and I went to bed pretty merry; the next morning early he came and called me out of bed, and desired me to come along with him to the house of Thomas Noads in Coleman-street. I said, I had not got my breakfast. He said, Come along; what a blockhead you are! we will get a pint of purl, and go about our business: then he hurried me out. After we had had a draught of purl at the Castle and Horse-Shoe, Charing-Cross, we took boat at Whitehall-stairs, we landed at the Old Swan, and went to the house of Mr. Noads; there the prisoner introduced me by the name of John Daunt, and said I was a very honest man, and that he had known me a great while to keep a house at Lisbon, and that he had drank at my house several times in company with John Wilkinson; then he produced this forged will and power, and desired he'd pay the money due

to John Wilkinson, for his services on board the *Princess Amelia*, a private ship of war, to me, in the name of John Daunt. Mr. Noads and he talked a little while together; he told the prisoner, I believe I can't pay it upon this power; then the prisoner said, This Wilkinson is dead. How long has he been dead? said the other: said Murphy, I believe he has been dead two years, he died upon the coast of Guiney: then Murphy proposed to go to the Commons (I think he said to a proctor) to prove the will; but Mr. Noads told him to go to Mr. Crespigny to do it; we went, and on our way thither I stopped, and said, Murphy, I don't understand what you are about, I believe you are going to play the rogue with me, I'll not go a step farther; I'll return back back, and tell Mr. Noads my name is not Daunt; I'll divulge the whole affair to him. With that he swore vehemently, and took up a great stick, and said, he'd dash my brains out, or have me hanged, if I did not go that minute, and prove the will in the Commons.

Where were you when you had this conversation?—It was in a little alley not far from Coleman-street.

Did you go?—By the fright I went along with him, and by his desire and directions, and there in his presence I proved the will.

To what proctor did you go?—To Mr. Crespigny; there the will was produced and proved.

Look at this paper, do you know it?—That is the very will; the hand-writing is Murphy's; if I was to die this minute, I am sure no man wrote it but he; here are the names, I saw them wrote; he wrote this name John Wilkinson, with a fine pen, which he made with my knife; he wrote also the other names, Thomas Carty and Diniah Collins, and I am sure I saw him have such a seal in his pocket as is here put on the wax.

What did you do after the will was proved?—Then he came back to Mr. Noads's house, and told him, the will was proved at the Commons.

Who told him so?—Murphy did; then there was a letter of attorney made by Murphy's desire, for Mr. Noads to have power to receive the money of Mr. Casamajor, who he told us was in Bristol at that time.

Who signed that power?—I did, and Murphy was the only subscribing witness to it; then we took it along with us, (this was I believe on Saturday afternoon) and on the Monday he called me very early, and by his desire, I went along with him to my lord-mayor's office, and there I think this letter of attorney was re-executed; then we went again to Mr. Noads's house, and gave him the power of attorney, to receive the money of Mr. Casamajor; then we went away, and went again two or three times between that and the 19th. or 20th of February: on one of them days we received the money, he said, he had from Mr. Casamajor, and then he paid me 37*l.* 12*s.* or thereabouts, in the name of John Daunt, in the

presence of Murphy, and took a receipt for the money, signed by me; I wrote John Daunt; if you'll please to look, you'll see a sort of a boggle, there is a letter not made right; instead of the letter *a*, I was going to write *o*, and was forced to make it an *a* afterwards; I did not know how to write Daunt cleverly. [His lordship, jury, and counsel, looked at it, and it appeared as he said.] Murphy said to Mr. Noads, I have taken a damn'd deal of trouble, he ought to give me something for my trouble (we had made that bargain before we came there, that I was to give him half a guinea in the presence of Mr. Noads, to induce Mr. Noads to believe he was only to have that for his trouble). I gave him half a guinea in Mr. Noads's house, then we went away, and at a little distance he said to me, Don't you remember you are to give me two guineas for my trouble in making the writings, over and above the half of the money? I was very much disheartened, and said, Murphy, I'll go back, and give him the money back, saying, It is a very unjust thing, I will not carry it any farther; he swore damnation to his soul, if I should go a step farther, he'd give a judge or jury no trouble, but he'd dash my brains out if I did not go forward, and had a great stick in his hand at the time, he pushed me along before him; I was afraid of my life, for he threatened me both one way and t'other, either to kill me or get me hanged: then I said, Take all the money, and gave it him all in his hand, I'll have nothing to do with it: he answered to that, No, no, I have revealed all my secrets to you, and now you are going to have me hanged; he said, I'll take two guineas, and half the whole money; which he did, and gave me the remainder of it.

When was the first time you saw Mr. Noads?—I never saw him till I went with the prisoner to his house, nor never saw Wilkinson, or knew that there was such a man living.

When did you hear Wilkinson was alive?—I never heard it 'till Mr. Noads came to me in Cork in Ireland, where I was a prisoner for debt.

Had you seen Mr. Noads between the time you took the money and the time you saw him in Cork?—No, I never did.

Cross-examination.

Coun. for the Pris. How much punch might you drink at the house near Charing Cross, when you say this will was made?—*Williams.* I believe we drank about three shillings-worth.

Did you call for a second bowl?—No, we did not.

What had you been drinking before?—We had been drinking a dram each, and a pint of purl.

Then you was a little in liquor, was you not?—I was tolerably warm.

Was there a fire above stairs?—No, there was not.

What time of the day was it that you was there?—It was in the morning.

Did either of you smoke tobacco?—No, we neither of us did.

What did you do with your candle then?—That was brought up by the prisoner's desire, after he had drawn the writings up.

How long had you been in the house before the candle was brought you?—We might have been in the house two hours before the maid brought it up.

How long had you been in the house in all?—I believe we might have been in the house two hours and a half in all.

How long was you in the house before you went above stairs?—It might be above half an hour before I went up, which was when he called me.

When did you hear the name of John Daunt first?—I never heard it before that day.

Where did he get the wax?—He had wax in his pocket, and I believe a seal too.

Did you see him put the seal to the wax?—I did, he put it to one of them before he wrote the name.

Did he to the other, do you remember?—I can't say, whether he wrote the other first or not.

Which did he seal before he wrote the name?—It was the will.

What sort of a table were they wrote upon?—It was a table big enough for half a dozen men to dine at.

Did you see him write all the will?—I saw him write part of it, that is the latter end, that is part of one side, where the witnesses are; he had not finished it when he called me up.

Had he ink of his own, or was there any other that he made use of?—There was a pewter ink-stand in the room.

Are you sure you saw him write the name to the will?—I saw him write them three same names on it.

Was there but one ink-stand?—No, there was but one dish with ink.

Were these three names wrote with the same ink?—They were, but with different pens.

How long do you think you might be above stairs?—We might be there about an hour.

Where did you bestow your time the other part of the day?—We went and walked, and smoked, and drank mostly, for it was very cold weather.

Then you must go near being fuddled, was you not?—I went to bed brave and heavy, I know.

Where did you live then?—I lodged near Mr. Manning's at Charing-cross, at the Thistle and Crown: Bob Carter lodged over-against me.

You say you never saw Mr. Noads till that time the prisoner and you went to his house the beginning of February 1750-1; recollect yourself whether you had not seen him before?—I had not.

Did not he once lend you half-a-crown on your Chatham-chest ticket?—No, he never lent me any thing.

Do you know one Margaret Williams?—I

lodged at her house several nights; but my proper place of lodging was at Mr. Fox, on the back of the Haymarket.

Did you ever pawn your Chatham ticket?—No, I never did; I might, but I don't remember I did; I am almost sure I never did; it is a 4*l.* ticket, that is, 4*l.* a year for my life.

Upon your oath, did you, or did you not borrow money on your ticket of Mr. Noads?—Upon my oath, I never did, nor never let it go out of my possession to any body.

In your way going along, you say your conscience seized you, and you told the prisoner you would not go a step farther; was that the first remorse you felt?—No, I had a remorse of conscience that morning, when he desired me to go.

Did you believe he would be as good as his word, when he said he'd knock your brains out, and threatened you?—I did by his countenance.

Was he with you all the time you was proving the will?—He was.

Did not you go into a particular office to prove it by yourself?—No.

Were there any threats made use of in Doctors' Commons?—No, there were not.

Was you under any surprize when you was there?—I was under much fear.

How many people were there in the room?—There was but one gentleman there.

Why did you not tell the gentleman the affair, that he might assist you?—I was shocked so, that I did not know what I had best to do.

Did you swear there that your name was John Daunt?—I did, by the prisoner's directions and desire.*

Was any body with you and Murphy, when you were with Mr. Noads?—There was not a soul with us.

Why did not you tell Mr. Noads that it was a forgery?—I did not indeed; I did not know what to do, I was so confounded.

Who wrote the word 'Extor,' after the name John Daunt, on the receipt?—I wrote the name John Daunt, but I don't know who wrote the word 'Extor,' either Murphy or Noads.

Coun. for the Crown. Which do you believe wrote it?—*Williams.* I believe Murphy did.

Coun. for the Pris. Whether your remorse and threatening to go back again was not because he demanded two guineas of you?

Williams. No, it was not.

Did he demand two guineas of you before, or after you said you'd go back?—I told him I'd go back, and return the money, before he demanded the two guineas, and after too.

How long did you stay in England after this transaction?—But a very little time, about a fortnight; I was obliged to go down to Chatham to receive my pension-money that was due to me there.

* See the admission of this evidence cited *arguendo* by Nares in the Case of Elizabeth Canning, p. 454, of the present Volume.

In this great remorse of conscience that you had before and after you had received the money, how came you to remain a fortnight out of the power of Murphy, and did not make a discovery of it?—I was afraid to go about it myself, and I had no opportunity to do it till Mr. Noads came to me in gaol in Ireland; I thought the very stones would fly in my face about it, and he hunted me out of the way as fast as he could.

Q. from his Lordship. Why did not you open the affair before my lord-mayor?

Williams. I had not the sense to do it; I was directed and led like a child by him, as he pleased.

[The Receipt read to this purport.]

"Received the 20th of February 1750-1, of Thomas Noads, 37*l.* 12*s.* 6*d.* being so much he received of Mr. Cassamajor, per probate of the will of John Wilkinson, in full balance of his account.

JOHN DAUNT, Extor."

£. 37 12 6

Coun. for the Pris. to Noads. Who added the word 'Extor' to the receipt, after the name John Daunt?

Noads. I did.

Pris. I desire Mr. Noads may be put out, while I ask Williams a question or two. [It was granted, and he went out.]

Pris. How came Williams to be so perfect as to the day of the month that he mentions of the money being paid? Whether the papers were not shewn to him by Noads since?—*Williams.* No, they never were since I came to England; I have not seen one of them till I saw them now, nor Mr. Noads never told me what day of the month the money was paid.

Whether that witness ever went to Mr. Noads with Mrs. Williams?—No, I never did.

Whether he ever heard Margaret Williams say her dependance was upon Mr. Noads?—I heard her say there was some prize-money due to her.

Did you ever hear her mention one Jones?—I don't know that ever I heard her mention the name of Jones.

Did not he borrow money on your ticket? Where did you get the money you paid her?—I pawned my watch in St. Martin's-lane.

Where did he and I agree upon this?—At Mac Mullins's, a bawdy-house.

Did I pay for the punch there?—No, the prisoner took care of that, he made me pay.

Where did he get the money?—The prisoner found rogueish money for me.

Noads called in.

Coun. for the Pris. to Noads. Whether or no you shewed either the power of attorney or will of Wilkinson to Williams since he came to England?—*Noads.* No, I have not.

Whether or no you told him the month in which you paid the money to him?—I shewed it him in Ireland.

Whether you have not since he came to England?—No, I have not.

Did ever Thomas Williams come to your house along with one Mrs. Williams?—No, never.

Prisoner. Do you know Mrs. Williams?—*Noads.* She came to me two or three times, and told me the prisoner had robbed her of her prize-money.

When did you see her last?—I believe I saw her in the court-yard this morning.

Coun. for the Pris. Do you know where she is now?—*Noads.* No, I don't know that.

Pris. Was not this Mrs. Williams at your house in Bell Alley?—*Noads.* She never was, to my knowledge.

Mr. Alderman Cockayne sworn.

[He is shewed a letter of attorney made to Mr. Noads.]

Mr. Alderman Cockayne. This was re-executed before me; here is the name Timothy Murphy, a witness; I believe the prisoner is the man that wrote it. [It is read to this purport:]

"Know all men, by these presents, that I John Daunt, executor of John Wilkinson, deceased, late of the Princess Amelia privateer, for certain good causes and considerations me hereunto moving, have, and do hereby name, make, and in my stead and place, put and constitute Thomas Noads of London, gentleman, my true and lawful attorney, revocable, for me, in my name, and to my use, to ask, claim, demand, recover, take, and receive of and from the agent for the Royal Family privateers, or whom else it may concern, all and singular such salary, wages, tickets, bounty-money, prize-money, short-allowance-money, smart-money, pensions, and all other sum and sums of money whatsoever, as now is, or at any time or times hereafter shall be due, payable, and belonging unto me, for my own, or any other person's service, or otherwise, in any of his majesty's ships, frigates, or vessels, or any merchant-ship, or ships; and also of all other person or persons whatsoever, all and singular such other sum and sums of money, salary, wages, goods, wares and merchandize, freight, profits, rents, and arrears of rent, debts, dues, duties, claims, and demands whatsoever, which now is, or at any time or times hereafter shall be due, owing, payable, and belonging unto me by any ways or means, right or title whatsoever or howsoever; giving, and hereby granting unto my said attorney, his substitutes and assigns, all my authority and lawful power in the premises, for receiving, recovering, obtaining, compounding and discharging the same, as fully and effectually as I myself might or could do, being personally present, and acquittances, releases, or any other discharges in my name, to make, seal and deliver; and one attorney, or more, to make, substitute, and at pleasure to revoke; ratifying, and hereby confirming all and whatsoever my said attorney, his substitutes and assigns, or any of

VOL. XIX.

them, shall lawfully do, or cause to be done in and about the premises by virtue of these presents. In witness whereof I have hereunto set my hand and seal, the 9th day of February, in the 23d year of the reign of our sovereign lord George the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and in the year of our Lord 1751."

JOHN DAUNT. +

"Sealed and delivered (being first duly stamped) in the presence of TIMOTHY MURPHY."

"London, re-executed the 11th day of February, 1750, before me,

"F. COCKATNE, Mayor."

Anthony Devoyer sworn.

Anthony Devoyer. I am clerk to Mr. Crespigny the proctor; in February 1750-1, I don't remember the persons, but there were two men applied to me in the absence of Mr. Crespigny, to prove a will of J. Wilkinson.

What was the executor's name?—It was John Daunt; the person pretending to be so was one of the two that desired me to get a probate of the will. We always do enquire where the testator died, and when, and we write that under the jurat, that it should be passed to the seal. The description of the testator was, that he was a bachelor, and belonged to some ship, I don't remember the name; that he died on the coast of Guiney, within the time there limited. [He is shewn the will.] This is my hand-writing on it, and this is the very will brought to me at that time; I attended the person who called his name John Daunt before the surrogate, who subscribed his name.

Was he sworn?—He was, I think, in my presence, as executor to the will, as is usual on such occasions, and upon that the probate was put under seal afterwards, which is now upon it.

Cross-examination.

Coun. for the Pris. You say, you can't swear to the persons of the two men that came?—*Devoyer.* No, Sir, I cannot.

Coun. for the Crown. Can you recollect what passed at the Compter, when you saw the prisoner there?—*Devoyer.* I was at the Compter; the prisoner there told me he remembered me; he there told me, while I was gone to get the executor sworn, he was in conversation with Mr. Crespigny.

Did he mention any thing of his being the person that came along with the pretended executor?—Yes, Sir, he did.

Coun. for the Pris. When was this conversation?—*Devoyer.* This was the day that the first bill was thrown out.

When you carried Daunt in to be sworn, did that other person go with you into the room?—I believe we left him in the office.

Thomas Dyer sworn.

Dyer. I was constable. Mr. Noads applied

to me to take the prisoner at Newington on the other side the water; I was at my house over-right the Black Prince, and Mr. Noads was at the Black Prince, and one Frith brought me the warrant. On the Saturday morning Murphy had been with me to justice Hammond to assist me with a prisoner; I promised to pay him; he came on the Monday morning for his money; I said, I'll pay you presently, but I have got a warrant against you: he said, For what? and wanted to see the warrant: I told him, I would not shew it him. The other man (Frith) said, it was for forgery, and asked him if he knew Mr. Noads; he said, Yes. This was as we were going along: he desired to walk by my side. Frith, at the same time, went out to fetch Mr. Noads from the Black Prince; the prisoner turned on his heel and ran away, and kept calling out, A poor debtor! A poor debtor! I ran after him, and called, Stop thief! knock him down.

Was Mr. Noads in sight when he turned to run away?—I cannot say whether he was or not; but if he was at the Black Prince door, the prisoner might see him very well.

How far did he run?—He ran into a brick-field; there we took him again, and we carried him to the Black Prince; then I went to get my breakfast till they were ready to go; then we took him before 'quire Clarke, and from thence to alderman Chitty. I delivered him up to Mr. Ward on London-bridge as we were going, and went with him before the alderman as an assistant; then the prisoner was charged by Mr. Noads for forging a seaman's will; the prisoner said, he knew nothing of it.

Do you recollect he said any thing about half a guinea?—Yes; he said he had half a guinea for signing a letter of attorney.

Cross-examination.

Counsel for the Prisoner. Had he been told what he was taken for, before he ran away?—*Dyer.* He had.

He soon stopped, I suppose, did he not?—He stopped when he could run no farther; there was one Fielder went to stop him, and he ran against him to knock him down, and turned him round.

Counsel for the Crown. When he stopped, did he surrender; or what did he do?—*Dyer.* No, he then took up a brickbat, and swore he'd kill the first man that opposed him.

John Frith sworn.

Frith. I am servant to the master of Dulwich college; I was applied to by Mr. Noads to endeavour to discover and take up Timothy Murphy, the prisoner at the bar; and was by when the constable, Mr. Dyer, took him at Newington.

Was Mr. Noads by at the time?—No, he was not; the prisoner asked, what he was taken up for? Mr. Dyer would not tell him: he said, Pray gentlemen, what am I taken up for? I desire to know: then said I, If you

must know, it is for forgery; said he, Upon what account? I said, I can't tell, but I'll go to a gentleman hard by, and he'll tell you. Then I went for Mr. Noads; and when I was at a little distance, I heard the constable call out, Stop thief! then I turned again, but I was too far behind; he was taken and secured before I came up.

How far was you from the place where Mr. Noads was, when he ran away?—I was about 900 yards from him.

Where was Mr. Noads when you heard the cry, Stop thief?—He was at the Black Prince.

Was he within or out of the house?—I can't tell which.

Did he attempt to break away till you had informed him it was for a forgery?—No, he did not.

Mr. Woodman sworn.

Woodman. I am keeper of the Poultry Compter. [He shewed a commitment.] I remember this being brought to me with the prisoner on the 27th of July last, the day it bears date, to the Poultry Compter.

What is he charged with in that commitment?—He is charged before alderman Chitty, by the oath of Thomas Noads, upon a violent suspicion of being concerned with one John Daunt, not yet taken, in publishing and uttering a false, forged, and counterfeit will. It is signed, Thomas Chitty.

Mr. Hume Campbell. My lord, in the general course of business, witnesses are not produced to support the character of a prosecutor, unless his character is impeached either by evidence or the nature of the transaction itself; in the present instance, the gentlemen have taken an objection to Mr. Noad's competency as a witness; it has been, with great justice, over-ruled in that respect, but left to operate on his character with the jury: the indictment against him has been read in evidence: it is an indictment against him, together with the other witness to the fact, and upon the back of it stand Mr. Goddard and two or three more. This being admitted evidence against his character, we are proper to produce evidence in support of Mr. Noad's character, and I hope your lordship will be of opinion we are regular in so doing.

Lord Chief Baron. You have a right to it under the circumstances of this case.

To the Character of Thomas Noads.

Nicholas Magens, esq. sworn.

Mr. Magens. I have known Thomas Noads ever since he came to London, which is about seven or eight years: it was about the beginning of the breaking-out of the Spanish war.

What is his general character?—I have always known him for a very diligent, sober, promising young man; I have all the reason in the world to believe him so, and don't doubt his integrity in the least.

Cross-examined.

Counsel for the Prisoner. Do you think he would not say what is false to save his own life?—*Magens.* I can't answer to that.

James Laroche, esq. sworn.

Mr. Laroche. This is the second time I have come from Bristol to London to speak to Mr. Noads's character: I have known him eight years. I knew him at Bristol, where he was under the direction of a gentleman there (that gentleman is so infirm he can't come up.) Mr. Noads behaved so well there, that the gentleman recommended him to my brother-in-law, Mr. Henry Casamajor, to transact his great affairs, being agent for very rich prizes; he behaved diligently through the whole transaction. I have heard many speak well of him in Bristol, and never heard any thing reflecting on his character in my life. I don't think he'd be guilty of a forgery.

John Ellis, esq. sworn.

Mr. Ellis. I have known Mr. Noads these six years; I believe him to be as honest a man as any man whatsoever; I don't think he'd do a scandalous thing; I don't think he is capable, for any lucrative views whatsoever, to be guilty of a forgery.

Mr. Alderman Ironside sworn.

Mr. Alderman Ironside. I have known Mr. Noads about seven or eight years; he has been concerned in an affair where I am interested, in which he has always acted with great diligence and prudence; I have trusted him with large sums of money; it has been in his power to have injured us, but I never had any occasion or room to doubt his honesty; I don't believe he'd be guilty of a forgery on any consideration.

Henry Casamajor, esq. sworn.

Mr. Casamajor. I have known Mr. Noads, I believe, ten years.

What is his general character?—As good as any man's in being, both for honesty and industry; I have had great experience of him; he was with me from a child: I, from my good opinion of him, recommended him to my brother; he might have wronged me of large sums of money; I never found a disposition in him either to wrong me or any body else.

Mr. Nares. I desire the first part of the will may be read. [It is read.]

"In the name of God, Amen. I John Wilkinson, late of the Princess Amelia privateer."

Counsel for the Prisoner. Now read in the probate. [It is read.]

"The last will and testament of John Wilkinson, of his majesty's ship the Princess Amelia."

Counsel for the Prisoner. There is a difference between his majesty's ship and a privateer.

Lord Chief Baron. The probate being a wrong description does not alter the case; suppose there had been no probate at all, the prisoner is indicted for forging the will.

The Prisoner being called upon to make his Defence, said only, that they had sworn as they thought proper.

Whereupon the Lord Chief Baron summed up the evidence to the jury, who, in less than a minute, gave in their verdict, Guilty, Death.

Immediately after this Trial, Mr. Thomas Noads and Mr. Robert Carter were tried for this forgery; but were honourably acquitted, and copies of their indictments granted them by the Court.

The CONFESSION of TIMOTHY MURPHY.

"I was taken up in the month of July by the orders of Thomas Noads, clerk to the managers of the Royal Family privateers, for forging the will of John Wilkinson, late belonging to the Princess Amelia privateer, being one of the ships that composed the said Royal family, and was committed to the Poultry-Compter for the said offence; and on that day, and the day after, one Patrick Flanigan came to me, and asked what motive induced me to sign a general release for my share of my prize-money, to the said managers? I made answer, that Mr. Belchier, and the rest of the gentlemen, had long before that time advanced me twenty pounds, when I was in want of money, and that they behaved to me with the greatest honour. The said Flanigan further asked me, how came I to give a receipt for 54*l.* and upwards, and insinuated so much was not due to me, and desired me not to conceal it from him, for that he was acquainted with the whole affair: and said, if I had a million of lives, unless I would do one thing, I was a lost man. I then went on my knees, and begged for Heaven's sake he would let me know what that was. He made answer, Not yet; and said, I know you have been a tool to Mr. Noads a long time, and asked me, who came to me from him or any of the said managers? I told him, I had not seen or heard from any of them. He then said, Keep your own mind from them: I commiserate your present situation, I will call at another time. And gave me 18*d.* In a few days after, he came again, and asked me, whether the said Noads, or any of the said gentlemen, had been with me. I answered, They had not. He then gave me half-a-crown, and said some of them would send to me with directions to write to Mr. Belchier, and advised me not to answer that I would, and said, Do not write at your peril: and promised to come next night, which he accordingly did, and advised me to get some person in prison to write a letter to Mr. Belchier, but not to have any thing mentioned in relation to the said will (I so unfortunately forged of the said John Wilkinson). He went away and promised to come again. He came again the same night, when I shewed him the letter I caused to

he wrote, which he desired I would send to Mr. Belchier; and after many assurances of friendship, he went away, and said he would come the next night. The day after, Mr. Robinson, clerk to Mr. Belchier, came and shewed me the letter I sent, and asked me, if it was not my hand-writing; I told him, it was not. He desired me to write my mind freely to Mr. Belchier, in my own hand-writing, which, after he went away, I accordingly wrote, with a full resolution to send to Mr. Belchier, in order to open the whole affair, and rely on his mercy. He the said Flanigan called soon after, and told me Mr. Robinson had been with me, and asked what he said: I told him, that he brought back the letter he directed me to send, and asked me, if it was my hand-writing: I told him it was not; and that he had directed me to write in my own hand; and that I had wrote such, but had not sent it. He then replied, Did not I tell you that was a dead sett for you? That a letter under your own hand is what will cast you in court? and told me, that he had been with Mr. Belchier, and the rest of the gentlemen, the said managers, and that he was in great friendship with them, and knew all their secrets; and said, I was a dead man, if I sent such letter, or acted contrary to his advice. Then I said, The Lord have mercy upon my soul, I fear my life is gone at any rate. Replied Flanigan, If they can, you fool, do you know how far it lies on them to do so? I said, I did not; neither did I know what service my life could be to them: and said, it was the general character of Mr. Belchier, that he was merciful, and that the gentlemen prisoners in the Compter had so assured me. Flanigan then replied, What a great fool you are! take special care of them; as sure as death, they are set upon to get words out of your own mouth; and advised me to keep my room, and keep my secrets, otherwise it would not be in his power to have me saved. I then went down on my knees, and prayed to the Almighty to have mercy on my soul, and that he (Flanigan) would assist me: he desired me to get up, and assured me that I should be saved, if I took his advice, and that he had been that day about me; and told me, I need not fear, for there was one of the persons was a duke of very great interest; and told me, he had caused a letter to be presented to the duke, which he received, and declared he would stick to that cause, and that he would acquaint his majesty thereof, and that I should have his interest: I desired him to explain himself, what he meant by that cause. He said he would not then tell me; but again advised me to keep my room, and avoid speaking to any persons, and gave me one shilling, and went away: came again, and told me he had been at Doctors Commons, and saw the forged will, and that he knew the name Danish Collins, subscribed as a witness to the said will, to be the hand writing of said Noads, and said it was in vain for me to deny it; and insisted it was so, and that he would swear it to be so,

and that it must be so, and said, You are now under no restraint, and might and should be admitted a king's evidence, provided I would impeach the said Noads; and said, it was in vain for me to deny the forgery, saying, I can and will prove the body of the said will to be all of your hand-writing, when subpoenaed on the trial; but said, If you impeach Noads, and are admitted an evidence, you'll make him squeak; and assured me that nothing else could save my life: and assured me afterwards, that all the managers would be prosecuted by the king and government, but did not explain for what; and said, if I did not hang they must; and if it cost them 10,000*l.* they would cast me; and desired me to give him one of the buttons out of my sleeve, and said, The man to whom this is to be given, is a person whose interest will save your life; repeating at the same time, that the dependance of 78,000*l.* was on the said will. I then said, The Lord have mercy on me, I am a lost man. He then said, the managers want you to submit to be cast; and they will promise to save you, (they will tell you so) I know it to be what they are upon, but for your life don't send them a scroll from under your hand; if you do, it will be impossible to save you; and said, he knew all their secrets, and that they could do nothing without his knowledge, and gave me half-a-crown, and went away. He came next morning, and told me that one Robert Carter's hand-writing was procured, and compared with the names to the said will, and that it appeared he the said Carter was also concerned in said forgery; and said there was a decree granted against the managers for all the money; and unless I was hanged, they never could get over the decree: now, says Flanigan, if you flinch, I shall be subpoenaed to prove the will to be your own hand-writing, and said he would not perjure himself for any man; and then insinuated my life was in his hands. He then went away, and came the next day, and produced me a letter from commodore Walker, giving me a strict charge to stand on my defence, assuring me his interest with the duke of Argyll would save my life; and Flanigan then gave me a strict charge to stick to whatever should be prescribed to me, and that he would let me know from time to time all the said managers' secrets. He then swore me on a book not to make use of his name, or to discover what conversation had or should pass between him and the person who should produce to him the said sleeve-button, and that I should not call him by any other name than Mr. Friend, and told me he had also sworn that person, meaning Goddard, not to mention his name before me. That on the same day, after Flanigan went away, Mr. James Goddard came to me, and introduced himself, and called for a pint of wine, and asked me how I did; and bid me have a good heart, and then presented the said sleeve-button, and told me he was a man of as good a fortune and as great interest as any of the managers were; and said, he thought it was a

lucky thing for me that he had purchased the interest of the said Flanigan, whom he named by the name of Mr. Friend; and said such purchase cost him fifty pounds, in order to get at all the secrets of the said managers; and told me the said Friend was very great with the said Noads, and all of them, and without his interest, my life could not be saved. He said, he was master of all that passed between me and Friend, and said that Friend could and would prove the forgery against Carter and Noads, as well as I, and that I might freely speak to him; and said, that Friend was to be subpoenaed as an indifferent person against Noads, and that he would swear that Noads wrote the said name Dinish Collins, and that Friend had seen the said will in the Commons, and could prove the body to be my hand-writing; and expressed himself much in the same manner as Friend had repeated, before he told me that Friend acted as attorney for commodore Walker: he gave me a crown, and said he would call again. He came the next day, and expressed himself to the purport aforesaid, and said he would call the day after; and charged me at my peril, not to write to the said Mr. Belchier: then went away, and neglected coming according to promise, which made me very uneasy in mind, and induced me to write a letter to the said Friend, purporting, I thought it was a scheme laid between him and Goddard to take away my life; and that I would write to Mr. Belchier. Soon after, Goddard came to me, and told me of the said letter, and said it frightened him and Friend, and desired I would not write in that manner any more, assuring me I need not be afraid, and requested I would not communicate to any body what passed; telling me I was safe. He then took a paper out of his pocket, which he read to me, purporting what I was to swear to; and told me I had no business to deny it, for Friend knew it to be true, and that he would also prove it; and said, the same seal which was to the will, Friend assured him was the said Noads's. He then took another paper out of his pocket, and got me to sign it, purporting to be admitted an evidence, and addressed to alderman Chitty; he wrote something more to the other paper he brought, and said my irons should be knocked off, and assured me it was by Mr. Belchier's directions that I was ironed, that I might easily judge by that what they were upon; assuring me of his friendship, and went away. The next morning he came, and told me I should be sent for to sir Joseph Hankey's, and that my irons should be taken off, which accordingly were. He then read over the said paper he had so first produced as aforesaid, and desired me to recollect the contents, when examined; and to stick to it, otherwise my life would be lost. I was carried to sir Joseph Hankey's, and in the presence of alderman Chitty, Goddard appeared, and Mr. Lock; Goddard took out the said paper, and asked me several questions, as did also the justice, and sent me back: Goddard

came to me, and had me in private, and told me I should be sent for again to be examined the next day, and then produced the said papers, and made some amendments, and desired me to stick to it. The next day I was carried to sir Joseph's, alderman Chitty was there; Goddard, Lock, and the said John Wilkinson, attended; and Wilkinson shewed me a subpoena he was served with by Noads, to prosecute me at the Old-Bailey; and Goddard there asked me several questions, as did also the justice; and the answers I gave, were calculated by the false counsel, instructions, and advice the said Goddard and Friend gave me, without doing which, they assured me, my life could not be saved. I was sent back, Goddard frequently came to me, and advanced me money from time to time; and one morning he told me he had thought of a thing which would prevent the bill being found against me, which he afterwards told me was, that the forged will was proved at the Commons, as the will of John Wilkinson, who belonged to his majesty's ship the Princess Amelia. The day the bill was thrown out by the grand jury, that was preferred against me, soon after Goddard came to me, and told me, that alderman Chitty made it appear to the grand jury, I was admitted an evidence, and that the bill was thrown out; and told me, I should be sent for the next day to Guildhall, to swear to a paper that was drawn up, and prepared according to form in law, and said, he would shew it me at Guildhall. The next morning I was sent for to Guildhall, where Goddard attended before the sitting alderman came, and called me into a closet there, and took out a paper, and gave me to read, and said, he had got it drawn up, and that it was what I must swear to, in order to save my life; and said, I must stick to that paper, or my life would be lost. He went out of the room, and Mr. Lock came in, and said, Mr. Murphy, was you not afraid before the bill was thrown out? I replied, I was. He then said, You are a free man, and desired me to consider what I was about. I had not time to converse with Mr. Lock, to know how I was free, before Mr. Goddard came in, and interrupted us; and Lock and Goddard went out, and Goddard soon returned, and desired me not to speak to Mr. Lock, or to the alderman, but to swear to that paper; and said, he would give Mr. Lock half a guinea for his trouble. I was soon after brought into the room where alderman Chitty was, and some other person, and was sworn to the said writing, which I never saw, till produced in the said closet, and declared such writing was calculated by the said Goddard. I was sent back. Goddard came to me, and produced a paper ready drawn, which he desired me to copy in my own hand, which was of his hand-writing, and directed me to give it to the judge or recorder at the Old-Bailey, the next day, which he said would clear up all to satisfaction. I copied the same, and the day after delivered it at the Old-Bailey to the recorder, and was sent back to

the Compter. Goddard came there to me, and asked me what passed: I told him I had delivered the paper as he directed. That Goddard and Mr. Woodman had a pint of wine together, and had some conversation in respect of having me detained in the Compter, and it was agreed a friendly action to be laid, which Goddard assured me was in order to preserve my life, assuring me, if I went abroad, I should certainly be knocked on the head, poisoned, or a robbery sworn against me, by the contrivance of the said managers, to prevent my evidence. Goddard put me on the master-side, for which he paid Woodman. I grew very uneasy at not being at my liberty. As the bill was thrown out, and I admitted, as Goddard told me, a king's evidence, being in a bad state of health, of the gaol-sickness, of which many died, I requested Goddard, when he came again, to have me bailed out, and sent into the country, to the same place where he kept the said Mr. Wilkinson; at which Goddard seemed uneasy, and declared he knew of no place in England so safe to preserve my life as the place where I was, and repeated as aforesaid, that if I went abroad before I was examined as a witness, I should certainly lose my life; and promised to get me on the debtor's side, with the assistance of Mr. Woodman, provided I could get a friend that could be confided in to keep things secret, who would bring a friendly action against me, and promised he would allow me a shilling a day, and pay for my lodging, till discharged; at which I was more reconciled to stay than I was before, apprehending what Goddard had so represented was intended in order to preserve my life. I then told him, that I believed Timothy Mahony, who was my relation, and whom Goddard knew, and was in the secret, would be the only proper person to bring such action. Then Goddard took a direction where the said Mahony lived, and told me, he would go to him. The said Mahony came to me in a day or two after, and told me, Mr. Goddard had been with him, and addressed himself to him, by telling him, he had something to say to him to save my life, and wanted him to go and swear a debt against me, in order to keep me on an action in the Compter: and that he assured him, that though the bill was thrown out against me, yet if I went abroad, I should be knocked on the head, poisoned, or a robbery sworn against me, and that my life would certainly be taken away, by the party who were against me. The said Mahony told me he said to the said Goddard, he would not take such an oath on any account: and that Goddard asked him, Would he not do such a thing as to take an oath to save my life, being my relation? and said, he told the said Goddard, he would not take a false oath for the world. And that Goddard, at length, by many fair speeches, importuned him to go to take out such action, and had directed him to his brother's house in St. Christopher's church-yard, for 15s. on that account, and promised to leave

directions with his brother to give the money, and desired Mahony, when he got the money, to come to me, in order to take out such action. The said Mahony also told me, he had received the 15s. which he offered to give me, and said he would not take out any such action, as I was not indebted to him in any sum that amounted to an arrest: then I pressed and intreated the said Mahony to bring such action, as it was intended to save my life, and told him I would give him a promissory note for as much as he was to take the action for, and he would be safe in so doing, which he then complied with; and I drew a note for 5 or 6*l.* which I antedated, payable to him or order; and it being then too late to take out any action, in a night or two after Mahony came again to me, and I directed him to go to the office and lodge such action, which he did; and he afterwards gave him 15s.—That the said Mr. Friend, at different times, came to me, and assured me he would attend at the trial, and swear that Noads wrote the said name Dinish Collins; and he also assured me, that if I went abroad before the trial was over, I should be murdered or poisoned, or have a robbery sworn against me, by the contrivance of the said managers. That Goddard frequently came to me, and kept me full of spirits, assuring me I should be an evidence against Noads and Carter; and if Thomas Williams, who was the supposed executor of the said Wilkinson, and went by the name of John Daunt, should not be produced on my trial, the said Mr. Friend was to swear falsely against the said Noads. I do declare, that the said Mr. Noads and Robert Carter were innocent of what I swore against them, relating to any knowledge they had in any forgery; and that I, and the said John Williams, otherwise Daunt, were the only persons concerned in forging and publishing the said will of the said John Wilkinson. And I do also declare, that I never had any intention whatsoever to charge the said Mr. Noads, or the said Carter, with the said forgery, until I was spirited and prompted up in the manner aforesaid, by the art, management, and contrivance of the said Goddard and Flanigan. And I do also solemnly declare, that the said James Goddard has often, since my conviction, sent several messages to me, to desire I would not reveal any of the secret transactions that passed between us as aforesaid, and sent, in his own hand-writing, a false paper to be published, which he requested I would sign, but refused so to do. I had several letters and papers of consequence, which, being advised and requested, I burnt, lest I should be searched, which would have given a very full and satisfactory discovery in this affair. That word was sent to me last night by Goddard, that if I kept it secret, in case my life could not be saved, I should be decently buried, provided I would send back to him signed the false confession, which he sent me in his own hand-writing, as also another writing that would be-

sent me. Mr. Vicors, chaplain to the Spanish ambassador, being my father, this day told me, that he dined with the same James Goddard yesterday, and that he had desired him to bring back to him from me the said confession, and proposed to send by him another writing to be signed by me, which the said Mr. Vicors told me he informed the said Mr. Goddard he would not be any wise concerned therein; but he said he would charge me to make an open confession of the truth before life parted. And I declare the said Mr. Vicors advised me

so to do; and, as a dying man, being desirous to discharge my conscience, have made this declaration, which is nothing but the truth. Given under my hand, from my cell in Newgate, the 27th of January, 1753.

"TIM. MURPHY."

Present,

"WILLIAM HAWKINS,

"ISAAC DOLSTON.

He was executed at Tyburn, Monday, Feb. 12, 1753.

534. Proceedings against Dr. ARCHIBALD CAMERON, at the King's Bench, May 17th, on the Bill of Attainder passed against him 19 Geo. II. for being in the Rebellion 1745: 26 GEORGE II. A. D. 1753.

"THIS Dr. Cameron* was younger brother to Donald Cameron of Lochiel, and son of Ewan Cameron, who was in the rebellion in 1715, and was one of the seven that came from France with the young Pretender, and who, on their landing in July 1745, went to the house of Donald Macdonald of Kenloch Moirdart, and from thence orders were issued for the clans to join the young Pretender: on which Donald Cameron, after much intreaty, waited on him, and expressed his surprise to see him so weakly attended, and refused to raise his clan, till the young Pretender could produce in writing the French king's resolution to assist him with a proper number of forces, &c. and being assured that he would, he summoned his clan, and set up his standard with this motto, Tandem Triumphans, At length Triumphant; though, at the same time, he told the young Pretender, that his scheme was so ill concerted, that he feared no success would happen from it, and that the issue of it would be the ruin of his friends; as in the end it proved.

"Dr. Cameron was in himself of a quiet and peaceable temper; and, had he not been brother to Lochiel, it is very probable he would never have gone into the rebellion.

"His father gave him the best education Scotland could afford, designing him for the bar; which profession he did not like, and applied himself to the study of physic and anatomy, and put himself under the direction of Dr. Alexander Monro, of the university of Edinburgh, a gentleman of established reputation; and when he had acquired a competent skill in anatomy, he applied himself to physic, and was instructed therein by Dr. Sinclair, a gentleman very eminent in the faculty; after which he travelled abroad, and studied in those

branches at Paris; and after staying some time there, returned to Lochaber, and married a young lady of the name of Campbell, by whom he left seven children.

"This Dr. Cameron might have made a considerable figure in his profession, had he settled at London or Edinburgh; but chose his residence near his brother's, among the Highlands, where he took great pains to cultivate the minds and manners of the Highlanders, who by his means were greatly improved. He was a man of no ambition, but of an easy, quiet temper. His chief business in the rebel army was to attend his brother, and to assist him with his skill, if any accident should befall him in battle; and he did attend not only several of the wounded rebels, but likewise several of the king's troops that fell wounded into the hands of the rebels. But the battle of Culloden put a final end to the rebellion, and all the Pretender's hopes, and ruined vast numbers of families, that put their trust in French faith: Lochiel was wounded in the ankle in the battle, and carried off by his clan, and attended daily by the doctor his brother, wandering about for some time after the battle; till at last the young Pretender, Lochiel, his brother the doctor, and some other of his followers, embarked on board a vessel in the harbour of Flota in the isle of South-Uist, and landed at Boulogne in France about the middle of September 1746, to their great joy, having suffered innumerable hardships.

"Lochiel had immediately a regiment given him by the king in the French army, and the doctor was made physician to it; but on the death of his brother, in September 1748, he was appointed physician to lord Ogilvie's regiment, then quartered at Lisle in Flanders.

"About the year 1749, a collection was made among the Jacobites for their friends abroad; and, it was said, Dr. Cameron came over, and received a part of it: after this another collection was made for these unhappy

* From the Historical Account of his Life, published at the time of his death. Former Edition.

people; and the doctor represented, that his pay would not keep him and his family: but, after many solicitations, receiving no satisfactory answer, he came over himself to Scotland, and was there discovered, and was seized by a party of lord George Beaulerk's regiment, who were sent from the fort of Invernaid in search of him, and brought prisoner to Edinburgh, March the 26th, 1753; and being brought before the lord justice clerk, he told him, You are the only man in your circumstances, that ever I had occasion to speak to since I have been engaged in business, whose answers to me could be of no prejudice to him; because you are to be carried to London, and there are witnesses ready to appear against you at the Court of King's-bench, to prove that you are the identical Dr. Cameron, mentioned in the bill of attainder: this will condemn you, and you are to have no other trial.—This struck him; and, after some pause, he replied, That he did not come over with any political design, but only to transact some affairs relating to Lochiel's estate.

"Upon his arrival at London, he was examined by the council at the Cockpit, and committed prisoner to the Tower."

DOCTOR CAMERON'S CASE.

[*Foster's Crown Law*, 109.]

'PLEAS before our lord the king at Westminster of Easter Term, in the 26th year of the reign, &c.

"Amongst the Pleas of the King. Roll.

"*England.* Our present sovereign lord the king hath transmitted to his beloved and faithful sir William Lee, and others his fellows justices, &c." [as in the case of Mr. Murray, of Broughton, *mutatis mutandis*. See in the Trial of lord Lovat, vol. 18, p. 637.]

Dr. Archibald Cameron, who was one of the persons attainted by the act of the 19th of the king, was, on the 17th of May 1753, brought to the bar by Habeas Corpus directed to the lieutenant of the Tower; and being arraigned by the secondary on the crown side, the writ of *Mittimus*, with the *Certiorari*, and return, were read to him by the secondary. The attorney-general then prayed that execution might be awarded; and the secondary demanded of the prisoner, what he had to say why execution should not be done upon him?

The prisoner, who, during the whole time he stood at the bar, behaved with great propriety, not insensible of his condition, nor greatly disconcerted, said, That he was led to take a part in the rebellion against his own judgment and inclination, by some upon whom his all depended: that he still flattered himself he should appear not unworthy of his majesty's mercy; and mentioned some facts which he hoped might intitle him to it. He said, he did not offer these things as a defence he relied on in point of law, but as facts which he hoped

might have some weight in another place, for he was determined to throw himself entirely on his majesty's mercy.

Whereupon proclamation being made for silence, the chief justice after a short exhortation to the prisoner, pronounced the usual judgment in case of high treason, as an award of execution grounded on the act of attainder. And a rule was made for his execution on the 7th of June, and writs for that purpose to the lieutenant of the Tower and the sheriff of Middlesex were ordered, as in the case of Mr. Ratcliffe, vol. 18, p. 450.

The Court, in pronouncing judgment in this case, followed the precedents in the cases of Humphrey Stafford, (1 H. 7, 23. 25) and of Barkstead, Okey, and Corbet, (1 Sid. 79. 1 Lev. 61.) vol. 5, p. 1301. The cases of Holloway and sir Thomas Armstrong, in Charles the 2nd's time, vol. 10, p. 105; and of lord Griffin,* in the late queen's time, were mentioned at a conference among the judges of the King's-bench on this occasion; but little regard was paid to them.

For in Holloway's, which was the leading case, the opinion of the Court seemeth to have been given hastily, and against the sense of the bar. And in lord Griffin's case, chief justice Holt, who was at that time absent, was of a contrary opinion, and, as I have heard, constantly persisted in it; and I do not see how an attainder by outlawry at common law, is, in this respect, distinguishable from the case of an attainder by act of parliament, which, in the present case, is but in nature of a parliamentary outlawry.

* The CASE of LORD GRIFFIN, from a MS. Report of the late Lord Chief Baron Dod. Pasch. 7 Annæ 1703.

Lord Griffin, who had been outlawed for high-treason, was this term brought to the King's-bench; and the whole record of the indictment and outlawry was read to him, and he was demanded, if he had aught to say why execution should not be done; and he not making any material objection, the Court ordered execution to be done. But note, sir James Montagu, solicitor general, (there being then no attorney-general) prayed that judgment as in case of high-treason might be pronounced; or that at least it might be entered on the roll in the award of execution: and said this was the opinion of Holt, chief justice, then at Bath *propter ægritudinem*. But Powell and the Court held, that the award of execution should be general; for the judgment in the outlawry implieth all the particulars, and no second judgment ought to be given. And so they said it was held in the cases of Holloway and sir Thomas Armstrong. *Mes per antea dubitatur, quia le Livre del 1 H. 7, fo. 24, est contra*; and it was said that in the case of Barkstead, Okey, and Corbet, the Court followed the precedent of that book. As to lord Griffin, see a Note to lord Lovat's case, vol. 18, p. 834.

Indeed, in cases within the act of the 19th of the king, c. 34, where the proceeding is upon a suggestion on the roll, that the prisoner did not surrender to justice pursuant to that act, the constant course hath been to award execution, without pronouncing sentence of death, as in cases of felony: but that practice is grounded on the words of the act; "And it shall be lawful for the Court to award execution against such offender, in such manner as if he had been convicted and attainted in the said court."

The record in the case of Barkstead, &c. was searched, and the judges had copies of it. It is of Easter term, in the 14th of king Charles the second; it agreeth, *mutatis mutandis*, with the record in Mr. Murray's case, [vol. 18, p. 637.] and after setting forth the act of parliament by which the prisoners stood attainted, it proceedeth, "Et modo scilicet die Mercurii prox' post Quinden' Pasch' isto eodem Termino coram Domino Rege apud West' veniunt prædict' Johannes Barkstead, Johannes Okey, et Milo Corbet, per Johannem Robinson Mil. et Bar. Locum tenent' Turris London', virtute Brevis Domini Regis de Habeas Corpus ei inde direct' ad Barram hic duct' in propriis personis suis (in cujus Custod' præsentia ex Causis prædict' commissi fuerunt) qui committuntur eidem Locum tenent' super quo quæsit' est per Cur' de eisdem Johanne Barkstead, Johanne Okey, et Milone Corbet si quid pro se habeant, vel dicere sciant, quare Cur' hic ad Executionem de eis et eorum quolibet procedi non debeat, Separatim dicunt quod ipsi non sunt eadem Personæ, nec eorum aliquis est eadem Persona, quæ de alia Proditione prædict' in Actu Parlamenti prædict' specificat' Convict' et Attinct' existunt; et hoc parat' sunt verificare prout Cur', &c. unde petunt judicium &c. et Galfridus Palmer Mil. et Bar. Attornat' Domini Regis Generalis qui pro eodem Domino Rege in hac Parte sequitur præsens hic in Cur' pro eodem Domino Rege dicit, quod prædict' Johannes Barkstead, Johannes Okey, et Milo Corbet, modo comparent' sunt eadem Personæ, et quilibet eorum est eadem Persona in prædict' Actu Parlamenti nominat' qui de alia Proditione prædict' Convict' et Attinct' existunt, et hoc pro Domino Rege petit quod inquiratur per Patriam, et prædict' Johannes Barkstead, Johannes Okey, et Milo Corbet, similiter, &c. Ideo immediate veniat inde Jurata coram Domino Rege ibidem, &c. Et Juratores Juratæ prædict' per Vicecomit' Middlesex prædict' ad hoc impannellat' exact' veniunt, qui ad Veritatem de præmissis dicend' elect' triat' et jurat' dicunt super sacramentum suum, quod prædict' Johannes Barkstead, Johannes Okey, et Milo Corbet, sunt eadem Personæ, et quilibet eorum est eadem Persona in prædict' Actu Parlamenti nominat' qui de alia Proditione prædict' in Actu Parlamenti prædict' Convict' et Attinct' existunt, prout prædict' Galfridus Palmer Mil. et Bar. Attornat' Domini Regis nunc Ge-

VOL. XIX.

neral' pro dict' Domino Rege superius allegavit, &c. et ulterius quæsit' est de prædict' Johanne Barkstead, Johanne Okey, et Milone Corbet, separatim, si quid ulterius pro se habeant vel dicere velint necne, qui Nilil dicunt &c. Ideo considerat' est quod prædict' Johannes Barkstead, Johannes Okey, et Milo Corbet, ducantur, et quilibet eorum ducatur usque Turrim London, et deinde per medium Civitat' London directe usque ad Furcas de Tyburn trahantur, et quilibet eorum trabatur, et super Furcas illas ibidem suspendantur et quilibet eorum suspendatur, et Videntes ad Terram prosternantur, et quilibet eorum prosternatur, et Interiora sua extra Ventres suos et eorum cujuslibet capiantur, ipsisque Videntibus comburantur, et Capita eorum et eorum cujuslibet amputentur, et Corpora eorum et eorum cujuslibet in quatuor Partes dividantur, et quod Capita et Quarteria illa ponantur ubi Dominus Rex ea assignare voluerit, &c.'

"On Dr. Cameron's receiving sentence, he made a genteel bow, and only desired he might have leave to send for his wife, who, with seven children, entirely dependent on him for support, were at Lisle in Flanders; which was granted. He said, that in 1746 he came from France to surrender himself, agreeable to the proclamation, but was prevented by an accident happening in his family. He behaved with great resolution and decency before the Court."

"During the interval between the sentence and his execution, his wife used all possible means to obtain a pardon, by delivering a petition to his majesty, another to her royal highness the princess of Wales, and to several of the nobility, but without effect: for, on Thursday, June 7th, about ten o'clock in the forenoon, he was brought out of the Tower, guarded by a party of the horse-guards, and delivered to the sheriffs of London and Middlesex. As soon as he was out at the Tower-gate, he was put into the hurdle, to which he was fastened by the executioner. In this manner he was drawn through the city, attended by sir Richard Glynn, one of the sheriffs, and under the care of the sheriff's officers and constables, to the place of execution. Sir Charles Asgill, the other sheriff, left the prisoner at the Tower.

"The doctor being arrived at the place of execution, and helped into the cart, desired to speak to the sheriff, who came to him: the doctor intreated the favour of him, that he would give orders to let his body hang till he was quite dead, before the executioner began his further operation, and the sheriff promised to oblige him in his request; and accordingly the body hung three quarters of an hour before cut down, when no remains of life were in him.

"While in the cart, a gentleman in a lay habit came and prayed with him, and then left him to his own private devotions; by which it was imagined the doctor was a Roman Catho-

* From Hist. Account of his Life, p. 27.

lic, and the gentleman who prayed with him a priest. He died with great decency and resolution, without any visible alteration in his countenance or behaviour, but perfectly resigned to the will of Heaven. He left no paper behind him. After his body was taken from the gallows, the executioner cut off his head, and took out his bowels, but did not quarter the body. His body and head were put into a coffin, with this inscription on the lid of it, 'Dr. Archibald Cameron suffered the 7th of June, 1753, aged 46.'"

The following Article was published at the time :

COPY of what Dr. CAMERON intended to have delivered to the Sheriff of Middlesex at the place of Execution, but which he left in the Hands of his Wife for that End. With a LETTER from Dr. CAMERON, when under Sentence of Death, to his SON in France. To which is added, an authentic Account of his Behaviour at the place of Execution. London : Printed in the year 1753.

On the first Slip of Paper, dated Tower, 6th June, 1753.

" Being denied the use of pen, ink, and paper (except in the presence of one or more officers, who always took away the paper from me, whenever I began to write my complaints) and not even allowed the use of a knife with which I might cut a poor blunted pencil that had escaped the diligence of my searchers, I have, notwithstanding, as I could find opportunity, attempted to set down on some slips of paper, in as legible characters as I was able, what I would have my country satisfied of in regard to myself, and the cause in which I am now going to lay down my life.

" As to my religion, I thank God I die a member (though unworthy) of that church, in whose communion I have always lived, the Episcopal Church of Scotland as by law established before the most unnatural Rebellion begun in 1688, which, for the sins of these nations, hath continued to this day: and I firmly trust to find, at the most awful and impartial tribunal of the Almighty King of Kings, through the merits of my blessed Lord and Saviour Jesus Christ, that mercy (though undeserved) to my immortal part, which is here denied to my earthly, by an Usurper and his Faction, though it be well known I have been the instrument of preventing the ruin and destruction of many of my poor deluded countrymen who were in their service, as I shall make appear before I have done, if opportunities of writing fail me not."

On the second Slip of Paper.

" In order to convince the world of the uprightness of my intentions while in the prince of Wales's army, as well as to shew the cruelty,

injustice and ingratitude of my murderers, I think it proper, in the first place, to take notice, how much better usage I might have expected of my country, if humanity and good nature were now looked upon with the same eyes as in the times of our brave and generous ancestors: but I am sorry to observe, that our present men in power are so far sunk below the noble spirit of the ancient Britons, as hardly at this day to be distinguished from the very basest of mankind. Nor could the present possessor of the throne of our injured sovereign, if he looked on himself as father and natural prince of this country, suffer the life of one to be taken away, who had saved the lives and effects of more than 300 persons in Scotland, who were firmly attached to him and his party: but, it seems, it is now made a crime to save the lives of Scotsmen.

" As neither the time, nor the poor materials I have for writing, will allow me to descend to a particular enumeration of all the services I have done to the friends of the Usurper, I shall therefore only mention a few of the most known, and such as can be well attested.

" In July 1745, soon after the setting up of the royal standard, and before our small army had reached Corryarrig, it was moved by some of the chiefs to apply to the Prince for a strong detachment of clans to distress Campbell of Invera's house and tenants in that neighbourhood; which my brother Lochiel and I so successfully opposed, by representing to our generous leader (who was always an enemy to oppression) that such proceedings could be noway useful to his undertaking, that the motion was entirely laid aside, to the no small mortification of the proposers.

" My brother and I likewise prevented such another design against Breadalbine, to the great satisfaction of our dear prince; and, on our return from England to Glasgow—

" ARCHIBALD CAMERON. "'

On a third Slip of Paper.

" My brother and I did service to the town of Glasgow, of which the principal gentry in the neighbourhood were then, and are to this day, very sensible, if they durst own the truth: but that might be construed as disaffection to a government founded on, and supported by, lies and falsehood.

" On our march to Stirling, I myself (though I am like to meet with a Hanoverian reward for it) hindered the whole town of Kirkintulloch from being destroyed, and its inhabitants put to the sword, by my brother's men, who were justly incensed against it for the inhuman murder of two of lady Lochiel's servants, but two months before. Here was a sufficient pre-

" * Mr. Cameron (as was his custom when interrupted) subscribed his name (as he told his wife) to make what he had written the more authentic, in case he should not have an opportunity of writing any more."

tence for vengeance, had I been inclined to cruelty: but, I thank God, nothing was ever farther from my nature, though I may have been otherways represented. Mr. Camppebell of Shawfield likewise owes me some small favours done to himself and family, which at least deserved some return in my behalf.

"And lady Duncan Campbell of Lochpelt, now in London, can, if she pleases, vouch for the truth of some of the above facts."

"ARCHIBALD CAMERON."

On a fourth Slip of Paper.—June 6, 1753.

"I thank kind Providence I had the happiness to be early educated in the principles of Christian loyalty, which, as I grew in years, inspired me with an utter abhorrence of rebellion and usurpation, though ever so successful, and when I arrived at man's estate, I had the testimony both of religion and reason to confirm me in the truth of my first principles. Thus my attachment to the royal family is more the result of examination and conviction, than of prepossession and prejudice; and as I am now, so was I then, ready to seal my loyalty with my blood. As soon therefore as the royal youth had set up the king his father's standard, I immediately, as in duty bound, repaired to it; and as I had the honour, from that time, to be almost constantly about his person till November 1748, (excepting the short time after the affair of Culloden, that his royal highness was in the Western Isles) I became more and more captivated with his amiable and princely virtues, which are indeed in every instance so eminently great, as I want words to describe.

"I can farther affirm, (and my present situation, and that of my dear prince too, can leave no room to suspect me of flattery) that, as I have been his companion in the lowest degree of adversity that ever prince was reduced to, so I have beheld him too, as it were, on the highest pinnacle of glory, amidst the continual applauses, and I had almost said, adorations of the most brilliant court in Europe; yet he was always the same, ever affable and courteous, giving constant proofs of his great humanity, and of his love for his friends and his country. What great good to these nations might not be expected from such a prince, were he in possession of the throne of his ancestors! And as to his courage, none that have ever heard of his glorious attempt in 1745, can, I should think, call it in question.

"I cannot pass by in silence that most unjust and horrid calumny, (viz. of giving no quarter to our enemy) raised by the rebels under the command of the inhuman son of the elector of Hanover, which served as an excuse for the unparalleled butchery committed by his orders in cold blood, after the unhappy affair of Culloden; which, if true, must have come to my knowledge, who had the honour to serve my ever dear master in quality of one of his aides de camp: and I hereby de-

clare I never heard of such orders. This above is truth.

ARCHIBALD CAMERON."

"I likewise declare, on the word of a dying man, that the last time I had the honour to see his royal highness Charles prince of Wales, he told me from his own mouth, and bid me assure his friends from him, that he was a member of the church of England.

"ARCHIBALD CAMERON."

On a fifth Slip of Paper.

"To cover the cruelty of murdering me at this distance of time from passing the unjust attainder, I am accused of being deeply concerned in a new plot against this government (which, if I was, neither the fear of the worst death their malice could invent, nor the blustering and noisy threatening of the tumultuous council, nor much less their flattering promises, could have extorted any discovery of it from me) but not so much as one evidence was ever produced to make good the charge: but it is my business to submit, since God, in his all-wise Providence, thinks fit to suffer it to be so; and I the more cheerfully resign my life, as it is taken away for doing my duty to God, my king and my country; nor is there any thing in this world I could so much wish to have it prolonged for, as to have another opportunity of employing the remainder of it in the same glorious cause.

"ARCHIBALD CAMERON."

"I thank God I was not in the least daunted at hearing the bloody sentence, which my unrighteous judge pronounced with a seeming insensibility, till he came to these words 'But not till you are dead;' before which he made a pause, and, uttering them with a particular emphasis, stared me full in the face, to see, I suppose, if I was as much frightened at them, as he, perhaps, would have been, had he been in my place. As to the guilt he said I had to answer for, as having been instrumental in the loss of so many lives, let him and his constituents see to that: at their hands, not at mine, will all the blood that has been shed on that account be required.

"God, of his infinite mercy, grant they may prevent the punishment which hangs over their heads, by a sincere and timely repentance, and speedy return to their duty.

"I pray God to hasten the restoration of the royal family (without which this miserably divided nation can never enjoy peace and happiness,) and that it may please him to preserve and defend the king, the prince of Wales, and the duke of York, from the power and malice of their enemies; to prosper and reward all my friends and benefactors, and to forgive all my enemies, murderers and false accusers, from the elector of Hanover and his bloody son, down to Samuel Cameron, the basest of their spies, as I freely do from the bottom of my heart.

Sic Subscribitur,

"ARCHIBALD CAMERON."

"I am now ready to be offered; I have fought a good fight. All glory to God."

"The above is a faithful transcript of my late dear husband's dying sentiments.

Sic Subscribitur, "JEAN CAMERON."

COPY of a LETTER from DR. ARCHIBALD CAMERON, under Sentence of Death, to his Son in France.

"Tower of London, June 6, 1753.

"My dear child;

"It is with the highest satisfaction, that I have, for some time past, observed in you a sense of honour and loyalty, much beyond what could have been expected from a boy of your years; and though death will soon deprive me of the power of being of farther service to my king, prince, and country, yet, what greatly adds to my satisfaction, is the principle you shew in your letter to your mother, on the news of my being in custody, and the confidence you have of my inviolable fidelity to the royal cause: I give you the joy to assure you, that your confidence is well grounded; for I have been unalterable, even in the smallest matters; and my approaching death, and the most severe usage, will rather serve to confirm, than shake, my fixed resolution of remaining so for ever.

"I am far less concerned about myself, than about my friends and ruined country: they, not I, claim pity, though I fall a victim to truth, honour, and uprightness, by the rage of Hannoverian councils, the declared enemies of every virtue. I thank God, I am hearty, and in much better health than I have been for some years past; more especially since I saw that letter, which gives me such hopes of your future conduct, from the desire you express in it, that I should rather sacrifice my life than save it on dishonourable terms. I thank my God, I was always easier ashamed than frightened.

"I have no money to leave you as a legacy, but take what is of infinite more value, viz. above all things, first serve God, next your king, prince, and country; then be always in your duty to your mother, brothers, and sister; act honourably and honestly by your neighbour; meddle in no party quarrels; but, when you are personally wronged, demand justice with coolness, regularity and resolution, without personal reflections; beware of ever speaking to the disadvantage of the absent, even though they should deserve it.

"I recommend to you, in a particular manner, the care of your health; observe great moderation in eating, at any rate abstain from heavy and late suppers, and, above all, avoid drinking and whoring. Be a good economist of your little money and clothes. Let the company you frequent be rather of your betters than your inferiors.

"My time and writing implements allow me only to recommend my most hearty thanks to my noble and worthy colonel [Lord Ogilvy]; don't neglect your duty to him.

"My love and dying benediction to my children, affection to my brother's children, best wishes to all my friends, and hearty compliments to all my good acquaintance. And

[Here this great good man was obliged to leave off, probably for want of a knife to cut his bit of a pencil; and he never had another opportunity to add what he had to say farther to his son, except what he had told a friend by word of mouth, the morning of his execution, in delivering the last present he sent his son, which was a pair of steel shoe-buckles, with this charge, (which, that it might not be forgotten, he repeated several times), viz. 'These I send 'by you to my wife as my last present to my 'son, and bid her tell him from me, That I send 'him these, and not my silver ones; and that, 'if I had gold ones, I would not send him the 'gold, but these steel ones, which I wore 'when skulking; for, as steel is hard and of 'small value, it is therefore an emblem of constancy and disinterestedness: so I would have 'him constant and disinterested in the service 'and defence of his king, prince, and country; 'and neither be bribed nor frightened from his 'duty.']

An Authentic Account of the Behaviour of Dr. ARCHIBALD CAMERON.

"When this gentleman came to the place of execution, he looked on the officers and spectators with an undaunted and composed countenance; and, as soon as he was unloosed from the sledge, he started up, and with an heroic deportment, stepped up into the cart, by the help of one of his executioners; whence looking round, with unconcern, on all the awful apparatus of death, he smiled: and seeing the clergyman that attended him coming up the steps, he came forward to meet him, and endeavoured, with his fettered hands, to help him up, saying, So—are you come? This is a glorious day to me! 'Tis my new birth-day; there are more witnesses at this birth, than there were at my first. The clergyman asked him how he did: he said, Thank God, I am very well, but a little fatigued with my journey; but, blessed be God, I am now come to the end of it.

"On hearing one of the gentlemen, who presided at the execution, ask the clergyman whether he would be long about his office, Dr. Cameron immediately took the word, and said, He required but very little time, for it was but disagreeable being there, and he was as impatient to be gone as they were. The clergyman then asked the gentleman who had spoke, whether he was the sheriff? and, on his being answered in the affirmative, he told him Dr. Cameron's business there would be chiefly with him; that he had something to communicate to him, if he would take the trouble to come near; which he very readily complied with, and endeavoured to bring his horse close to the cart: but finding the horse a little un-

ruly, and that he could not hear what the doctor said, by reason of the noise of the multitude, he beckoned with his hand for silence, but to no purpose, whereupon he very obligingly alighted, and came up the steps, and, with great civility and attention, listened to the Doctor, who spoke to this purpose :

“ ‘ Sir, you see a fellow subject just going to pay his last debt to his king and country. I the more cheerfully resign my life, as it is taken from me for doing my duty according to my conscience. I freely forgive all my enemies, and those who are instrumental in taking away my life. I thank God I die in charity with all mankind.

“ ‘ As to my religion, I die a stedfast (though unworthy) member of that church, in which I have always lived, the church of England, in whose communion, I hope (through the merits of my blessed Saviour) for forgiveness of my sins, for which I am heartily sorry.

“ ‘ The custom of delivering something in writing, on such occasions as this, I should willingly have complied with, had not my uncommon hard usage, even after sentence, put it out of my power, being denied the use of pen, ink, and paper, except in the presence of some of my keepers. But what I intend my country should be informed of, with regard to my dying sentiments, I have, by the means of a blunt pencil, endeavoured to set down on

‘ some slips of paper, as I could come by them, in as legible characters as I was able; and these I have left in the hands of my wife, charging her, on her duty to her dying husband, to transmit, with all convenient speed, a faithful transcript of them to you, and I am confident she will honourably discharge the trust.’ ”

“ He then told the sheriff he would presume no longer upon his patience; but the sheriff, with looks that bespoke a great deal of concern, and with much good nature, begged he would take as much time as he pleased, for they would wait till he was ready. The doctor thanked him.—Then turning to the clergyman, he said, I have now done with this world, and I am ready to leave it.

“ He joined heartily in the commendatory prayers, &c. then repeated some ejaculations out of the Psalms: after which he embraced the clergyman, and took leave of him.

“ P. S. As the clergyman was going down from the cart, he had like to have missed the steps, which the doctor observing, called out to him, with a cheerful tone of voice, saying, Take care how you go. I think you don't know this way so well as I do.”

* “ Which Mrs. Cameron most faithfully performed, sending along with it a letter from herself.”

535. The Trial of STEPHEN M^cDANIEL, JOHN BERRY, JAMES EGAN, (otherwise GAHAGAN) and JAMES SALMON, at Justice-Hall in the Old-Bailey, on Saturday the 1st of March, 1755, before the Right Hon. Stephen Theodore Janssen, esq. Lord Mayor of the City of London; the Hon. Sir Richard Adams, knt. the Hon. Mr. Justice Wilmot, William Moreton, esq. Recorder, and others of his Majesty's Justices of Oyer and Terminer, for the said City and County, for being Accessories before a Felony committed by Peter Kelly and John Ellis, in the County of Kent; for which they were tried and convicted at the Assizes held at Maidstone, August 13, 1754 :*
- 27 GEORGE II. A. D. 1755.

JURY.

| | |
|---------------------|-------------------|
| Richard Heavysides, | Randolph Baileys, |
| Gamaliel Gardner, | John Keen, |
| Nathaniel Norton, | Henry Knight, |
| Samuel Nesbit, | William Basson, |
| Ebenezer Gardner, | John Brewin, |
| John Paperton, | John Pricklow. |

* See Post. 121. 364, 365.

STEPHEN M^cDaniel, John Berry, James Egan (otherwise Gahagan) and James Salmon, were indicted, for that, at the gaol-delivery for our sovereign lord the king at the county gaol at Maidstone for the county of Kent, on Tuesday the 13th of August, in the twenty-eighth year of our said sovereign lord the king, Peter Kelly and John Ellis were, in due form of law, indicted for a robbery on the king's

high-way on James Salmon, by putting him in corporal fear and danger of his life, in the parish of St. Paul, Deptford, in the county of Kent, and taking from him one linen handkerchief, value 4d. two pair of leather breeches, one clasp-knife, one iron tobacco-box, one silver pocket-piece, one guinea, and one half-crown; and that the said Peter Kelly and John Ellis were tried and convicted for that robbery; and that the said M^dDaniel, Berry, Egan, and Salmon, on the 23d of July, 1755, in the city of London, were accessaries before this felony was committed; and feloniously and maliciously did aid, abet, assist, counsel, hire and command the said Ellis and Kelly to commit this robbery, against the peace of his majesty, his crown and dignity.

There was a second count in the indictment, as an offence at common law.

At the desire of Berry, the witnesses were examined apart.

Joseph Cox sworn.

(He produced the copy of the record of the conviction of Peter Kelly and John Ellis.)

Q. Where had you this?—*Cox.* I had it of Mr. Knap's clerk.

Is it a true copy?—It is; the clerk and I examined it with the record; I looked over the record on the file, while the clerk read this; after that the clerk read the record, while I looked over this. (It is read in court, the purport of which is "That Peter Kelly and John Ellis were tried on the 13th of August, 1754, at Maidstone assizes, before sir Dudley Ryder, knight, and sir Michael Foster, knight, for the said robbery on the defendant Salmon, and found guilty.")

Thomas Blee sworn.

T. Blee. I have known the prisoner Berry eight or nine years, and M^dDaniel twelve months last November. I never had any great acquaintance with Salmon, till through Berry, in the month of June last. I have known Egan four or five years, by his coming backwards and forwards to Berry's.

Q. Did you know Peter Kelly and John Ellis?—*Blee.* I did; I believe they are now in Maidstone gaol; they were when I came away last Monday.

Court. Tell the Court the first time you had any conversation with them.—*Blee.* I lodged at Berry's house, and worked for him; Berry said to me, in the beginning of July, Go to Mr. M^dDaniel, (he lived then in Scrub's-court, Holborn) and tell him I want to speak with him. I went, and he and I came back together to Berry's house. They both said, Tom, money grows scarce, you must give a sharp look-out for a couple to go upon the scamp now, and if you cannot get two, you must get one.

Q. What did they mean by going upon the scamp?—*Blee.* That is, to go upon the highway. I told them, as Kidden's was so bad

an affair, I did not chuse to be concerned more. He was convicted last January was twelve-month, and executed at Tyburn. M^dDaniel said, Damn your eyes, if you don't it shall be the worse for you. Then Berry said, I might go about my business; so I went away. The next morning Berry called me into his room.

Where did he live?—At a place called the George-yard, at the upper end of Hatton-Garden. He then said, Go up to Mr. M^dDaniel's house, and desire him to meet me in the fields about 11 o'clock. I did, and we went into the Spa-fields, and Berry came to us. They both said to me, Go and look about the fields, and we will lie down on the grass, and see if you can pick up a couple of idle fellows, that will do for the purpose, and introduce yourself into their company.

What did they mean by that purpose?—To go upon the scamp were the words they said: accordingly we three went into the fields several days, but could not meet with any body fit for the purpose. I remember one day in particular, it was Monday the 15th of July, that day they ordered me to go into the fields, and said they would come, and I sat there two hours before they came nigh me: then M^dDaniel came to the top of the hill, and bid me come to the sign of sir John Oldcastle, a public house, and said, my master was there; he and I went there, and down to the bottom of the yard; and, in the farthest arbour but one, on the left-hand side, there sat Berry and Salmon the breeches-maker. Berry bid me sit down, which I did; there we all discoursed together about doing this robbery: M^dDaniel said, We'll do the thing somewhere towards Blackheath; then he and Berry had a sort of a wrangle whether they should not have it done between New-cross turnpike and Deptford, just facing the four mile-stone.

Was there any particular reason to have it done in that place?—Yes, they said, there is a reward of twenty-pounds, that is given by the inhabitants of East-Greenwich for apprehending highwaymen and foot-pads: Berry said, Suppose we have Egan concerned with us; then they talked about his being the fence, as they call it.

What did they mean by that word?—That is, to buy the goods after Salmon had been robbed of them: M^dDaniel made an objection to Egan's being in, because he thought five would be too many to be concerned in the reward: Berry said, We cannot cleverly do without him, and if there are five of us concerned, it will be pretty nigh twenty pounds each, if a constable should come in: and they all three, that is, Berry, M^dDaniel, and Salmon, concluded that Egan should be concerned as a fence in the robbery: and Berry said, he would go and let Egan know of it that night; and said to me, Now, Tom, you may go home about your business, we will not be seen to walk along the streets together; so I went away and left them. The next morning I went out again, to see if I could find any body for

the purpose, but I could not that day; the next after, which was on a Wednesday, Mr. Berry called me into his room, and ordered me to go and tell M'Daniel to come to him to the Bell-inn in Holborn; I went, and M'Daniel and I went to the Bell together; there were James Egan, James Salmon, and Berry; we were all five together; they bid me come and sit down, which I did, and drank part of a pot of beer; then we all concluded that the thing should be done.

Where is the Bell-inn?—It is in the city of London, just beyond Bartlet's-buildings, on the right-hand side.

What thing was to be done?—That if I could get a couple to go on the highway, that Salmon should be the person to be robbed; and Berry and Salmon talked about making two pairs of breeches that Salmon was to be robbed of, and to mark them under the pocket or waistband with some particular mark; to the best of my knowledge it was to be J. S. Then Berry and M'Daniel said, they must have a particular handkerchief too: then M'Daniel put his hand into his pocket, and pulled out this handkerchief that I have now in my hand: James Salmon said, he had got a handkerchief at home, that he would mark so as to swear to it; which he was to mark with four oilet-holes, one at each corner. Berry said, they should want a tobacco-box; M'Daniel said, he had got a very remarkable one, that any body might swear to; which I have fetched forty halfpenny-worths of tobacco in for M'Daniel, and I know it to be the same now; (taking it in his hand) M'Daniel said, he would give it to Salmon to be robbed of: then they said, they wanted a halfpenny, and would have it marked; M'Daniel said, he had got a pocket-piece; which piece I saw his wife buy for three-pence and a halfpenny-worth of gin some time before: he said, that would do; and it should be marked with a shoemaker's tool, and he gave it to Egan to mark it: Egan said, he had got a tool that he used to stamp the shoes with, that he would mark the piece with: then they bid me go home about my business, which I did. The next morning Berry called me up into his room again, he gave me three-pence, and ordered me to go down to the Fleet-market, to see if I could pick up two men or lads there.

Did he say any thing more at that time?—He said, to do the thing. I knew what he meant; accordingly I went down to the market, and met with Peter Kelly and John Ellis.

Did you know them before?—I did; I knew them to be very bad lads, that is, pick-pockets. I gave them some gin, but had no discourse with them that day about the thing: the next morning Berry called me into his room again, and gave me three-pence more, and bid me go down to the Fleet-market to them, and be sure to have a little talk with them, and told me what to say; and that was, to tell them, I knew where to get a brave parcel of lullies.

What is the meaning of that?—He meant, to get a parcel of linen, if they would go with

me to Deptford. I went and met them there, and told them as Berry ordered me; that is, I told them I knew where to get a brave parcel of lullies, if they would go to Deptford with me.

Did you tell them Berry told you so?—No, I did not; if I had, they would not have agreed to go; they both agreed to go with me any time I thought proper; then I left them for that day, and bid them a good night.

You say you knew Kelly and Ellis before; What are they?—Ellis is a chimney-sweeper, about twenty years of age; and the other about twenty-one, by their looks. The next morning Berry called me into his room again; I came home pretty late over night, so I had not seen him then: he ordered me to go and tell M'Daniel to come to him to the sign of the Plumb-Tree, in Plumb-Tree court, Shoe-lane, at the bottom of Holborn-hill; accordingly M'Daniel and I went there; there were Berry and Salmon. Berry told Salmon, I had got two men, Ellis and Kelly, and they had agreed to go along with me any where, where I thought proper, as I had told him before, that morning; Berry bid me drink once, and go about my business.

Did Salmon say any thing to it then?—No, he did not; the reason they chose I should go by myself was, because people should not take notice of me. I went away, and left them three all together.

Did they say so?—They did.

When did they say that?—When Berry and he gave me this great-coat I have now on, to disguise myself.

When was this?—It was on a Friday; I remember it was market-day at Smithfield, and I had been there to Kelly and Ellis. I saw them in the Fleet-market on a pea-cart, betwixt five and six o'clock: I asked them, if they would have a glass of gin; and gave them each a glass, and bid them good-bye: about two hours after I met them again in the market, and asked them, if they would go to Deptford or not? They said, Yes. Kelly asked me, if I had got ever a bag to put the linen in? I said, we did not want a bag, I would tell them more of that another time; and left them then. At night, it being Saturday, Berry called me into his room, and asked me, if I had seen them and talked with them? I said, I had: he said, that was very well. He said, when you get up in the morning, come into my room before you go out, which was the Sunday morning: I got up, and went in; he then gave me sixpence to treat them with. I went out into the brick-fields, and found them, and treated them with some gin and beer; and we agreed to go to Deptford to steal some linen, and I bid them a good-bye for that time; and said to them, I would meet them on the morrow morning. I left them in the Spaw-fields, and went to M'Daniel's house and dined there. I told M'Daniel I had got two lads that I believed would suit for the thing, and told him who they were; and said, I would

let him know more of it on the morrow, for I should see them again to-night or to-morrow; he said, that was very well. At night I saw Berry, and told him what had passed between the lads and I; he said, it was very well, he should see Egan to-morrow morning; then I went to bed. The next morning, which was Monday the 22d of July, about five o'clock, Berry called me into his room again, and bid me go and tell M'Daniel not to be out of the way, and he also gave me three-pence to go down to the Fleet-market to treat Ellis and Kelly with some gin. I went down, and there I met with them, and gave them each a half-penny-worth; and told them I would fix a day when we should go down to Deptford: then I left them, and went to M'Daniel's house. About nine that morning there came Berry and Egan up into his room; Berry said, God damn you, Mack, you and my lord mind nothing but that God damn'd tea-kettle; you don't mind to look after business.

What did he mean by my lord?—He meant me; it was a nick-name they gave me. M'Daniel answered, He is just come from the two lads, as he tells me. I said, If Egan has a mind to go, he shall go and see them; he and I went down into the Fleet-market, there were the two lads sitting on a pea-cart; I put my hand into my pocket, and gave them a halfpenny each to go and get some gin. Egan stood not above three or four yards from them at the same time, leaning against a post; then he went one way, and I another; I went through Plumb-Tree court, and met Egan in Shoe-lane; then he went to M'Daniel's house again. Egan said there to M'Daniel and Berry, By God they'll do very well, they are two pretty lads.

Berry. Where was this?—Blee. You know well enough, it was at M'Daniel's house: then Berry, Egan, and I came down stairs; we parted with Egan at the end of the court. Berry and I went over to the Plumb-Tree; and, as we went by Salmon's door in Shoe-lane, Berry beckoned him out, and he went with us. I stayed and drank part of one pint of beer, and then went away by Berry's order, and left them together. On the Tuesday morning Berry and I went to the Plumb-Tree ale-house again; he bid me go over, and tell M'Daniel he wanted to speak with him; I went and told him, and he came: then I went out of the house, to see if I could find the two lads again; I found them in the Fleet-market, and discoursed with them; they said, they were going to work (as they called it) in the Artillery-ground.

What work?—It was picking of pockets. I came back and acquainted Berry and M'Daniel with it. Berry gave me three-pence in half-pence, and they bid me go out directly to them, and keep them company: Berry always found the money. They both said, they would come into the Artillery ground about two o'clock to see the lads: the White regiment marched that day: I went and walked up and down with

them. About half an hour after two I saw Berry in the Artillery-ground; (I was to take no notice to Berry and M'Daniel, or they to me) and presently after, walking round by the Artillery-House, I saw M'Daniel; after that I left the lads, and went to Berry, as he stood at the Artillery-gate, and said to him, Mr. Berry, do you think they will do?

Berry. What time of the day was this?

Blee. It was about three o'clock.

What was Berry's answer to that?—He said, Do! damn me, I have done less than they over, for March and Newman were less: he put his hand in his pocket, and gave me sixpence; and bid me be sure not to leave them.

Berry. Here is a man in court will contradict that (pointing to one that stood near him);

Court. Don't you know, at your request, all the evidences for the prosecution were put out of court, to be called in one at a time; at which time your's were put out also? How came this witness in again? He must go out, and come in when he is called. (He went out, but did not come in again to give evidence on Berry's defence.)

Blee. I went with the sixpence round the Artillery-ground, and met with M'Daniel; he said he was going to Berry. I asked him if he thought the two lads would do? He said, Damn your eyes, I have done less than they over at Kingston.

Had he a sight of them?—He had, as we passed him before; he and Berry went into the ground, on purpose to see them. Then I left M'Daniel, and went and gave the boys part of a full pot of beer; then I bid them good-bye, and told them I would see them again the next morning, which was the 24th. I went home, and got up in the morning, and told Berry I was going to them; he gave me three-pence. Then I went down into the Fleet-market, and told them, I believed the thing would be done on the Friday; this was on the Wednesday: if not, I would let them know farther. Then I left them, and at night I went home, and told Berry I had been again along with Ellis and Kelly. He said, Damn you, don't go to deceive us; do you come up to the Bell in Holborn by-and-bye, and tell M'Daniel I want him. I went to M'Daniel's house, and left word what Berry ordered me; for M'Daniel was not at home. Then I went to the Bell, and Berry met me just at the door: just as I was going into the house he said, Here is three-pence; go away to the Artillery-ground, be sure to be there about two o'clock: this was on Thursday the 25th, in the morning. He said, Don't come in, for Mr. Bagley is there; I don't desire he should see you.

Who was that Mr. Bagley?—He was a neighbour of Berry's. I went away to the Artillery-ground at the time; and walked about an hour and a half before I saw either Berry or M'Daniel; but walking by the Artillery-ground, I saw M'Daniel; he told me he had been at dinner along with somebody in the

Artillery-house, and said, Where the devil is Berry? I said, I never saw any thing of him. About half an hour after that, there was hue-and-cry after a pick-pocket. M'Daniel came to me, and said, God damn me, the chief person is a-ducking in the Pyed-Horse yard; follow him, and give him some gin, for they have almost killed him. I followed him (it was Ellis the chimney-sweeper, the biggest of the two lads) cross Moorfields; I saw the people go from him, and there were but two or three people behind him; I gave him a penny or three-halfpence, I don't know which. Then I went back to M'Daniel, and told him he was very safe; then he and I came out of the Artillery-ground together: as we were coming out of the ground, we met one they call Plump (his name Brebrook) and another fellow they call Doctor, that was turnkey at Clerkenwell Bridewell. Plump seeing M'Daniel and I together, said to me, God damn you, you rascal, you deserve to be hanged for that affair of Kidden. M'Daniel said to me, Come along, don't be afraid of any body. We went over Moorfields together. He ordered me to go to his wife, which I did; and after that I went down the Fleet-market, to see if Ellis was safe; I found them both, and told them I would meet them the next morning: they said, they had no money to pay for their lodging; I said, Here is three-halfpence for you, go and lie in the brickfield to-night. Then I went home to Mr. Berry's; he told me he had been at the other end of the town about some business, and he could not come into the Artillery-ground. If this affair of Ellis's being ducked had not happened, the robbery of Salmon was to have been committed on the Friday.

When was it fixed to be off the Friday?—That was determined to be on the Wednesday.

By who?—Berry and I pitched upon the thing in the morning, and he was to go and let the rest know.

Where did you consult this?—We did it in his room, before we went out to go to the Bell.

What did he say to you about it then?—He bade me tell the lads we should go to Deptford to steal the linen on the Friday.

Who did he mean by the rest, which he said he would let know it?—He meant Egan, Salmon, and M'Daniel. On the Thursday night I told Berry of Ellis's being ducked; he said, M'Daniel, Egan, Salmon, and he had agreed, that it should not be done on the Friday, lest the lads should be apprehended on the Saturday, and kept all day on Sunday in the watch-house; and somebody might come to them, to whom they might tell something about my being concerned with them, and so by impeaching me I might be apprehended; so he said they had fixed it to be on the Monday. On which morning I got up by Mr. Berry's orders; he gave me two-pence or three-pence (I cannot be positive which) to go to the Fleet-market to meet them, and bid them stay till nine o'clock, and say I would come to them again; which I did, and returned, as Berry ordered me, to him

VOL. XLX.

at the Plumb-Tree alehouse: there was Salmon and he; he sent me out for M'Daniel; I went to him, and he bid me tell Berry he was shaving himself, and he would come when he had done. I went, and told Berry; he changed a guinea, and gave me five shillings, and bid me not to be extravagant: he gave me that, as he said, to flash to the boys; to shew it to them, and say, I made that last night: I was to pull it out all at once. He gave Salmon half-a-crown to be robbed of.

Was it in one piece?—No; it was two shillings and sixpence.

Who were present at this time?—There were Berry, M'Daniel, and Salmon. Then Berry said to me, Now go away as fast as you can; and I said, At what place shall I stop for you, to see you are going, that we may be both sure? I said, I will stop at the Bell in the Borough, and call for a glass of gin; then you may know and be sure that we are going to Deptford. I left them, and went to the two boys.

About what time was this?—It was about half an hour after nine in the morning. I went with the boys to a house in Little-Britain; there I called for some beer, and bread and cheese; and pulled off my coat, and said, I must go to the Fence to get some money, for the woman has not paid me all. Then I left my great-coat, and went to Berry; and told him to hasten away, for the boys wanted to go. Berry bid me return to them directly, and said, he would be over the water time enough for us. I went to the boys again, and called for another pot of beer, to delay the time. After we had drank that, we went out, to go to Deptford. When we came to the Bell in the Borough, we went in; and in the right-hand box there sat Berry and Salmon; there I gave the boys each of them a halfpenny-worth of gin; I was not to take notice of Berry or Salmon. After we came out, Kelly said, Damn your eyes, there is that old thief-catching son of a bitch, your old master. Said I, Never mind it, I don't belong to him now. Then we went down the Borough market; they bought a breast of lamb for their dinners, and we went to the Black Spread Eagle in Kent-street (which was the house the prisoners and I had appointed for them to come to the next day). We had the lamb fried for our dinners; from thence we went to Deptford.

What time did you set out from Kent-street?

We set out from thence about half an hour after twelve o'clock: I had made them almost drunk. After we went from thence, it was too soon in the day; we could do nothing till it was dark, I told them, so we would go over into the fields, and go to sleep: so, to prolong the time, we went into the fields, and all three of us went to sleep: they slept pretty heartily. When I thought it proper time to awake them, I did; and away we went for Deptford:

What time did you set out after this sleep?—I cannot tell the time.

Was it dark?—No, it was not. We were in

3 C

Deptford an hour before dark. I went with them to the sign of the Ship, the house that Berry and Salmon had appointed to come to. I called for a pint of beer at the door, and bid them stay there; and said, I had a relation in the town, near the Water-Gate, which I wanted to see: I left them, and went to see for Berry and Salmon. I found Berry; he and I went into a public house, I think it is the Duke William's Head; he called for a pint of beer, and bid me return to the two boys, and Salmon should come to the house. I went to them (they were still at the door); I said, Come, let us go into the house; I expect my cousin to come to me.

Had you let the boys into any knowledge of this affair, before you came to this place?—No, I did not: only I had told them it was to steal some linen; they went for no other intent. Then I went in, and called for a pot of beer, and bread and cheese; we eat the bread and cheese, and drank the beer; and called for another pot of beer: in the mean time in came Salmon. He first went and leaned against a dresser for about half a minute, and then came and sat down in the box near us, and began to discourse about going to London (it was then dusk). I saw Berry go by the window; he beckoned his finger, and I went out to him. He said, Be sure follow Salmon when he comes out. I went in again, and Salmon presently went out. I changed half-a-crown, and asked the lads if they would have any gin. When Salmon first came in, Kelly said, There is that old blood of a bitch, the breeches-maker in Shoe-lane; his son and I have been picking of pockets together many a time. I said, Never mind that; what is that to us? I knew the place where he was to stop at; it was just by the four mile-stone: this was agreed upon before. The two boys and I went on; and by the four-mile stone, by a gate, Salmon stood making believe he was making water. Damn me, said Kelly, there is the old breeches-maker; he is suckey, let's scamp him.

What reason did you give Kelly and Ellis for your going after Salmon?—I said, we will take a walk, till it is time to steal the linen.

Was it light or dark?—The moon shone. Kelly said, when he came up to Salmon, God damn you, what have you got there? Salmon said, Gentlemen, take what I have got, don't use me ill. He had the breeches under his arm, and he gave them to me; they were in a blue and white handkerchief, and I gave them to Kelly. I said to Kelly, What money have you got? Salmon said, Here, gentlemen, what money I have got is in my left-hand waistcoat pocket, in a tobacco-box. (He had told me before what money he had got would be there.) Kelly put his hand into his pocket, and took the tobacco-box out, and a clasp-knife and fork; then away we walked on for London, and came into Kent-street as fast as we could, and lodged there all night, at a house where I paid the lodging-money at going down, by Berry's order, to induce the lads to come there again.

What time did you get to Kent-street after the robbery?—I believe we got there about eleven o'clock; the people had no clock in the house.

What money did you take from Salmon?—We looked at that coming along; I knew what was in it before: there were two shillings and sixpence, and a pocket-piece with Skilion on it, or some such name, and a punched mark in the middle of it. [Mr. Cox produced the things mentioned].

Court. Look at this tobacco-box.—Blee. This is the very same, it is riveted within-side; I have had this box a hundred times in my hand before.

N. B. The box was an oval iron box, with a rose, and garter round that; and a lion and unicorn (as on the king's-arms) in basso-relievo on the lid.

Court. Look at this pocket-piece.

Blee. This is the same piece which I mentioned before.

Court. Look at the two pair of breeches and handkerchief.

Blee. These are the same breeches and handkerchief.

Court. Look at this knife.

Blee. It is the same knife.

N. B. The clasp-knife and fork were made to fasten together in the handles.

What was done the next morning, when you lay in Kent-street?—We got up the next morning about seven o'clock, and went over the way to the sign of the Black Spread Eagle (the house that Berry ordered me to go to.) I called for some beer, and said to Kelly and Ellis, Sit down, and I will go get you something for breakfast. I went out with that pretence, and went to the White Bear in the same street, where Berry ordered me to come to let him know. There sat Berry, Egan, and Salmon at the door on the bench. Berry said, That son-of-a-whore M^r Daniel is not come yet; now we must wait for him: go you back, and Egan shall come after you directly. Egan and I walked up the street a little way together. I said, Stop there a bit, while I go over to that shop to buy a lamb's liver for breakfast; he said, he would go on. He went on before, and called for a pint of beer; I came after with the liver. I said to Ellis and Kelly, as I was going to cut the liver, That man deals in Rag-Fair (meaning Egan); at the same time I knew he did not: but I was to say so when he came in. I said, May-be he will buy the breeches; shall I ask him? Yes, said they, with all our hearts. I said to him, Master, will you buy some leather breeches? He said, Let me look at them; if you and I can agree, I will buy them. After he had looked at them, he said, What will you have for them? I said six shillings. He said, I will give you five. He put his hand into his pocket, and gave Kelly a shilling earnest; and said, he had not so much money about him, but he would come in an hour or

two, and pay the rest of the money; and he would leave the breeches in our care till he came back. I said, My friend, will you eat a bit of liver and bacon before you go? He said, I don't care if I do. He sat down by the fire-side, and said, Landlord, let us have a halfpenny-worth of tobacco; and said, God bless me, I don't know what I shall do; I have lost my tobacco-box. (This he was to say to get the tobacco-box of them.) I said to Kelly, Let us sell him the box, may-be he will buy it. Kelly said, No, let us ding it; it is such a remarkable one, may-be it may be known.

What did he mean by dinging it?—He meant to fling it away; I said, No, let us sell it: then Kelly said, Master, I will sell you a tobacco-box, if you will buy it: said he, Let me look at it; he looked at it, and asked, what he would have for it? Kelly asked six-pence for it; he said, No, he would not give it. I said, We will not have dry money, we will have some beer: then Egan said, He would give a full pot of twopenny for it; then Kelly said, he should have it: after he had eat his breakfast, he went out, and goes to Berry and Salmon. I went backwards with the two boys to play at skittles to detain them, but the ground was so wet we could not play: so we found another pastime, called The Devil and Taylors. I kept them there an hour and half; then I said, If the man does not come, let us sell the breeches. I said, I will go and be shaved; and I left my great-coat, and went to the White Bear; but when they came there, they did not like the people or the house, because when M'Daniel came they did not like him. I went out of the house, and saw Berry come out of the Elephant and Castle; they beckoned me over; I went and called for a pint of beer; Berry said to me, You may drink with us; and said, Damn you, where is your great-coat? (which is the same I have now.) He bid me turn back and fetch it, and said, M'Daniel and Egan shall go.

Who were there?—There were all the four prisoners there, sitting in the box going in on the left-hand side, drinking: I went back again to Ellis and Kelly, and said, The barber is busy, and cannot shave me, I must come again in five or six minutes. I said, The weather is cold, I must put my great-coat on; I put it on, and went to the Elephant and Castle to them again. Berry bid me go to the Bell in the Borough, and stay there till he came, and to get shaved. I went away; and, as I was going, Egan and M'Daniel went out; I got shaved, and went to the Bell in the Borough, and called for a pint of beer, and drank it. About an hour after Berry came in, and we had another pint; then he and I went homewards together: we went as far as Ludgate-Hill, there we saw one Mr. Rogers coming along; so he said, Leave me, don't be seen with me; and I left him. At night, when Berry came home, I said to him, Master, be so good as to lend me some money to go to the fair to-morrow. He said, That is right,

Uxbridge fair is to-morrow, the 31st; he lent me eighteen-pence, saying, it was to go to Billingsgate to buy shrimps with: I went to the fair, and came back again on the 1st of August. Berry bid me not be afraid; saying, he would always keep a good look out: and they always said, if I was taken up, Salmon should never appear against me.

You say you went to the White Bear in expectation of seeing the prisoners, and after that to the Elephant and Castle; when you came in there, what did you see?—I saw Mr. Berry, Salmon, and Egan; M'Daniel was down in the yard at my first going in, but he came in before I went away.

Recollect yourself, whether you saw them eat or drink?—I drank part with them, but I had breakfasted before I got there; I know Berry told me they had a rasher of bacon; and he said I had had a better breakfast than they.

Where did he tell you this?—He told me so at the Bell in the Borough.

Was you at the trial of Kelly and Ellis in Kent?—No, I was not.

Where was you at the time of the trial?—I was taken up on the Friday before, being the 8th day of the month.

What day was the robbery committed?—It was on the 29th of July.

Cross-examination.

You have given an account of several meetings and conversations you had with Kelly and Ellis before the robbery was committed; was not the conversation about stealing linen?—It was.

Was there any mention made about a robbery on the highway?—No, none; I said what Berry ordered me to tell them.

Berry. You say Kelly and Ellis went with you under a notion of stealing of linen, and Kelly accidentally pitched on Salmon, and proposed to you to commit a robbery on him?—Blee. No, he did not till we just got up to him; then he said, There is the old breeches-maker, let us scamp him.

Before that had you proposed to him to commit a robbery upon Salmon?—No, Sir.

Whether Mr. Berry had any conversation with Kelly or Ellis?—No, none at all; he did not chuse to be seen in it.

Nor none of the other prisoners?—No, they had not.

M'Daniel. He mentioned that he had been four or five times up in Holborn; I never was there with him in my life.

Blee. He was several times.

M'Daniel. He mentions he was at the Plumb-tree in Shoe-lane: I never was there with him in my life.

Blee. Yes, he was several times.

Berry. What lodging did you lie in at my house?—Blee. Sometimes in Berry's hay-loft, and sometimes in the room adjoining to his: I lay in that room till all the money was gone of Kidden's reward, then I was forced to be in the hay-loft.

Berry. He says I lent him one shilling and sixpence to go to Uxbridge fair; what time, was that?—*Blee.* It was on the Tuesday-night the day after the robbery; Uxbridge fair is on the 31st.

Berry. Uxbridge fair is always the 20th day of the month.

Blee. That is Old Stile.

M'Daniel. Ask him, if he has not had a quarrel with me, and swore he would be revenged on me.—*Blee.* No, never; M'Daniel once got a long knife, and threatened to cut my throat.

Berry. Because I took his brother, that was transported, he always swore he would be revenged of me.—*Blee.* I never swore so; he did not take him.

Salmon. I have never been at the Bell in Holborn these five years.

Blee. He was there, as I have mentioned.

Egan. I want to know, if it can appear by any man or woman that I have been in a house with Blee?—*Blee.* There are several will prove that.

George Holewright sworn.

G. Holewright. I live in Scroop's-court, facing St. Andrew's church, Holborn.

Do you know either of the four prisoners at the bar?—I know three of them.

Which are they?—M'Daniel, Salmon, and Berry. I do not take upon me to know Egan.

Do you know Blee the evidence?—I do.

How came you to know M'Daniel?—I have known him and Berry some years; M'Daniel kept the sign of the Angel in Scroop's-court.

Where did he lodge about July last?—He and his wife as he calls her, came into my house on Ash-Wednesday was twelve-month. He gave me a crown earnest, and they continued there about four months; he lodged there till he was taken up at Maidstone.

Did you ever see the evidence Blee coming to him amongst the rest?—Yes, many times; he was a very handy man amongst them, and a very willing fellow.

Have you seen him often with M'Daniel?—I have seen them together many times. Blee used to come there to wash the house, and clean the dishes; and he used to come often to ask for his master Berry. They used to be generally together.

He has said, in July last he was at M'Daniel's lodgings in Scroop's-court; do you recollect yourself that he was there in that time?—The last time I saw M'Daniel was on the Friday night; and on the Saturday, the day after, he was gone down to Maidstone; but then I thought he was gone down to Coventry: and I saw Blee at my house much about that time. They were very busy together; but I never did expect to be called upon in court about these things, and have made no account of this; I cannot be exact as to the last time Blee was there.

Was you ever in the Artillery ground?—I was, and saw Blee there, running backwards

and forwards; that was, I remember, on a Tuesday: I don't know in what month; but it was when the White regiment marched.

In what manner did Blee appear there?—I think he had a great coat on; running backwards and forwards; I said, Tom, what are you at? He said, Hold your tongue, hold your tongue; I saw him cross several times.

Did you see either of the prisoners there?—I did not see any of them, as I remember.

You say M'Daniel went down to Maidstone assizes; did he tell you he was going there?—No, he never mentioned a word to me of that; he said he had taken a man in Smithfield for a murder, and he expected to have the reward; and said, he should go to Coventry one day or another.

Did you know the prisoners at the bar were acquainted together?—I have seen M'Daniel and Berry together especially, Salmon the least: I have seen them all together, except Egan; him I never saw, to my knowledge.

Have you seen Blee with them?—I have seen him with all three of them; he was a sort of a runner to them, as I thought.

Did they appear as of one company when you have seen them together?—Very often; and if any thing was to be done, Blee used to run backwards and forwards; and there was whispering together, but it was nothing to me.

Had you ever an opportunity of hearing their discourse?—No, I never had.

Berry. Where have you seen us drinking together?—*Holewright.* At M'Daniel's, when he kept the Angel in Scroop's court.

How long is that ago?—It is about five years ago.

Have you seen me lately?—I have seen you lately at the Union Arms in Union court. I have seen them all three there.

How long is that ago?—That may be about seven or eight months ago.

Berry. We have been in gaol seven months. —Did you ever see me up at your house where M'Daniel lived?—*Holewright.* No, I never saw you within my door; I have seen you about the door in the court, once, twice, or three times.

Anne Pattey sworn.

A. Pattey. I know Egan and Salmon. I live servant at the Plumb-Tree in Plumb-Tree court.

Court. Look about the court; do you see them?—*A. Pattey.* I don't see them.

Go down, and look about till you find them out.—Egan is lame on his right leg. (She goes down and looks at Egan, but said she did not know that to be him. N. B. He is a lame person.)

Do you know Blee?—I think I do; he was once at our house; he came and had two half pints of beer, my master drew him one, and I another; he stood with his back towards me.

Did you ever see Blee and Salmon together?—No, I cannot say I have.

James Kirby sworn.

J. Kirby. I live in Cross-street, Hatton Garden.

Do you know any of the prisoners at the bar?—I know three of them, Berry, M'Daniel, and Salmon.

Where have you seen them?—I have seen Berry and M'Daniel at the Two Brewers on Saffron-hill; on the 8th of July they were drinking at the door.

Did you see any of the others in company together?—I have seen M'Daniel and Salmon at the Union-Arms in Union-court drinking together; I believe it was in the same week, may-be a day or two after the other; they were busy together in discourse.

Did you ever see Blee in company with them?—Blee came in that evening at the Union-Arms just as Salmon went out, and stayed there some small time; M'Daniel's wife came in, and they settled something that Blee had sold for her.

Did you ever see them together after that time?—I saw M'Daniel, Berry, and Blee smoking at the Union-Arms in a trifle of time after; may-be the next week after the 8th day of July last.

From any thing that you saw pass, do you think they were acquainted together?—They were very well acquainted; Blee appeared to me to be M'Daniel's man.

By what do you think he was M'Daniel's man?—I have seen him come several times to the Union-Arms to fetch beer for his master.

Did he use to appear as if he shaved often?—No, his beard was very long most of the time I knew him.

How was his beard at that time you saw him last at the Union-Arms?—It was very long at that time.

Did you ever see them three together any other time?—No, never but once; but I have seen two of them together, by turns, several times.

Did you hear of Salmon's being robbed?—No, not a word of it, till I was told of it by the constable.

Salmon. How many times have you seen me at the Union-Arms?—*Kirby.* I saw Salmon once in the kitchen with M'Daniel, and another time sitting at the door, and Blee came while he was with M'Daniel drinking, and fetched both away in a great hurry: before Blee came, they had got three dogs, and were talking about them; this was a little after the 8th of July.

Berry. What month was this in?—*Kirby.* It was in the month of July.

Was it in the middle or the beginning of the month?—I cannot say within a fortnight.

What apparel was Blee in when you saw him there?—In his usual apparel.

James Price sworn.

J. Price. I know John Berry; he lived in George-yard, where I now live, I have seen

M'Daniel frequently with him there. I have also seen Egan with him there.

Do you know any thing of Salmon?—Salmon came into the yard in August last, and asked me if I had seen Berry; I directed him to the Hat and Tun, where I had seen him go.

Do you know Blee?—I had a warrant against him and young Berry. Berry kept Blee from me in his house.

At what time was that?—I believe it was about a year ago; I believe I had the warrant in the latter part of February. I remember about the beginning of August I saw Berry, M'Daniel, and Egan, at the Two Brewers, at the bottom of Saffron-hill.

Have you often seen them together?—I have often seen M'Daniel and Berry together.

Did they seem to be acquainted?—They appeared to me to be very well acquainted, for they were almost always together.

Berry. How many times may you have seen M'Daniel and I together?—*Price.* I believe a hundred times and more, I dare swear; they were seldom ever apart; you would seldom see one without the other.

How long had you a warrant in your hands to search after Blee?—I believe I had it six months; I could not get at him: this was about the time that Kidden was taken up, and they were afraid of bringing the affair out.

John Samms sworn.

J. Samms. I know Berry, M'Daniel, Egan, and Salmon.

Do you know any body at your left hand?—Yes, that is Tom Blee.

Do you know whether any of them were acquainted together, and who?—I have seen Berry, M'Daniel, and Egan together, at the George on Saffron-hill.

At what time?—For these two years past.

When was the last time?—I cannot say in particular; I saw them, I believe, in February or April.

Did they appear to be tolerably intimate?—Egan has come and asked me many a time, whether Berry was at home.

Did you ever drink with them?—I have two or three times; M'Daniel has come and asked me many a time, whether I had seen Berry. (my stable was opposite to Berry's) I have directed M'Daniel where to find him.

Have you any reason to think they were acquainted with Blee?—I have; Blee lodged in Berry's house; they all seemed to know Blee. I have seen Blee with them all together, except Salmon.

Where have you seen them?—In George-yard.

When have you seen them there?—I cannot say the times when; I have seen them divers times together.

What were they doing?—They were talking together.

Berry. Was you ever up stairs in my house to see what beds I had?

Samms. I know my lord (that is, Blee) al-

ways went up stairs; and when Berry turned his wife out, Blee used to lie there.

Berry. When he had neither shoe or stocking to his foot, was he fit to lie with me?

Samms. I know, when Berry has turned his wife out, he has took Blee in, and locked the door.

Q. to Kirby. Look at this tobacco-box; did you ever see this before?—*Kirby.* Yes, I have, I am pretty sure of it.

Whose property is it?—I think it belongs to M'Daniel; I remember the time when Salmon and he were drinking at the Union-Arms together; when Salmon was gone, there was some tobacco left upon the table; this box was taken out by M'Daniel to put the tobacco in; it is a very remarkable one. I am pretty positive it is the same.

When did you see it?—I believe it was the same week the 8th of July was in.

John Brayder sworn.

Q. Look at this pocket-piece; do you know it?—*Brayder.* (He takes it in his hand.) I sold a piece once pretty much like this; there was on one side of it wrote Skilling; but there was not this mark on it when I sold it (meaning the mark which Blee said Salmon made in the middle).

Do you take it to be of the same specie of that you sold?—Yes, it was; there was the same writing on one side of it.

Who did you sell it to?—I sold it to a woman.

Was any body with that woman when she bought it?—Yes, one Blee was.

Should you know him if you was to see him again?—I should.

Court. Turn about, and see if you can find him.—*Brayder.* This is the man (pointing to him).

Q. to Blee. Was you by when this man sold such a pocket-piece as this?—*Blee.* I was; he sold it to M'Daniel's wife, or company-keeper; she gave him three-pence, and a halfpenny-worth of gin for it.

Where was she when she bought it?—It was by the Two Blue-Posts in Holborn, in the beginning of July.

Q. to Brayder. What time was it you sold that piece you mention?—*Brayder.* I don't know the time, but I believe it was in the cherry season.

What did you sell it for?—The woman gave me three-pence and a half-penny dram for it.

Joseph Cox again.

Cox. I have known M'Daniel two or three years; I never saw the other till I saw them all together at Maidstone assizes; I went down on the 14th of August.

What was your business there?—I am chief constable of the lower half-hundred of Blackheath; and I had an information about the 3rd, or the beginning of August, that a breeches-maker had been robbed in the parish

of Deptford, where I live, by three footpads, and that two of them were taken by M'Daniel and others, and sent to Maidstone gaol; and the third person, whose name was Thomas Blee, I was informed kept company with M'Daniel; and after two or three days searching, I very fortunately took that third person, with the help of a constable of Greenwich, on Friday the 9th of August, in Newgate-street, very early in the morning. I took him directly to the water-side, in order to carry him to Greenwich. When we got him into the boat, he said he would discover all he could concerning the robbery on the breeches-maker. I bid him not do it then, because of the watermen in the boat, till we came to a magistrate. We took him before a justice of peace; there he made an information: this is it. (Produced one.)

Do you know whose writing it is?—The name is Thomas Blee's writing, I saw him write it; the other is justice Bell's writing.

Was it read over to him before he signed it?—He read it over, and I myself read it over to him before he signed it.

When was it taken?—It was taken on the 9th of August, but not sworn to till the 13th; it was read over to him before the justice; and the justice and Blee signed it in my presence.

[It is read to this purport:]

The INFORMATION of THOMAS BLEE, of the Parish of St. Andrew, Holborn, Breeches-maker, taken upon oath, &c.

"*Xent, to wit.* This informant saith, That about four weeks or upwards ago, Stephen M'Daniel and John Berry desired him to look out, and they gave him money to that intent, to get into company with two lads, or men, which he should afterwards betray, by getting them into a robbery, and they share the reward given upon their conviction; and in order thereto, they did go frequently with the informant into the adjacent fields, but could not meet with any. And this deponent saith, that he has met Stephen M'Daniel, John Berry, James Salmon, breeches-maker, and James Egan, of Drury-lane, cordwainer, in order to concert and put this their said scheme into execution; and that he the said deponent met with John Ellis and Peter Kelly (now prisoners in the county gaol at Maidstone) in the Fleet-market, and as he knew them to be persons of bad life and conversation, introduced himself into their company; after treating them, he asked them to go with him to Deptford to steal some linen, which they agreed to do on the Thursday following; but after that put them off till the Monday following, by the direction of the said M'Daniel, Berry, Salmon, and Egan, who had all at different times seen the said Ellis and Kelly, and approved of them for that purpose; and judged it most fit to have the robbery committed on the Monday morning, lest they should be detained near London on the Sunday, and some circumstances might

render their schemes abortive; and that they met at the Bell in Surry as they went.

"And this deponent saith, That it had been concerted between them, that the intended robbery should be between New-cross turnpike and Deptford, to intitle them to the reward offered by the said parish: that he took the said Ellis and Kelly to a public-house, known by the sign of the Ship, where they had promised to come to him: and after staying there some time, he left Ellis and Kelly at the Ship, and went out to look for Berry and Salmon; he found Berry, who counselled this deponent to return to Ellis and Kelly, and said, that Salmon should follow him immediately; that he returned, and Salmon did come into the house at the sign of the Ship, and stayed there near an hour. During which time, he, this deponent, treated them with bread, cheese, beer and gin; and Salmon going away in the evening, they followed, and agreed to rob him in the first place that Salmon stopt at, which was the four-mile-stone, under a pretence to urize, but it was in order that they might overtake him, that being thought the most convenient place; that they came up with the said Salmon there: and this informant, without his, or either of the said Ellis and Kelly producing any weapon, took from under the said Salmon's arm two pair of leather breeches, which had been purposely marked, particularly on the waistband or pocket; and that he took out of his pocket a clasp-knife, and a tobacco-box, which tobacco-box was, he says, M'Daniel's; but as it was a particular and very remarkable one, he lent it to the said Salmon on this occasion, which had in it two shillings and sixpence in silver, and a silver pocket-piece, which he had submitted himself tamely to be robbed of; and after they had left this said Salmon, they went and lodged in Kent-street, and in the morning he took them to the Spread-Eagle, where he had agreed with the said M'Daniel, Berry, Salmon, and Egan, to take them; that about seven in the morning, the said Egan came in accordingly; and that this deponent told the said Ellis and Kelly, Egan dealt at Rag-Fair, and he asked the said Egan if he would buy the said leather breeches, and he agreed to pay five shillings for them; that he gave them a shilling in part; after that he called for a pipe of tobacco, and said that he had lost his box, with intent to buy that which they had taken from Salmon; that he bought it of them for a pot of twopenny; then he went out to get the remainder of the money for the said breeches, and went to another ale-house in Kent-street to M'Daniel, who immediately went with Egan, and secured the said Ellis and Kelly with all the things, except the said tobacco-box, which Egan had purchased of them, as he believes. And this deponent farther saith, that he has several times been in company with the said M'Daniel, Berry, Salmon, and Egan, and they have all severally encouraged him, and said, If he should be impeached, they would say nothing against him; and they promised to share the

reward and subscription-money raised, between the said Berry, Salmon, M'Daniel, Egan, and this deponent; and that this was contrived to convict the said Ellis and Kelly on purpose to get the reward.

"Sworn before me, — BELL."

Cor. As soon as this was taken, the same night I obtained a warrant against M'Daniel, another against Berry, another against Salmon, and another against Egan. I was advised to attend the trial of Ellis and Kelly, and not to discover that I had Blee in custody till after the trial; and in order that he did not make his escape, Thomas Warren went down to assist me. When I came to Maidstone, I informed myself as soon as I could, who was on the back of the bill of indictment of Ellis and Kelly. Their trial came on the 15th of August at night: I came into court very soon after the trial began; Blee was then in my custody, but nobody knew it then at Maidstone; he was brought down in the night, and stopped short of the town. When I came in, I heard Salmon giving evidence against Ellis and Kelly; he said, that he went in at the Ship at Deptford, and had a pint of beer; that he saw three men drinking in a box, and Ellis and Kelly, the then two prisoners at the bar, were two of the three persons, and the other was a carrotty-bearded fellow; that after he had drank his pint of beer, in the dusk of the evening he went out, in order to go home to London; and having got as far as the four-mile stone, opposite to which, at a gate, he stopped to make water, in the mean time the three men came up, and one of them damned him, and asked, where he was going? He said, he desired him not to swear, and said he was going to London; upon that one of them, the carrotty-bearded fellow, snatched the bundle from under his arm, and punched him on the breast. The judge was pleased to ask him, if it was light enough to see their faces, and whether he was sure the prisoners were two of the men? Yes, he said, it was light enough to see their faces, and he was sure they were two of the people that robbed him. Then he went on, and said, that Kelly, one of the prisoners at the bar, drew a knife, and said, Damn him, let us search him; and took out of his pocket an iron tobacco-box, in which was a guinea in gold, two shillings and sixpence in silver, and a silver pocket-piece, and likewise a clasp knife and fork out of his pocket: he said, the bundle contained two pair of leather breeches marked with J. S. and a figure of 4 under the right pocket; and that the handkerchief had an oilet-hole at each corner; and all these goods were produced in court, and he looked at them, and said, they were the goods he was robbed of, and that they were his property.

Are these produced here the same?—These are the same goods; they were delivered into my care, and have been ever since. The judge was pleased to ask him, how he knew the pocket-piece? He said, by a particular mark

it had in the middle. His lordship was pleased to ask to see it, and it was delivered to him by the constable of Greenwich.

Court. Look at that pocket-piece and tobacco-box.

Cor. I am sure they are the very same things he swore he was robbed of. I asked the judge what he was pleased to have done with the things? His lordship bid me take care of them till the persons were tried. He was pleased to ask the prisoners, if they would ask Salmon any questions? Kelly desired Salmon might be asked, whether he saw him draw a knife? Salmon said, Yes, you did draw a knife; but I suppose you will deny all the rest presently. Kelly said, That cannot be, because he had never a knife. There was one circumstance which I had forgot: when the judge had asked him, if it was light enough to see their faces, he also asked him, if he could know the carrotty-bearded man, and if he had ever seen him before? He said, No, he had not, to his knowledge.

Did you see either of the other prisoners there?—I saw M'Daniel, Salmon, and Egan.

Did they all give evidence?—They did.

Berry. Did you see me in court?—*Cor.* I did not; I saw him at Maidstone in the time of the assizes. After Salmon had done, Egan was the next evidence: he said, he dealt in old clothes; that on the 30th of July he went into Kent-street to the Lock-hospital, to see if they had any old clothes to sell; but they not being up, he went into the Black Spread-Eagle to get him a pint of beer; that he observed three men sitting in a box drinking, and as he was telling the landlady his business, one of them, a carrotty-bearded fellow, not taken, (for they did not know he was taken then) asked him, if he would buy two pair of breeches? he said, Yes, if they could agree for the price; and that they did agree for five shillings; and that he gave Kelly one shilling earnest to bind the bargain, till his wife should come with more money, or something of that sort; and he was asking the landlady for a half-penny worth of tobacco; and as he was saying he had lost his tobacco-box, one of the men offered to sell him one (I have forgot which of the prisoners he said that was). He said, he bought it of him for a pot of two-penny (indeed they sell no other liquor at that house): he said, as he was looking at the breeches, he knew them to be Salmon's property, having heard that Salmon was robbed over-night; and after some time he went out, under pretence to get the rest of the money, but meeting with Mr. M'Daniel, an acquaintance of his, and knowing him to be an officer, he told him the story, and M'Daniel said, he need not give himself the trouble to look for an officer, for he could do as well as a constable; and so he returned back with him, and took Ellis and Kelly at the Black Spread-Eagle; and upon searching them, took out of Kelly's pocket a silver pocket-piece, the same that was then produced, and a shilling, and a clasp-knife. The judge was

pleased to ask him, how he knew the breeches belonged to Salmon? He said, by a particular mark they had. He was asked, how he knew the mark? He said, he had bought breeches of him for himself, and, I think, his son, 12 years, and knew his mark particularly well. The judge asked the prisoners, if they would ask that witness any questions? And Kelly desired he might be asked, if the carrotty-bearded man and he did not wink at each other before he offered to sell him the breeches? And Egan also said, what gave him the greatest suspicion that the breeches were stolen was, because he had seen one of the two prisoners ducked for picking of pockets in the Artillery-ground. M'Daniel was the next witness; he said, he met Egan, an acquaintance of his, and Egan knowing him to be an officer, told him the story; and he went with him and took Ellis and Kelly; and upon searching Kelly, he found upon him a silver pocket-piece, the same that is now produced in court, a shilling, and a clasp-knife (I suppose the fork was then lost). He said, that was all he had to say, only there was a drummer in the room when he was taken, whom he ordered to assist him, which he did.

Did he say any thing about the tobacco-box?—

I don't remember that he did. The moment the people were called into court to give evidence, I had fixed my eye pretty steadily on Mr. Berry, whom I asked to go with me to drink a glass of wine, (he was in the other court) which he did, and I secured him at the Bell; then I went to secure the others according to my warrants. As soon as they had given their evidence the cryer ordered them to go out. We secured them. Upon searching M'Daniel, I found this knife upon him [Produced in court a singular long-sheathed knife of the Dutch sort]; I was told of it before. As soon as they were secured, I was forced to get leave to put them in the mayor's gaol. I asked Salmon in particular, if he knew one Thomas Blee? He did, as he had done before in court, say he knew no such man. I said to him, I am sure you must know him; he as positively denied it again: the next day when he was carried before the justices, (I believe there were 20 or 30 of them) Blee was brought face to face to him; he looked at him, and then declared he never saw that man in his life before. I asked M'Daniel that night, if he knew Tom Blee? He denied he knew any such person. I asked Egan the same, and he as positively denied it as the rest, at the time Berry was in custody at the Bell. I remember, as we were going along to the Bell to drink a glass of wine, he asked me what I thought would be the fate of Ellis and Kelly, and who was to pay the expence of the prosecution, for it was very considerable; upon that I could not help observing, that if they were convicted, there would be sufficient to pay the expence very handsomely; and if they were acquitted, the prosecutors, I said, I believed must bear the expence themselves; he said he knew that, and

for that reason if this affair was well over he never would be concerned again; by that time we had got to the Bell the discourse dropped, and I took him in custody. When I had secured the others in the mayor's gaol, I went and fetched Berry from the Bell; after I had got him into that gaol, I asked him, if he knew Tom Blee? He said, he did not know any such person. I put them in separate rooms that night, and set a man in each room with them. The next day, when Berry had been carried before the justice and was committed, he and I walked together from the Bell to the gaol; in going along he said, he hoped the gentlemen would not admit M'Daniel an evidence, (for at that time it was thought he would get to be an evidence) because he had saved himself once before by the same means; but said he, if the gentlemen will admit me an evidence, I can do for M'Daniel and another man, (whom he named) that is not in custody; whom I know not whether I should name.

Court. Name that person.

Cox. It is Ralph Mitchel. I asked him, if he would tell me any particular that he would alledge against him? He said, he could write to me in a few days; but he never did. As to M'Daniel, the next morning after he was apprehended, he desired to speak with me in the room where he was confined; I took Mr. Warren, one of the constables of Greenwich, with me, and went to him. He said, he had rather speak to me by myself; with that Mr. Warren withdrew: he there cried a good deal, and begged of me to be his friend, and got him committed for farther examination; for he said he could make a very great discovery relating to the public, and could put 500*l.* into my pocket. I told him I would acquaint the gentlemen with what he said. Accordingly I did, and used my endeavour to prevent his being committed for farther examination; he was afterwards committed upon the warrant.

Berry. Did you see me any way busy about the affair?

Cox. Berry kept M'Daniel, Salmon, and Egan company; and because it was to be my place to take them, I kept company with them all four for two hours.

Berry. Was I busy in preferring the bill?

Cox. I don't know that he was.

Berry. Was I not sitting in Nisi Prius court to see the trials there?

Cox. Yes, he was. When I talked with Berry afterwards, he denied knowing Blee, and pretended to be a stranger to them all; and said, he came down into that country about horses. As for Egan, he denied he knew Blee, or ever saw Berry. Some time after, I had some talk with him again; then he declared he never saw Berry in his life till he saw him in the Gravesend boat.

Q. Can you recollect whether there were any enquiry made by the judge, whether they knew one another upon their oaths?

Cox. There was nothing said of that sort, that I remember.

VOL. XIX.

M Daniel. Whether or no I did not go to 'squire Bell, to charge Blee with a robbery after he was taken?

Cox. I know but little of that; but here will be an evidence that can give a very good account of that.

Elizabeth Pragnell sworn.

Elizabeth Pragnell. I live at the Ship in the Broad-Way, Westminster. I remember seeing Blee at our house on the 29th of July in the evening, in company with two lads, each of them dressed in blue-and-white striped waistcoats very dirty; and I saw those two lads at our house the next day, being the 30th; I have heard since one was named Kelly, the other Ellis. On the 29th, in the evening, they came and sat down at the door, and called for a pint of beer; I believe they were there the best part of an hour. The evidence Blee enquired for somebody, I don't know who it was. He went out, and came in again in a little more than half an hour. Then the two lads said to him, Will you pay for this pint of beer? He said, Yes, come in, and we will have a pot of beer; then they came in, and called for a pot of beer; one of them went over the way to a shop for some bread and cheese; he brought some in, and they eat it; they stayed, I believe, about an hour and half, and went away when it was dark. Salmon also came in, with a bundle under his arm in a handkerchief, when they were there; he called for a pint of beer, and pitched himself against the dresser, facing them, and looked at them, then went and sat down in a box with his back toward them: he went out a little before them; I remember Blee went out two or three times.

What liquor had Blee and the lads?—*E.*

Pragnell. They had two pots and a dram; I cannot say whether it was a quarten or not; Blee changed half-a-crown, and paid for the liquor. On the forenoon the next day, the two lads that were with Blee were brought in again by a constable, and a drummer, named Cornack, to assist him. The man that I took to be the constable, which was M'Daniel, called for a pint of beer; he asked me, whether I knew them two boys to have been there overnight? I said, Yes. Then he asked me if I knew that man at the door? I said, Yes; he had a pint of beer at my house the last night, (that was Salmon).

Did he mention Salmon's name, or say he knew him?—No, he did not.

James Cornack sworn.

Cornack. I am a drummer; I was quartered at the Black Spread Eagle in Kent-street. On the 30th of July last, I came down stairs between eight and nine in the morning; I observed three men sitting together in a box, one of them had a carry beard, which was Blee; they had had some victuals, and there was some drink before them.

Court. Look about, and see if you see Blee here.

3 D

Cornack. There he stands (pointing to him); his beard is now much about the length it was then, (it might be six weeks growth) the other two were the two prisoners that were cast at Maidstone. Blee said, I think I will go out and get shaved; he went out. In about eight or ten minutes after that, in came M^dDaniel, with a darkish coloured coat on; he laid hold of Kelly, and said, Come out, you blackguard dog. I said, What makes you abuse the lad in this manner? He said, Damn him, I have got a warrant against him, I am an officer; they have robbed a man just against the four mile stone near Deptford; I desire you would aid and assist me. I said, If that is the case, I will. He took a piece of rope out of his pocket, and tied them together. Now said he, I will take care of them; do you step down to the Elephant and Castle, you will see two men, one in a light surtout coat, and his own curled hair; I will pay you for your trouble. I went there; there sat Berry the prisoner, and Salmon was coming in from making water. I said to Salmon, I believe you are the gentleman that I want; there is a gentleman at my quarters that wants to speak with you: Berry said, Go along with him. Salmon went with me; coming along the street, I said, What is the matter? What has happened? Said he, I happened to be at Deptford-yard last night, and had taken some money, and had some breeches with me; there were three chaps stoop me, and robbed me of a guinea in gold, half-a-crown in silver, a tobacco-box, and two pair of leather breeches tied up in a handkerchief; and if the breeches are mine, they are marked with J. S. and a figure of 4 on the right pocket; and the handkerchief has an eilet-hole at each corner. We went in; there stood the bundle on the table, and Egan sitting in a box opposite the lads. M^dDaniel asked Egan, what he had in that handkerchief? He answered, it was no business of his, for the handkerchief and the things in it were his; for he had bought them of the lads. I made him open the handkerchief, we found it marked at each corner as Salmon had said, and the breeches J. S. 4. M^dDaniel searched Kelly, and I saw him take a clasp-knife out of his pocket, a shilling and a silver pocket-piece; he gave him the shilling back again, and said the pocket-piece was marked in the middle, and shewed it me, and desired me not to be mealy-mouthed when I came before the justice; this he said once or twice. They tied the things all up in a handkerchief, and we set out with them to a justice of the peace at Greenwich.

Did you see ever a tobacco-box?—No, I did not.

Court. Look at this pocket-piece.

Cornack. I think this is the same; it has much the same mark; it is hard for me to swear it, but I believe it is the same. Going along, M^dDaniel said to the lads, You have made a good hand of it, if you have spent the guinea already; the lads said, they never took a guinea from him. M^dDaniel said to me,

One of them has got money in his stocking, but let them keep it, poor things, they'll want it; he wanted them sadly to confess the robbery, and told them, if they would not, they would certainly be hanged.

What were his words, as near as you can recollect?—He said, You dogs, I would have you confess when you come before the justice, it will be the better for you; and tell me where the other fellow is gone to: they said, they could not tell any thing about it, and would give him no answer: they said to him they wanted to go to some Bridewell, which I do not know. He said to them, if they would confess, he would do all in his power for them, and he would untie them when they came into Deptford, and they should go by water. We came to the Five Bells at the end of Deptford road, there M^dDaniel called for a pint of beer; the people brought the beer out. M^dDaniel asked the lads, if that was the house they had been drinking at the night before? They said, No, but they had been drinking at the sign of the Ship; we drank the beer, and then set out again: Egan and Salmon followed at a distance. When we came to Deptford, M^dDaniel took the lads in, and desired Egan and Salmon to stay at the door; he called for a pint of beer.

How came Egan to follow you?—I don't know; he came from my quarters.

Did M^dDaniel charge him to assist?—Not a word as I heard. When he and Salmon were at the door, M^dDaniel asked the landlady if she saw them lads there the night before? She said, Yes, they were there the night before, and had some bread and cheese; then he said to her, Did you see that man that is now at the door? (meaning Salmon) She said, Yes, he was here at the same time, and they went out about ten or twelve minutes distance one of another. Said M^dDaniel to me, Take notice of what this landlady says, and don't be mealy-mouthed when you come before the justice. Then we set out and went to Greenwich; and in the clerk's office they wanted M^dDaniel to be bound over to prosecute; M^dDaniel said he could not, for he had a bit of an estate left him in the country, and he could not be there at the time of the assizes; then the justice's clerk was pleased to bind me over. We stayed at Greenwich and had some beer, and were pretty merry till almost nine at night; coming home all together, they let me and Egan go before. Egan swore by the great God and the sweet Jesus, he would not appear against them at the assizes. Said I, You are bound over as well as I, and I cannot see you can be off from going down. He said, O! by Jesus, it is only changing my parish; it has cost me three shillings to-day, and the breeches may go to the devil, for I will never appear against them. We parted about ten that night; I went to my quarters; M^dDaniel told me to come to his house in Union-court. I went in about a week after, but could not hear of such a person; I went to the Union-Arms, and found the landlord knew something of him, and I found he

lived in Scroop's-court; I went and asked there for him, but never could find him at home, although I went there three or four times; his woman always told me he was gone into the country. I saw him once, but that was by mere chance; he was then dodging me, or somebody else, at the end of Parliament-street.

Was you at the assizes at Maidstone?—I was; when I came there, I could not find any of them; they kept out of my sight, I imagined, for fear I should come in for part of the reward. At last I happened to meet Egan in the street: I said, What, have you done the thing? (I meant, found the bill :) he said, No, we shall not do it this day or two; thinks I, I'll watch you: I did, and by-and-bye came Salmon and M'Daniel, and, I think, Egan, and one Sergeant, a constable; they and I went into the clerk's office to get the bill of indictment drawn, Berry did not go in, I followed them. When they came in, the clerk said, Are you all here? Yes, said M'Daniel, we are all here. Said the clerk, There are six of you. There are but five of us, said M'Daniel. Said the clerk, Is there not a drummer? Oh! said M'Daniel, I had forgot him. After we had prepared the bill of indictment, I went to the Cock at Maidstone, there sat Berry; I did not recollect him at that time; said he, How do you do, drummer? I said, You have the advantage of me, I cannot say I know you. No, said he, don't you know that morning when you went to the Elephant and Castle in Kent-street for Salmon? Then I said, I believe you are the gentleman that sat there in the box. Yes, said he, I am: then he asked me, what I thought of those lads, will they be convicted? I said, It appears very plain against them. Then he said, If they are not, I must either beg my bread, or go upon the highway myself.

Berry. Were there any company by at this time?—Cornack. No, there were not; Berry was sitting by himself, he generally was by himself, except he was with his companions.

Are you certain he said these words to you at that time?—I am positive of it he did.

Mory Hussey sworn.

Hussey. I live at the Elephant and Castle in Kent-street, I am servant there; my mistress's name is Jane Smith. There came three men into our house, and after that came in M'Daniel; they had a rasher of bacon for breakfast. I don't know the others' faces.

When was this?—It was in the last summer time.

Thomas Sergeant sworn.

T. Sergeant. (He is shewn the tobacco-box.) I have seen such a one; I made a remark that the unicorn's horn was broke off the box, when M'Daniel shewed it me above a year ago; this I see is broke as that was. His box has been sent to my house many a time, to be filled with tobacco; it is near a year ago since I saw it; this is like it, but I cannot tell this is it.

How came M' Daniel to shew it you?—He shewed it me as a piece of curiosity; saying Here is an old thing, a-curious thing. I said, It is not perfect now, here wants the horn to the unicorn.

Henry Sergeant sworn.

H. Sergeant. I know all the prisoners very well; I was at the taking them all at Maidstone assizes last.

Court. Give an account what you know of them.—Sergeant. M'Daniel said I was a young constable, and I should have my share of the reward; he should take the money, and he would see me paid.

What reward did he mean?—The subscription-money of our parish, for the two lads that were tried, John Ellis and Peter Kelly; I carried them down.

Did you produce these goods there?—I did. Where had you them?—I had them of justice Bell, who sent for me, I being a constable.

What passed when he said, You are a young constable?—The prisoner Berry said, We shall have a good supper if the prisoners are convicted; and if they were not, he thought he must beg his way home. As I was going along the road with Ellis and Kelly to Maidstone, they told me there was one Tom Blee concerned with them in the robbery; and also where he lived, and what sort of clothes he wore. I took it down in writing; the justice desired me to go and take him; I said, I would give directions to a thief-catcher, which I did to Ralph Mitchel; but he refused to act in it.

Was you upon the trial?—I was.

Was Salmon a witness?—He was; he swore he lost these things. Also Egan and M'Daniel were both examined upon it.

Berry. Did you see me concern myself at all in the affair, or was I upon the back of the bill?—H. Sergeant. No, he was not on the back of the bill; he had no business there, if he could have trusted his friends with the money. I heard M'Daniel and him both say, they would share the reward.

Berry. Did not you see me sitting at the Cock all the while?—H. Sergeant. No, he walked about with us.

Q. to Blee. You say Berry gave you a crown, what money was it?—Blee. He gave me a half crown and two shillings and sixpence that day I went with the lads to Deptford.

BERRY'S DEFENCE.

Berry. On the 25th of July I was out of town all day, and returned the Sunday following; and stayed at home all day the Sunday Blee tells you he was with me, and I gave him a crown. If your lordship will indulge me to put it off till next sessions, then I can bring witnesses to prove he falsely accuses me. I went out on the 5th of August to Bromley fair; I saw Blee with a saddle on his back; he is a pilfering sort of a fellow. I went and took him by the collar, and said, I would

chastise him; he said, Mr. Berry, I can tell you a great deal, if you will not hurt me. I said, If you can tell me a great deal, tell me where my goods are. I heard on the 13th of August that he was taken up at Greenwich; I went there, and took M'Daniel over there, to see if he was taken, on purpose to have charged him with my goods. My son is gone, he has pushed him away, and I have never seen him since, and they would never give me any answer that they had got him. I asked Mr. Sergeant, if he had got him? he would not tell me. They never took him to give any evidence before the justice. People may go a-thieving for ever, if they may get off in this fashion.

M'DANIEL'S DEFENCE.

M'Daniel. I was called out about the 30th of July to go over to the King's-bench; I met this man Egan: he desired me to go and take a couple of thieves in Kent-street; I said, What have they done? he said, I believe they have broke open some house, and stole these things. I went with him to the Elephant and Castle in Kent-street, and stayed there some time, till we sent for Mr. Salmon; and when he came, Egan came with him to me. I said, Is the man come? He said, Yes; then I went with Egan to the Black Spread Eagle; there were these two men sitting; one of them said, I believe I have done now. I turned him about, and searched him, and took these breeches from under their arms, and also from one I took this pocket-piece. After this I said to Salmon, The only way to save expence is to examine them before colonel Bell. In carrying of them down, the least of the two said, I wish I could be admitted an evidence, I would be glad; I said, You dog, where is the rest of you? where is the other fellow, what is his name? This lord Blee lived along with me six or seven months, I never knew his name; when he told me my lord, I guessed directly; one of them wanted to be admitted an evidence before justice Bell, and he would not admit either of them. After that I heard my lord was taken, I goes down to Greenwich, and went to Mitchel at Deptford; and said, Here, Cox has taken the other fellow, Ralph. will you come up, and see if he has got him? He was afraid of being taken upon some warrants, and would not go; so I went to the colonel myself, the clerk was there, and he was very ill; he said to me, Mr. M'Daniel, he is not taken, if he was, he would be brought to me. After that I stopped a man that had murdered another at Coventry; I brought him to Hicks's-hall, the justices committed him to New-Prison. The gentlemen told me, I must go down to Coventry along with him, I went down to Maidstone; there I said I could say nothing to the robbery: the drummer could say as much as I could as to the pocket-piece and tobacco-box. As God Almighty is in heaven, I know no more of them than your lordship there; I have taken a great many thieves, and have ventured my

life, and been shot at by them. I never had my name brought in question; I have been offered money to let prisoners go, but I never would do it: I could have had threescore pounds to have done it.

SALMON'S DEFENCE.

Salmon. That fellow that swore I had been at the Bell in company with him has sworn false; I never was in company with him in the whole course of my life, nor I have not been in that alehouse these five years.

EGAN'S DEFENCE.

Egan. Please to ask where the Bell is? I do not know where it is; I have no knowledge of that man in the world (looking towards Blee).

Q. to Berry. Have you any evidences to call to your character?—*Berry.* Call Henry Warrington. (He was called, but did not appear.)

Berry. I lived seventeen years in the yard where this man lives, that is, James Price; will you please to call him?

Price. I have known Berry, I believe, five years.

Court. He calls upon you for a character; what character can you give him?—*Price.* A very bad one, my lord.

Berry. Please to ask him, what he can say as a stain upon my character?—*Price.* It will hurt you if you insist upon it.

Q. to M'Daniel. Will you call any witnesses?—*M'Daniel.* There is a man that has known me these nine or ten years, and that I have the best of characters; that is Mr. Holewright.

Court. Do you chuse he should be examined to your character?—*M'Daniel.* Yes.

G. Holewright. I believe I have known M'Daniel eight or nine years, or longer; he never did me any injury in his life-time: but as for the rest of it, I believe he is had enough.

Q. to Salmon. Have you any witnesses to call?—*Salmon.* No, my lord; I have not had time to send for any.

Q. to Egan. Have you any witnesses to call?—*Egan.* No my lord; none of my acquaintance know that I am in trouble.

The Jury found them all four Guilty of all the facts charged against them in the indictment; but whether the facts charged were within the statutes of the 4th and 5th of Philip and Mary, and the 3d and 4th of William and Mary, they knew not*: and there.

* 4 and 5 Phil. and Mar. c. 4, which says, Every person that shall maliciously command, hire, or counsel, any person or persons to commit or do any robbery in or near any highway in this realm of England, and be thereof convicted, shall not have the benefit of clergy.

3 and 4 Wil. and Mar. c. 9. That all and every person and persons that shall comfort, aid, abet, assist, counsel, hire, or command any person to rob another, shall be excluded from the benefit of the clergy.

fore prayed the assistance of the Court. Whereupon the following Special Verdict was found:

We find the record of the conviction of Peter Kelly and John Ellis *prout*.

We find, that before the committing the said robbery, the defendants, M'Daniel, Berry, Egan, (alias Gahagan) and Salmon, and Thomas Blee, did maliciously, and feloniously, and with intention to procure themselves the rewards allowed by the statute for the apprehending of robbers on the highway, and some further rewards offered by the inhabitants of the parish of Greenwich, and other adjoining parishes, all met at the Bell-Inn in Holborn, in London; and that they all agreed Blee should procure two persons to commit a robbery on the highway upon the defendant James Salmon, in the parish of St. Paul, Deptford, in Kent, which is an adjoining parish to the said parish of Greenwich; and for that purpose did maliciously and feloniously contrive and agree, that the said Blee should inform such persons, that the said Blee would assist them to steal some linen in the said parish of St. Paul, Deptford.

That the said Blee, in pursuance of the said agreement, and with the privity of the said defendants, did engage and procure the said Peter Kelly and John Ellis, in the said indictment named, to go with him to Deptford to steal linen, but did not at that time tell the said Kelly and Ellis, or either of them, of the said intended robbery on Salmon, nor at any other time before the said robbery was committed; and in consequence of such agreement, and with the privity of all the said defendants, the said Ellis and Kelly did go with the said Blee to Deptford.

And that the said Blee, Ellis, and Kelly, being at Deptford aforesaid, and the said Salmon being then and there waiting in the king's highway, in pursuance of the agreement aforesaid; they, the said Blee, Ellis, and Kelly, did all feloniously assault the said Salmon, and did take from his person the said goods mentioned in the indictment, on which the said Ellis and Kelly were so convicted as aforesaid.

And we find, that none of the said defendants ever had any conversation with the said Kelly and Ellis, or either of them, before the said robbery was committed: but we find, that before the said robbery was committed, the said M'Daniel, Egan, and Berry, saw the said Kelly and Ellis, and told the said Blee that they would do very well for the purpose of robbing the said Salmon as aforesaid: but whether the defendants, or any of them, are guilty of feloniously and maliciously comforting, aiding, abetting, assisting, counselling, hiring, or commanding the said Kelly and Ellis, or either of them, to commit the felony and robbery above-mentioned, or whether the said defendants, or any of them, are guilty of feloniously and maliciously moving, procuring, abetting, or counselling the

said Kelly and Ellis, or either of them to commit the said felony and robbery, in manner and form as in the second count of the said indictment is charged against them, we know not, and pray the advice of the Court. And if the Court is of opinion they are guilty, we are of opinion they are guilty; but if the Court are of opinion that they are not guilty, then we are of opinion they are not guilty.

| | |
|---------------------|-----------------|
| RICHARD HEAVYSIDES, | RAND. BAYLEYS. |
| GAM. GARDNER, | JOHN KEEN, |
| NATHANIEL NORTON, | HENRY KNIGHT, |
| SAMUEL NESBIT, | WILLIAM HASSON, |
| EBENEZER GARDNER, | JOHN BREWIN, |
| JOHN POPERTON, | JOHN PRICKLOW.* |

Trinity Vacation, 28 Geo. II.

June 19, 1755.

At Serjeant's-Inn-hall, in Chancery-lane, before all the Judges. The Special Verdict argued.* The King against M'Daniel, Berry, Egan, and Salmon.

CASE.

Peter Kelly and John Ellis were indicted for a robbery on the highway, committed near Deptford, in Kent, on James Salmon; on which indictment they were tried, and were capitally convicted.

The defendants were indicted as accessories before the fact, to the robbery committed by Kelly and Ellis.

The judges at the Old-Bailey directed a special verdict to be found on the last-mentioned indictment.

Which verdict first finds the record of the conviction of Kelly and Ellis *prout*.

It also finds, 'That the defendants, M'Daniel, Berry, Egan, and Salmon, together with one Blee, with an intention to procure to themselves the common reward given by act of parliament, and an additional reward offered by the parishes of Greenwich and Deptford, for apprehending highway-men, met together at the Bell in Holborn; and there they agreed, that Blee should procure two persons to rob, and that he should inform them that he would assist them in stealing some linen in the parish of Deptford.'

It finds also, 'That Blee did procure and engage, with the privity of the defendants, the said Kelly and Ellis to steal the said linen; but that he did not acquaint them of any intentions to rob Salmon.'

It finds also, 'That the defendants never had any conversation with Ellis and Kelly before the commitment of the robbery; but that the defendants saw them, and said they would do: and if, upon this case, the judges shall be of opinion they are so, then the jury find them so, &c.'

* These notes were communicated by a gentleman of the Temple.

Mr. Hume Campbell. I have the honour to attend your lordships on this very solemn occasion, as counsel on the part of the crown, against the defendants, M'Daniel, Berry, Egan, and Salmon; and as this is a case which concerns the lives of four unhappy subjects, and the public safety in general, I hope I shall be excused, if I observe a minuteness somewhat singular before this assembly.

That I may observe some degree of method, I shall consider the charge against the defendants under two heads:

I. Whether all or any of them are accessaries before the fact in the felony for which Ellis and Kelly have been convicted?

II. If they are, whether they are deprived of their clergy?

The first of these includes three propositions:

1. That a robbery was committed, in which Kelly and Ellis were principals.

2. That the principals, which is sufficient to draw the accessaries to trial, have been convicted.

3. That such things have been done by the defendants, as will make them aiders, commanders, and abettors in the robbery.

The first of these is sufficiently established by the finding the record of the conviction: for wherever a deed operates by way of *estoppel*, and the jury find it *proven*, your lordships must consider it as an *estoppel*. In the present case the jury have found the record *proven*; and by that it appears, that a robbery was committed by them on Salmon, one of the prisoners. The verdict finds likewise, that Salmon agreed at the Bell that Bles should procure persons to rob him. It finds too, that Ellis, Kelly, and Bles did feloniously assault, and in the highway take from the person of Salmon, the goods mentioned in the indictment. Upon this point, nothing in the verdict appears contrary to the record of conviction; and you cannot construe the latter words of the verdict, so as to destroy the first.* This appears from the case of *Monson v. West*, Moore's Reports 431. (N. B. S. C. in Popham 110). The case was this: In assize, the tenant pleaded no tenant to the freehold, and so no disseizin, *nisi les parols entiel volunt*, gives the tenant title; upon which verdict there was judgment for the demandant, and error brought and assigned, that the jury did not find the demandant seized, and that the tenant disseized him, as the custom is, as appears from the book of entries, which says, that the assize shall find seizin and disseizin; also that the verdict was imperfect, by reason of the *Nisi*, &c. After divers argu-

ments, the judgment was affirmed; for finding the disseizin implies seizin also; and the *Nisi* the Court looked upon as nugatory, because the verdict is complete before upon the point on which the jury were charged, viz. the seizin and disseizin. Vaughan 77. Rowe v. Huntingtondon.

If a jury, by their verdict, shall take upon them to collect the contents of a deed, and yet by the same verdict find that deed in *hec verba*, the Court is not to regard the collection they have made of the substance of the deed, but the deed itself.*

2 Bulstrode 56. James v. Harris. Action for words. The jury found, that the defendant spoke these words of the plaintiff, viz. Thou art a thief, and I will prove thee so; but that they were spoke in the absence of the plaintiff. *Sed per tot Cur.* the latter part of the verdict shall not stand, for the issue is the words, and that they have found. Brooke Tit. Verdict, pl. 96. abridged from 11 H. 6. 42. N. H. brought a Writ of Error against A, and assigned for error, that the wife of the said A, who had obtained a judgment against him upon a writ of maintenance, died such a day at C, pending the writ and before the judgment. The defendant pleaded, that his wife was still alive at W, &c. The inquest was taken at bar, and the wife appeared in evidence, declaring herself to be the same woman who was said to be dead, and was known by others in the court. The jury found, that the wife was dead, as the plaintiff had assigned for error: and all the Court were astonished at this verdict, which found the woman dead, when she appeared at the bar alive; and the record of the writ of maintenance was viewed; and by that it appeared, that at the day of *Nisi Prius* in the said writ of maintenance, the wife appeared in her proper person, which day was four days after the day the verdict finds she died. CHEINE.

It is proved by this record, that the wife was alive four days after the verdict says she was dead: it seemed to him, that this verdict is nothing to the purpose, but is a jeofail, to try a thing which is contrary to the record.

Afterwards Cheine assembled all the judges; and their opinion was, that the verdict was nothing to the purpose, and is a jeofail: for a matter of record before the justices shall not be put in averment, but shall be tried by the record itself; and though the verdict has found contrary to that which is proved by the record, it is nothing to the purpose; for the verdict cannot defeat the record, nor is it of so great force as the record: and if the Court had been apprized of the record before inquest taken, the inquest ought not to have been taken, because of the record; and she was proved to be alive four days after she was alledged to be dead: but

* When an act inflicts a penalty for a second offence, the indictment for the second offence must recite the record of the first conviction; and upon the evidence, the record of the first conviction must be proved: but the matter of the first conviction shall never be re-examined, but must stand for granted. 1. H. H. 686. Burn's Justice, in Introduction, p. 27.

* For that collection derives its authority from the deed; and therefore must of itself fail and come to nothing, when it is opposite to the deed of which it is a collection. Gilbert's Law of Evidence, p. 98.

if the record had not proved her alive, then the plaintiff would have been intitled to judgment.

But in the present case, no contradiction is here found, not even by implication: for, though it may be said, that here was no robbery, because Salmon was consenting, yet in all robberies there is some degree of assent, and that is to avoid the injury which is threatened the person robbed. If a man is feloniously assaulted, and made to swear to bring money to such a place, and he does it; this is determined to be a robbery, though done with the assent of the person robbed. And your lordships cannot, without shaking the principles of law, say there is no robbery committed, when it is found by the jury that there is.

I apprehend, my lords, it is a rule in law, that accessaries shall not be tried till the guilt of the principals is established, and the reason is, to avoid contradictory verdicts upon the same fact.* [Vide *Brooke Coron.* 117. 40 *Ass.* p. 8. *Fitz. Coron.* 33.] There would be a subversion of all law, if accessaries, who cannot be tried till the guilt of the principals is established, should upon their trial be allowed to controvert whether there has been a robbery or no. I hope, therefore, it is plain that there was a robbery committed upon Salmon; for as to the putting in fear, the common law did not require it, only required a taking by violence. It is found, that Salmon was assaulted, and he might be put in fear.

I come now, my lords, to the second part of the first general question, viz. That the principals have been convicted. This is found by the verdict; it is also found, that Blee was one of the robbers. It may be said, perhaps, that the defendants were only accessaries to Blee, and he to Kelly and Ellis; whereas they are indicted for being accessaries to Kelly and Ellis. But I apprehend that by the law, a man may be accessory to one or more. It is found, that the agreement was, that Kelly and Ellis should commit the fact, and Blee procure them: therefore it does not follow, that the defendants were accessaries to Blee. I admit, that, if the defendants had been indicted as accessaries to Blee, not to Kelly and Ellis, there might have been some doubt, but now there can be none: for when the principals are convicted, the defendants cannot say, we were accessaries to three; but the question is, Were you not accessaries to two?

It is found, that the original fact was committed by Kelly and Ellis; and, as to the presence of stealing linen, that was the artifice by which these poor lads were to be entrapped; it was not the fact intended to be committed, nor was it the fact which was committed: for the agreement at the Bell was, that Blee should procure two persons to rob Salmon, and that he should inform them, he would assist them in stealing some linen in the parish of Deptford.

* See *Leach's Hawkins's Pleas of the Crown*, b. 2, c. 29, s. 47.

There are many cases in Keyling where these pretences have been rejected, particularly p. 44, where some rogues influenced a constable to break open the door of a house, and thereupon they entered and rifled it; this was adjudged burglary; and it was re-determined in 1730, in the case of the King and Cornwell.†

† This Joshua Cornwell was footman to Nicholas Fenwick, esq. and in October sessions, in sir Richard Brocas's mayoralty, 1730, "He, and Thomas Rivers, of St. Botolph Aldgate, were indicted at the Old Bailey, for burglariously breaking the house of the said Nicholas Fenwick, and stealing divers pieces of plate, to the value of 85*l.* and Holland shirts to the value of 20*l.* and other goods, on the 8th of September. The loss of the goods was proved by Mr. Fenwick and others, though no breaking open the house appeared; but he found part of his plate by the direction of John Girst, an accomplice, who swore, That after divers consultations with Cornwell, one Sunday evening, about robbing Mr. Fenwick's house, it was agreed, that he and Rivers should do it on the Tuesday following. Accordingly, Girst and Rivers came to Mr. Fenwick's house about two o'clock in the morning, and found Cornwell standing in his shirt, with the door open, peeping out for them; that they went in, and Cornwell opened the door of the beaufet, and there was a caudle burning in a silver candlestick, and Cornwell took out the plate, and set it on the carpet on a table, and then went and fetched the napkins and linen out of a bureau, and the lady's laced head, the tea-equipage, and two silver castors; Rivers bundled them up. He and Rivers carried all to Rivers's lodgings, and Rivers afterwards pawned them to one Grub, who swore he took in fifty-six ounces of the plate of Rivers." The fact being plainly proved, the jury found Rivers Guilty, Death: but as to Cornwell, it being a new point, the Court directed the jury to find a special verdict.

In December sessions following, the Court ordered Joshua Cornwell to the bar, and told him, That the opening the door of his master's house in the night-time, and letting in two persons to rob him (on which the jury brought in a special verdict last sessions,) was referred to the twelve judges, who adjudged his case to be burglary, and he received sentence of death.*

Rivers was executed at Tyburn, Monday, November 16, 1730; and Joshua Cornwell was hanged at Tyburn, Wednesday, December 23, following. He owned, "That by the persuasion of Rivers and Girst, while in Mr. Fenwick's service, he conspired with them to rob his master; which accordingly he did, by opening the back-door, and letting them in, and then suffering them to take away the goods

* See *East's Pleas of the Crown*, c. 15, s. 2, and *Leach's Hawkins's Pleas of the Crown*, book 1, c. 38, s. 14.

I come now to the third and last part of the first general question: Whether all the defendants, or any of them, have committed such things as will make them aiders, commanders, and abettors of the robbery?

Under this head I intended to inquire,

1. Into the nature of accessaries before the fact: and,

2. Whether there is any material difference in the case of Salmon from any of the rest?

But as I have already taken up so much of your lordships' time, I shall leave that which relates to Salmon, to the learned gentleman who is to speak next.

As to the first, the nature of accessaries:

By the common law, the person alone who committed the fact was deemed the principal, and those who procured it to be done 'qualicumque modo,' who contrived it, plotted it, counselled, and assisted, were accessaries before the fact; and the trial was posterior in respect of the commission, because the existence of the crime was to be first examined into; for before then it could not be known, whether they had been guilty of a crime or no. But when the fact was established, they proceeded 'inverso ordine,' and he that first counselled was last tried, as appears from Bracton, b. 3, cap. 19, p. 138, sect. 4, 5, and p. 139, sect. 10, 11, where he makes use of the words, 'fortia, præceptum, auxilium,' which three sorts include all sorts of persons who contribute to, or in any wise assist to the commission of the fact.

In sect. 5, he has the particular form of an appeal. Stanford, in his Pleas of the Crown, b. 1, c. 43, p. 40, 41, which is an abridgment of Bracton, says, 'That in an appeal of felony all the principals and accessaries must be joined; and there he describes accessaries thus: "Qui venit, vel tenuit, vel vinxit eum, vel fuit in auxilio vel consilio qualicumque modo, vel præcepto vel mandato, quo magis ipse C. interfectus fuit." [This is verbatim from Bracton.]

These words are general, but prove what the law at that time was; he was accessory, of whom it might be said, 'qui fuit in consilio;' and he alone was not an accessory, whom the jury found to be 'nullo modo in consilio,' which is only the negative. So Fleta, b. 1, c. 23, p. 33, 34. These days had not arrived at that critical skill; they thought it was the participation of guilt which constituted the crime.

The story of Tarquin * in Livy is a similar

mentioned in the indictment, with many others: but said, he did not hand out the goods, as Girst swore, but only shewed them where they were; and then Rivers bundled them up, and they carried them off to his lodgings."

* The Gabii, who had met with some success against the Romans, unanimously chose Sextus Tarquinius for their governor: "Itaque postquam satis virium collectum ad omnes conatus videbat, (sc. Sextus Tarquinius) tum è suis unum sciscitatum Romam ad patrem mitit, quidnam se facere vellet? quandoquidem ut

case; and no one can doubt, but that he was accessory before the fact, though he spoke not, though he saw not his son Sextus. There is a like story of Thrasibulus and Periaander of Corinth, related in Herodotus and Aristotle.

The Mirror, cap. 1, sect. 13, page 42, is more particular, and recites nine kinds of accessaries:

1. Those who command.
2. Those who conceal.
3. Those who allow or consent.
4. Those who ———
5. Those who aid.
6. Those who are partners in the gain.
7. Those who knew it, and did not disturb it by defence or excuse.
8. Those who received them knowingly.
9. Those who are in the force.

Thus Coke's Instit. 182, in the Comment on the Statute of Westminster, c. 14. Accessaries before the fact are divided into three branches, Commandment, Force, and Aid.

Præceptum. Under this are understood all those that incite, procure, set on, or stir up any other to do the fact, and are not present when the fact is done.

Fortia is a word of art, and properly signifies the furnishing a weapon of force to do the fact, by force of which the fact is committed, and he that furnisheth is not present when the fact is done; and cites Bracton, b. 3, page 139. "Ubi factum nullum, ibi fortia nulla, nec præceptum nocere debet;" and again, "Vulnus, fortia, et præceptum generant unicum factum; non esset vulnus forte, si non adfuisset fortia; nec vulnus, nec fortia, nisi præceptum præcessisset." And sometimes, in a large sense, for any that is accessory before the fact.

Auxilium. Under this word are to be comprehended all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the fact, and are not present when the act is done; for, if present, they are principals. Before the time of Henry the 4th, there was no distinction between present and not, but only he who struck the stroke was principal; the others, who were present, were accessaries, Plowden 98 and 100. Fitz. Coron. 33. Brooke Coron. 118. The word 'procure' is

omnia unus Gabiis posset ei Dii deissent. Huic nuncio, quia credo dubiæ fidei videbatur, nihil voce responsum est. Rex, velut deliberabundus, in hortum ædium transit, sequente nuncio filii, ubi inambulans tacitus, summa papaverum capita dicitur baculo decussasse. Interrogando expectandoque responsum nuncius fessus, ut re imperfecta, redit Gabios: quæ dixerit ipse, quæque viderit, refert; sen ira, seu odio, seu superbia insita ingenio, nullam eum vocem emisisse. Sexto ubi, quid vellet parens, quidre præciperet tantis ambagibus, patuit; primores civitatis, criminando alios apud populum, alios sua ipsos invidia opportunos interemit; multi palam; quidam, in quibus minus speciosa criminatio erat futura, clam interfecti." Liv. lib. 1, cap. 54."

often used by Brooke Coron. 19, 104, 188. Fitz. Coron. 33.

The view of the common law was to prevent, if not prevent to punish, all those who should stir up any one to commit a felony: and the law respects the intention.

The law of England is not a cobweb, which offenders may slip through by being greater villains than are allowed of by the laws of other nations; and I hope this kind of calm and deliberate villainy shall not escape by a criticism.

But it may be said, that the verdict has not found any communication by express words. But this will make no difference, whether they did it by Blee, or by letter, or by any sign; for, by whatever method it is done, they did it: and, though there were no words, they shall be accessaries.

Suppose a person should plot high treason, and employ another to kill the king: here he is not principal; but is he not accessory? Certainly he is. It would be very singular, after all the encomiums that have been given to the common law of England, if this should not be the law of the land, when it is the law of all the nations in the world. Julius Clarus, in his *Practica Criminalis*, b. 5, q. 89, puts this case: If a messenger is employed by A, to convey a letter to B, which letter advises B to commit a felony, and the felony is committed, they are all three to be punished with the same punishment. But there is, my lords, a case of the highest authority, that is, that of Ahab and Naboth, 1 Kings, c. 24. (and very artfully recited it before he mentioned the authority.) Can any one say, that Ahab was not an accessory, though he spoke not at all? I need not cite cases from histories of other nations, when sir Thomas Overbury's case, [Vol. 2, p. 911, of this Collection] is so applicable to the present case. There was only one principal convicted, though there were six accessaries; and five convicted, though the poison passed through three or four hands; and Franklin was executed.

Where then is the reason of the law, that says, this consent must be in express words? The consent is the crime, and that the jury have found; and that that is sufficient, appears from Plowden 473-4. Saunders and Archer's case. Where Archer counselled Saunders, who wanted to get rid of his wife, to give her poison in a roasted apple, which he accordingly did; and the wife was going to give some of it to their child, whom Saunders was very fond of: whereupon he endeavoured to dissuade her from giving it, saying, It is not good for children; but the wife answered, It is better for it than for me, and gave the child some: but the wife lived, and the child died. Here Saunders was guilty of murder, though he intended none to the child; because his intention was to murder. But as to Archer, the question was, Whether he was accessory? And though the judges in this case were of opinion that he was not, yet they thought it

VOL. XIX.

more proper that he should be delivered by a pardon than otherwise, and accordingly they kept him in prison from one sessions to another, till he procured a pardon: and Plowden, the reporter, says, it was his opinion, that whoever counsels or commands an evil thing, should be judged accessory to all which follows from that evil action, but not from any distinct thing. If I command one to strike or rob another, and he kills him, I am accessory to the murder, because it is done in consequence of my command. The same, if I command one to burn a particular house, and he does it pursuant to my command; but if he burns another house, this is not in consequence of my command.

I come now, my lords, to the second general question, which is, Whether the defendants are deprived of their clergy? And if the first proposition is established, I apprehend they are. This question depends on the construction of the acts of the 4th and 5th of Philip and Mary, cap. 4, and the 3d and 4th of William and Mary, cap. 9.

The 4th and 5th of Philip and Mary, is for the due punishment of such as command, counsel, or hire any person to commit any felony, and deprives them of their clergy.

The 3d and 4th of William and Mary deprives those of clergy, who shall comfort, aid, abet, assist, counsel, hire, or command any person to commit felony.

These Acts constitute no new offence; they follow the common law, and are suppletory, and speak of an offence known at common law; and I submit it, that if your lordships determine these men to be accessaries before the fact, unless the king interposes his mercy, they must be executed. If a statute speaks of matters known at common law, it must, as to that matter, be construed and extended according to the common law. Hobart 98. Coke Lit. 381. 6 Modern 143.

This is no new case; for in a similar case it is determined, that if a statute is made suppletory to the common law, and taking away the clergy, it must be construed literally, Jenkins, 2 Cent. 97. The statutes 23 H. 8, and 27 Edw. 3, which take away clergy, are *pro bono publico*; therefore to be taken by equity.

But it may be said, that the words 'excite,' 'procure,' &c. are not in the acts of Philip and Mary, and William and Mary: but this will make no difference; for, 1 Anderson 194, the words of the indictment were, *excitavit, movit, et procuravit*: resolved, that the indictment was good, though the word 'counsel' was out; for it is not possible to excite, move, and procure, without counselling.

Mr. Madan, on the same side, states the question as Mr. Hume did. I shall take notice of the word 'aid'; and I apprehend, my lords, that the defendants will certainly fall within the sense of aiding. In Hale's Pleas of the Crown, page 616, there is a definition of accessaries,

3 E

viz. That which makes an accessory before the fact, is command, counsel, abetment, or procurement, by one to another, to commit a felony, when the commander or counsellor is absent at the time of the felony committed; for if he be present, he is principal. But in the case of poisoning, a man may be principal, though absent, as in Vaux's case, 4 Coke 44, 6 Hale's P. C. If a man is indicted as principal, and acquitted, he shall not be indicted as accessory before the fact, Stamford 105. and 2 Edw. 3, 150. 282. Fitz. Coron.* So that Salmon, it may be said, is no accessory before the fact (and if he is to be looked upon as a principal, he will not come under this indictment) because he was present when the fact was done. This is absurd; for the fact could not have been done, if he had not been present. Because he was at Deptford when the fact was committed, therefore not at the Bell when contrived; this is a plain *non sequitur*.

I shall now consider,

1. Whether your lordships can consider it to be a robbery on Salmon, as the indictment is for putting in fear, which could not have happened, if he purposely put himself in the way?
2. Whether the prisoners, as they never spoke to Kelly and Ellis, are guilty of being accessories?
3. Whether, as the prisoners agreed that Blee should tell Kelly and Ellis that he could assist them to steal linen, this will alter the case, as Blee enticed them to commit one felony, and they committed another?
1. The jury have found the record of the conviction of Kelly and Ellis *prout*; and your lordships and the whole world are estopped to say the contrary, viz. That a robbery has not been committed: for to say that Salmon was not robbed, is to say against that record, which the jury have found to be true. The record lies before your lordships, as part of the special verdict, and records cannot be contradicted, Coke Lit. 117. b. Id. 260.

In lord Lovat's case, the crown called Mr. Murray as evidence against him: lord Lovat objected to him, as he stood attainted of high treason: it was there said, he had been proceeded against in the King's-bench for not surrendering within the time limited. Mr. Murray pleaded, he did surrender himself within the time limited by the act of attainder; and the attorney-general confessed his plea to be true: how did he prove this? By the record of the admission of his plea to be true.† And if your lordships determine this to be no robbery, it is not only overturning the original conviction of Kelly and Ellis, but also the finding of the present jury.

The matter now to be considered is not, whether a robbery was committed by Kelly and Ellis, but whether the prisoners are guilty of

counselling them to do it. The parts of the finding of the jury, subsequent to the finding of the record, are now to be looked upon, as upon private knowledge, Plowden, 83. b. The jury cannot find the record in one part, and contradict it in another.

Whoever counsels a felony or robbery to be done, is accessory before the fact: the defendants counselled, &c. *ergo* accessories before the fact. That they did counsel, is found in the special verdict; and the third proposition follows from the premises.

But it is said, that the defendants counselled Blee to counsel Kelly and Ellis.

1. What is counselling, within the meaning of the statutes? Procuring, moving, are only species of counselling, and shall be good in an indictment, though the word 'counselling' is left out, 1 Anderson, 194. And I insist, that by the word 'counsel,' is not meant counselling by word of mouth only, though the second count of the indictment does not conclude with a '*contra formam statuti*;' but having the word 'counsel' in it, it will be sufficient, 1 H. P. C. 525. A man may be acquitted upon an indictment which concludes '*contra formam statuti*,' and found guilty of simple felony at common law.

Kelly and Ellis were seen and approved of by all the prisoners. As far as I can find, this indictment is the same as all indictments for accessories. The gist of the indictment is the counselling.

A general malice is transferable to any one a man meets with; as

Particular malice to one person may be transferable to another: as in Saunders's Case, Plowden, 473. The indictment is, '*ea intentione felonice prebuit*,' and reached to one not intended; so '*ea intentione felonice percussit*,' will reach one who did not strike at all; for the stroke of one extends to all that were present and abetting, Plowden, 98.

2. If the defendants had never seen Ellis and Kelly, the general command to Blee, to procure two persons to rob, would, by operation of law, operate against the defendants, as soon as Ellis and Kelly were procured.

Counsel even against one not '*in rerum natura*,' if when the person is in being, the counsel is followed, it will make the counsellor accessory, Dyer, 186. a. Blee did nothing, said nothing, without the advice and consent of all the prisoners.

3. Blee was directed to tell Kelly and Ellis, that he could help them to steal some linen at Deptford, which he did; but told them nothing of the robbing Salmon.

I admit, if I counsel one to commit one species of felony, and he commits another, I am not accessory, H. P. C. 616. So in H. P. C. 618. If a man, after having counselled another to commit murder, and, before the fact is done, repents, and forbids and countermands it, he is not accessory if the murder is committed. So in the present case, if the defendants intended that Kelly and Ellis should only steal linen,

* So too Kelyng, 28; John Roberts's case.

† See vol. 18, p. 637.

and they met with Salmon by chance and robbed him, the defendants would not be accessory to that robbery: but it appears by the record to the contrary; their intention was to get the rewards offered by act of parliament and the inhabitants of Deptford; and, from the nature of the action, Blee could not tell them the design, for it would have been absurd to have told them; for how could Blee know Salmon would be there? This must have struck them upon his first mentioning it.

A robbery was counselled, a robbery was committed, and a robbery was committed as counselled.

But if all these arguments should fail, the argument 'ab inconvenienti' is often allowed to be of great weight, and it would deserve in no case more than the present. Had I been asked my opinion upon such a case as this, I should not have hesitated in my opinion: but if, after your lordships' determination to the contrary, I should have the same case put to me; I should tell my client, That provided he saw not, nor spoke not to him that committed the murder, he might ride in his coach, and laugh at his friends, while they went to be hanged. The defendants cannot be said to be accessory to an accessory; for that is, by construction of law, one who receives another before the fact, knowing him to be an accessory.

But it may be said, after all, that I have produced no case in point; I must confess, after a long and diligent search, I cannot find one: but there will be one; there will be a report of this case, and the King and M^r. Daniel and others will be a case in point hereafter.

Trinity Vacation, 28 Geo. II.

July 28, 1755.

The King against M^r. DANIEL and others.

The Judges met again at Serjeant's-Inn Hall, to hear the Arguments in favour of the Defendants.

Mr. Hume begged leave to mention a case which he had met with since his argument, which seemed to be applicable to the present: that was the case of William Belchier, who was tried at the Old-Bailey, in the mayoralty of Robert Alsop, esq. in June sessions 1752, N^o 345, p. 209, and recited the case at large from the Sessions-Paper, viz.

"William Belchier was indicted, for that he, on the king's highway, on William Norton did make an assault, putting him in corporal fear and danger of his life, and taking from his person five shillings, June 3.

"William Norton. The chaise to the De-vizes having been robbed two or three times, as I was informed, I was desired to go in it, to see if I could take the thief, which I did on the 3d of June, about half an hour after one in the morning. I got into the post-chaise: the post-boy told me, the place where he had been

stopped was near the Half-Way House, between Knightsbridge and Kensington. As we came near the house, the prisoner came to us on foot, and said, Driver, stop! He held a pistol tinder-box to the chaise, and said, Your money directly, you must not stay, this minute your money. (He produced the tinder-box.) I said, Don't frighten us; I have but a trifle, you shall have it. Then I said to the gentlemen, (there were three in the chaise) give your money, &c. I took out a pistol from my coat pocket, and from my breeches pocket a five-shilling piece, and a dollar, and held the pistol concealed in one hand, and the money in the other. I held the money pretty hard: he said, Put it in my hat. I let him take the five-shilling piece out of my hand: as soon as he had taken it, I snapped my pistol at him; it did not go off: he staggered back, and held up his hands, and said, O Lord! O Lord! I jumped out of the chaise; he ran away, and I after him, about six or seven hundred yards; and there took him. I hit him a blow on his back; he begged for mercy on his knees. I took his neckcloth off, and tied his hands with it, and brought him back to the chaise: then I told the gentlemen in the chaise, That was the errand I came upon, and wished them a good journey; and brought the prisoner to London.

"Q. Did you lose sight of him in the pursuit?

"Norton. No, I did not, my lord; it was a very clear morning.

"Q. from the Pris. Ask him how he lives?

"Norton to the Q. I keep a shop in Wyck-street, and sometimes I take a thief.

"William Messenger. I drove the post-chaise. I took Mr. Norton in the chaise at Hyde-Park corner; and told him, if we did not meet the highwayman between Knightsbridge and Kensington, we should not meet him at all. I saw him coming, and said, He is coming, get the pistol ready. He came up to the chaise, and said, Your money, make haste, your money. I heard the pistol snap. The prisoner said, O Lord! and ran away, and Norton after him, and took him.

"Q. Did you ever lose sight of him in the pursuit?—Messenger. I did, for a little time: the pursuit was not above three minutes. I heard the prisoner cry, O Lord! the moment he was taken.

"Prisoner's Defence. I leave it to your lordship and the honourable Court.

"Guilty, Death."

Mr. Serjeant Davy. I have the honour of attending your lordships as counsel for the prisoners; and I must own, that I could not have been prevailed upon to have been counsel for such a set of rogues, had I not been appointed by your lordships.

I shall consider the question under two general propositions:

I. Whether, upon the state of the verdict, it does appear, that any robbery was committed by Ellis and Kelly?

II. If there was a robbery committed by them, Whether they are accessaries in such a manner as to be liable to any judgment against them?

I shall first take notice of the objections which have been raised against the defendants. And I find it is chiefly insisted on, That the jury having found the record *prout*, is sufficient proof that there was a robbery; and that the defendants are thereby estopped to say the contrary.

I admit, that the rules laid down relating to estoppels shall prevail at law. But it is as to the extent of those rules which I contend for; and I insist that they do not extend to parties that are not privies to the record. The reason of the rules of law in this case, is, that there may be an end of strife; for the witness to the record might be dead; and therefore records shall bind parties and privies, but shall not bind strangers. There is another reason: parties to the record may have an attain for a false verdict, on the modern method of moving for a new trial, but strangers cannot.

And this appears from Locke and Norbonne, 3 Modern 141. Trial at Bar in Ejectment for lands in Wiltshire. The case was this:

"Mary Philpot, in 1678, made a settlement, by lease and release, to herself for life, then to trustees to support the contingent remainders; then to her first, second, and third sons in tail male, &c. then to Thomas Arundel in tail male, &c. It was objected at the trial, that she had no power to make such a settlement; because, in the year 1676, her husband had settled the lands in question upon her for life, and upon the issue of his body, &c. and for want of such issue, then upon George Philpot in tail male, with several remainders over, remainder to Mary Philpot in fee; proviso that, upon a tender of a guinea to George Philpot by the said Mary, the limitations as to him should be void. George Philpot having afterwards made a lease of this land to try the title, the trustees brought an ejectment; but because the tender of a guinea could not be proved, there was a verdict for the defendant."

And now Mr. Philpot would have given this verdict in evidence at this trial, but was not suffered by the Court; for if one man hath a title to several lands, and if he should bring ejectments against several defendants, and recover against one, he shall not give that verdict in evidence against the rest: because the party, against whom the verdict was had, may be relieved against it if it is not good, but the rest cannot, though they claim under the same title, and all make the same defence.

So if two tenants will defend a title in ejectment, and a verdict be had against one, it shall not be read against the other, unless by rule of Court.

But if an ancestor hath a verdict, the heir may give it in evidence, because he is privy to it; for he who produceth a verdict must be either party or privy to it; and it shall never be re-

ceived against different persons, if it doth not appear that they are united in interest.

Therefore a verdict against A shall never be read against B; for it may happen that one did not make a good defence, which the other may do.

If upon the writ of *Contra Formam Collationis* a recovery is had against the abbot, and a *Scire Facias* issue against the terre-tenant, he is not concluded by any trial had against the abbot, 2 Inst. 488. [N. B. I have looked into the authorities quoted, but cannot find any thing in point.]

If this doctrine which the gentlemen have laid down relating to estoppels, and that accessaries upon their trial cannot controvert the robbery, should be admitted,

It would,

1. Encounter the known principles of natural justice.

2. Be contrary to the principles of law, and the practice in trials.

3. Contrary to authorities.

Suppose A is indicted and convicted of the murder of B, and C is afterwards tried as accessary to A, and upon the trial the prosecutor brings the record of the conviction of A, to prove the murder: C admits that he did give such counsel, but that it was never executed, for B is still alive, and offers to bring proof of it: No, say the gentlemen, here is a record, which says he was murdered, and records cannot be contradicted; therefore C must be hanged. If this is the law of England, it is contrary to the law of God. But it may be said, that in such a case the crown would pardon: but that is a favour. Mercy is the king's privilege, and the brightest diadem he wears; justice is the peculiar attribute of the law.

The same doctrine with that I have laid down holds with those who are to bring a writ of error; for none can bring a writ of error, but, 1. Parties; 2. Privies; 3. Those who may receive any advantage from the reversal of the judgment: but it is contrary to the rules of law, to assign error contrary to what appears upon the face of the record, 1 Rolle's Abridgement, 747, 1, 2, 3, 4. Dyer 90. 5 Coke 39. b. Godbolt 377. 1 Leon. 361.

The great object of the law is to protect the innocent; the punishment of the guilty is only so far observed, as it tends to protect the innocent; every thing, therefore, which tends to destroy the innocent, is against law. So records are often the effects of perjury; and those who are guilty of perjury may be tried, notwithstanding the record is not reversed. As for instance, A is indicted for assaulting B. To prove the assault, J. S. is called as a witness, and he swears he saw it: afterwards B indicts J. S. for perjury, which indictment sets forth, that there was such an indictment found against A, &c. and that he was found guilty upon it, &c. Upon this trial, the first thing produced is the record of A's indictment, which sets forth, that A was indicted and found guilty. It would be impossible, therefore, to

cording to the doctrine the gentlemen have laid down, that J. S. could be tried; for here is a record which says, that A was convicted.—So in Canning's case, (p. 283.) a case which has lately happened, and has made a great deal of noise; I was concerned in it; and upon her trial, the record of the conviction of Mary Squires was produced, and it remains still, and Squires is subject to all the disadvantages attending it.

It is said, that records cannot be contradicted; but they often are, as in the case put. A record is no evidence in some cases; as suppose the above case, and afterwards B brings an action for the same assault against A, who has been already indicted and convicted, the record is no evidence. I speak this with great deference to your lordships: I think it is not evidence, but I am sure it is not conclusive.

The reason why accessories cannot be tried till the principal is convicted, is this: the principal best knows, whether he is guilty or no; and therefore is best able to make his defence.

I must own, the case cited from Brooke, Tit. Verdict, pl. 96, by Mr. Hume, has an ugly aspect; but upon looking into the year book from whence it is abridged, I find it will answer no purpose at all; and as it is a case somewhat curious, I beg leave to mention it (and then recited the Case, *quod vide*).

It was insisted, That it was sufficient to say that the principal was convicted, not that the principal felon was convicted: the reason is, because, upon the face of the record, the conviction is a presumptive proof of it, and the accessory may endeavour to acquit himself either by denying the counsel or the principal felony.

I apprehend it is a maxim, That in all special verdicts, the judges will only judge of what the jury find in their verdict, and so it was resolved in 2 Siderfin 8. *Street v. Roberts*.

The jury finding the record, is no proof that it is true. Their finding is of the fact of the existence of the record: and your lordships can only from thence judge that the principals were convicted, sufficient to bring the accessories to their trial. The question then is, Whether this special verdict finds, that any felony was committed by Kelly and Ellis?

There are some words in the verdict which I consider as only descriptive, and chuse to lay out of it: 'feloniously robbed.' The office of the jury is to find the fact, and leave the law to the judgment of the Court. In 9 Co. 69, Mackally's case, exception was taken, because it was not found by the verdict that the said Mackally *felonice percussit*, but *percussit* only; *sed non allocatur*, for the reason above. If then the omitting the word *felonice* will not hinder the fact from being a felony, the putting it in will not make it a felony. Having stripped the verdict of these unnecessary words, which the jury had no right to put in, I shall consider the nature of a robbery; and here, is order to constitute a robbery, two things are necessary:

1. Violence, and putting in fear.

2. A taking against the will.

If either of these are wanting, there is no robbery. 3 Inst. 68. Fear constitutes the difference between a robber and a cut-purse.

2. The taking against the will; for *volenti non fit injuria*. So Bracton, b. 3, fol. 150. b. "Furtum est contractatio rei alienae fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerit."*

Let a man, when he parts with his money to a robber, be asked, If he gives it willingly? No; he chuses the lesser evil to avoid the greater, and had rather suffer the loss of his money than death.

As to the case of swearing to put money, &c. the answer to that is given in the book. It is the fear and the oath continuing, which make it a robbery: suppose a man did not think the oath obligatory, and had no fear upon him, then I apprehend, my lords, it would be no robbery.

But suppose that Salmon was put in fear, the defendants must be acquitted. As to Salmon, the jury are silent as to his being afraid: they have in fact found that he was not afraid, because they have found the fact was done according to his agreement. But the putting in fear ought to be found positively, or to appear from the words of the verdict.

It is insisted by the gentlemen on the other side, that this was a felony to which Salmon was accessory before the fact; they might have gone a little further, and made him principal, as aiding that counsel which he had given. If principal, he might have been indicted as principal: where there are many principals, each is a separate offence, and each may be separately indicted: if so, Salmon might be indicted alone (and then recited part of the indictment as it would stand against him, to shew the absurdity of it).

Whether Salmon consented or not to Blee, he certainly did not to Kelly and Ellis; their intent was to rob a man against his will, and if Salmon did consent to be robbed, it could be no robbery.

Mr. Hume insisted, that nothing appeared in the verdict contrary to the record of conviction. But there certainly is, for it first finds a robbery, and afterwards finds such circumstances as make it impossible there should be a robbery. And Hobart 53. Foster and Jackson, Wherever a jury begin with a direct and end with a special matter, which is either contrary to their verdict or to law, the special matter shall overrule the general.

1 Inst. 227, a. and 4 Co. 53, Rawlin's case. The Court held, that the jury being sworn 'ad veritatem dicendam,' must leave the matter of law to the Court; and if the jury find an

* Bracton adds, "Cum animo dico, quia sine animo furandi non committitur, sc. furtum." Q. Whether the *animus furandi*, which is agreed on all sides to have been in Kelly and Ellis, will not constitute this *furtum*?

estoppel, the Court will not regard it, but will judge upon the special matter.

Every fact found by the jury ought to be attended to, your lordships see, even in disputes relating to property; God forbid, that in favour of life any should be neglected.

If the conviction of Ellis and Kelly be any proof of a robbery, then the jury have found the record one way, and the fact another.

I come now to the second question; which is, Whether, supposing a robbery to have been committed, the defendants are accessaries in such a manner as to be liable to any judgment against them?

If Blee was no accessory, the defendants cannot. In reality this was a felony committed by Ellis and Kelly spontaneously, and without any accessory at all. In order to make this a robbery by procurement, these three things are necessary to be proved:

1. That this was the very robbery which Blee undertook to procure Kelly and Ellis to commit.

2.

3. Whether the defendants are within the statutes of Philip and Mary.

The question is, whether Blee procured Kelly and Ellis to commit this robbery? And here I must observe, that the word 'procure' is the most general of all those applied to accessaries: but it is plain, he did not procure them to commit this robbery, but to steal linen; and whatever was intended by Blee, cannot fall under consideration.

There is a distinction between procuring an act to be done, and procuring the persons to commit it. As for instance, if I am walking in the street, and designedly let my handkerchief hang out of my pocket, in order that it may induce somebody to pick it; here I could not be said to procure the persons to commit this felony, but the felony to be committed. The act intended to be committed must be communicated to the parties who are to commit it. And whether the defendants intended that Kelly and Ellis should steal linen or no, they were originally actuated by such a disposition, and this robbery was committed without any previous intention of Kelly and Ellis, and therefore there can be no accessaries; as in manslaughter there are no accessaries before, because the nature of it implies that it was done without premeditation or design: therefore if, upon an indictment for murder, the principal is convicted of manslaughter, the accessory is *ipso facto* discharged, Moore 461, Goose's case. 4 Co. 44. 1 Hale's P. C. 437.

But let us consider, whether the defendants are within the statutes of Philip and Mary.

The word 'procure' is put into the second count; and if the defendants are at all guilty, they are guilty of all.

The word 'procure,' which is not in the statutes, is added to some words which are in the statutes, and if the defendants merely procured, no judgment can be given against them upon this indictment: for, if they pro-

cured without counselling, they will not come within the statute.

Judge Foster observed, that the word 'procure' was in all the precedents of indictments.

Serj. Davy. I admit the case which was laid down relating to the construction of statutes, which being made for the public good, should be construed for the public good.

But statutes now shall have a very particular construction.

It is going a great way to extend penal statutes to operate capitally.

Greville's case, 1 Anderson 194, is different from this; the words there were 'excited,' 'moved,' and 'procured;' and the judgment was, that it included 'counsel'. Suppose 'excited' and 'moved' had been out, the Court would not have given the same opinion on the word 'procure.' Counselling is but one species of procuring, which is the genus; and therefore, by this way of reasoning, he that is guilty of the species is guilty of the genus.

There are many ways of counselling without procuring; Blee's procuring cannot be extended to mean the defendant's procuring.

It will be proper to review the facts as they stand to each count.

The general question is, who moved? The defendants did not; for they had no communication with either Kelly or Ellis, by any way whatsoever. If Kelly and Ellis had been asked, By whose advice are you doing this felony? the answer would have been, By Blee, not by the defendants. Blee advises them to steal linen, and the defendants advised Blee to be an accessory.

I admit all Mr. Hume's doctrine relating to signs, messages, &c. The meaning of the counsellor must be conveyed to the perpetrator of the fact, and the consent must be in consequence of the advice, in order to make him a commander, adviser, and counsellor: so that Tarquin's case does not come up to this case. The slave was the passive instrument to convey Tarquin's mind; but here Blee gave Blee's advice. Who did procure? The answer is, Blee. If a stranger had advised Tarquin, would he have been accessory to Sextus? There is a difference between 'advising' a thing to be done, and 'procuring' it to be done. The words of the statute are applied to advising any person to commit a felony, not any felony to be committed. The defendants counselled, before any persons were fixed upon.

The act of forgery is, whoever shall forge, or procure to be forged, or assist [in procuring] to be forged; if procured the forgery, he is a principal; if procured a person to commit the forgery, an accessory.

Jenkins only means the receiver.

If all the intermediate persons are to be considered as accessaries, then it will be proper to consider, whether the defendants did advise any felony to be committed. The agreement was, that they should rob Salmon, who agreed that it should be done. Salmon could not be helped

by his own consent. This does not refer to the record: but if there was a robbery, the felony exceeds the agreement, for no felony was agreed to be done; only the appearance of a felony, which those who did it should apprehend was a felony; and that they might avail themselves of that appearance, either the goods taken from Salmon were taken against his will, or not.

If against his will, it was different from the agreement, which was, that he should part with them willingly: if not against his will, there could be no felony. I admit that Salmon might be in fear, if they had taken more than he agreed to part with; but *eo instante* that his will departed from him, there was a departure from the agreement; this extends to all the defendants.

As to the case of Ahab and Jezebel, which my learned friend cited, however guilty they may have been deemed, they are certainly not accessories according to the law of England; according to which law the defendants are to be tried.

Mr. Aston, on the same side. I also have the honour of being appointed by your lordships as counsel for the defendants; and here I cannot but observe, how tender the law is in favour of the worst of men, that it allows them to make use of subtilties before such an august assembly.

Before I consider the argument made use of by the gentlemen on the other side, I shall just mention an objection upon the face of the indictment. By the common law, an accessory in one county could not be tried in another: but by 2 Edw. 6, c. 24, accessories may be tried in that county where the offence of accessory was committed, 9 Co. 118, a. It is not set forth in the indictment, that the fact was committed in Kent, only that the party was indicted there; and the defendants are to be tried by this jury, not by the jury of Ellis and Kelly.

I shall consider three things:

First, it is said, That the defendants must be accessories to the offence which was committed. In answer to which,

1. This verdict does not find any felony or robbery, which can make the defendants accessories to any felony or robbery charged in the indictment.
2. The defendants were not estopped from controverting the fact of the robbery.
3. Supposing the felony and robbery sufficiently found, it is not sufficiently found to make the defendants accessories.

The aiding and abetting is a matter of fact, which this jury ought to find, which they do not here find.

I admit that the jury have properly found the record *prout*. The jury must proceed to state the facts, which make the defendants accessories, and the finding must be of the actual felony laid in the indictment. There is no time found when Kelly and Ellis committed the

robbery on Salmon; it may be after the robbery on which they were convicted. Pulton, de Pace 128, defines a robbery to be the felonious taking away any thing from the person of another against his will. Fitz. Coron. 115.

The case of the King and Belchier, which Mr. Hume mentioned, was put out of doubt by the jury finding him guilty; therefore he was put in fear, which is essential to constitute it a robbery, as appears 1 Hawkins, 96, 97. Hale P. C. 534. Dyer, 224. Keyling, 70. 3 Inst. 68. Pulton, 128. By the omission, the nature of the offence is varied; it must be expressly found that he was put in fear, otherwise it will be no robbery.

As to the case of swearing to put money, Pulton, 128, sect. 28, gives the reason why it is deemed a robbery; because (says he) it is against his will.

The verdict cannot be helped by any intendment, 2 Hawkins, 47, 9. King and Plummer. Keyling, 111. But it is said, that the jury having found the record, it operates by way of estoppel. But the record found, and the fact found, may stand consistent with the subtle doctrine of estoppels. Therefore I will lay all that out of the question; for nothing can be implied in this case. The jury have found facts which must speak for themselves: the jury have only found the record. The record of conviction is not falsified; but the charge upon the fact is not sufficiently proved, and the accessory has a right to controvert the robbery; and there are instances where accessories have been executed before the conviction of the principal, and upon the principal's coming home, found innocent, 9 Co. 119, b. Pulton, 140.1, gives the reason, because the party has waived that privilege the law gives him. Accessories may be indicted with the principal, and in the same indictment; and then the jury is first asked, Whether the principal is guilty or no? But they may be indicted separate; and Plowden, 100, says, might have separate Venires.

The conviction of the principal is only to substantiate and warrant the Court to proceed to the trial of the accessory: in the present case, this indictment stating this conviction is no more than a made necessary to found this trial: it proves no guilt, only is intended to try guilt. There must be proof of the procurement of the act, and of the doing the act in consequence of that procurement.

The defendants, in general, may give every thing in evidence which will shew them to be not guilty of the charge: what then is so proper as to shew there was no felony committed, and therefore not guilty of being accessories?

Wherever a plaintiff brings an action to defeat a record, he is not estopped by the record. Whenever a record is made use of to found a charge, the defendant may make use of, and give evidence against it. 6 Mod. 216. Cro. Car. 531.

Verdicts may be defeated in their operation: Supposing this felony is sufficiently found,

yet it is not found so as to make the defendants accessaries. This will depend on the nature of accessaries, and what privity there must be between the principal and accessary, and how far it is necessary the act agreed to be done should be done. In order to make an accessary before the fact, the assent must be express and shewn, Cro. Eliz. 540. pl. 4.

All the cases of Tarquin carry the communication home to the principal. And so in Saunders and Archer's case, Plowden, 475, the judges said, that Archer was not guilty of being accessary to the death of the child, as there was no communication by words between him and Saunders concerning the child, only concerning the wife.

And that the felony intended must be communicated, appears further from Popham, 143.

Suppose a man sends a letter to A, counselling him to kill B; but A does it before he receives the letter; here there is no communication, and so he is not guilty of being accessary.

2. The act committed must be the same as was agreed to be done, or in consequence of that agreement, as in Saunders's case, Plowden, 475. There was no persuasion to induce Ellis and Kelly to commit the robbery on Salmon; for the verdict says, they were never told of that being the robbery intended.

The procurement then was only to commit larceny; and it was contingent, whether grand or petit larceny; for it depended on the value of the goods they took. As to what Mr. Hume said, that stealing linen was the artifice by which Ellis and Kelly were to be entrapped; it is not found, that it was the artifice.

But lastly, There is a case founded on very great authority, 2 Lord Raymond, 1574, 1586, the King against Huggins,* where it is said, that the aiding and abetting is a matter of fact, and must be found by the jury, and not left to the Court: same case, 2 Strange, 885, 6. The Court there said, We are to determine upon facts, not upon the evidence of facts. It must be expressly found that they have aided and abetted.

When a person is ousted of clergy by act of parliament, two things are necessary:

1. That the indictment precisely brings the party within the statute; otherwise, though possibly the fact itself may be within the statute, and it may so appear upon the evidence; yet, if it be not alledged in the indictment, the party, the convict, shall have his clergy.

2. If the fact laid in the indictment does come within the statute, yet, if upon the evidence, though it is a felony, it appears not to be so qualified as laid in the indictment, the jury ought to find him guilty of the felony only, but not in the manner laid in the indictment; as for instance, guilty of the felony, but not of the robbery; and thereupon the prisoner shall have his clergy, 2 Hale P. C. 236.

* See it in this Collection, vol. 17, p. 298.

Mr. Hume's Reply.

It is now, my lords, incumbent upon me, in this case, of so great importance to the defendants, the law, and the public, to offer something to your lordships by way of reply. I shall beg leave, therefore, first of all, to lay two objections, which were started by Mr. Aston, out of the case:

1. To the form of the indictment, because the question now is not in arrest of judgment.

2. The last objections from the case of the King and Plummer, and the King and Huggins.

I admit that the jury are to find facts. The jury find that they aided; this is finding that they were accessaries, and so there was no need of a special verdict. The special verdict is only, that the judges may determine, whether what they have found will make them accessaries or no.

I shall first consider what is to be the effect of the record of conviction. It may have two:

1. It may be decisive and conclusive, in respect to all the defendants, of the principal felony existing, and said to be committed.

2. It may be evidence, on the part of the crown, of the fact, sufficient to prove the fact, &c. thereby rendering it necessary for the defendants to prove the contrary.

I lay out of the case all that was said of the cases where records are no evidence at all; for here the record is evidence legal and necessary.

Mr. Aston seemed to contend, that the record might be evidence, but such as to throw the *onus probandi* on the defendants.

1. As to the principal's being convicted first; all the indictments are in the present form.

The defendants must give that in evidence, according to the nature of evidence, and such as the law will admit. If the record of the conviction is sufficient to support the charge, the defendants cannot give parol evidence against it.

2. Whether it does not operate on the part of the crown, unless any evidence be given against it.

If the defendants had given any evidence, and the jury had been of opinion, that it appeared that there was no robbery, the judges would have directed a general verdict. The defendants ought to shew, that there was no robbery committed in this verdict. Let us see then, whether or no there is a robbery found. It is found, that the goods were taken by assault, and feloniously: it is not found, that he consented to deliver the goods. How can Salmon's agreement at the Bell be taken to go to an after time in the high road, that he did assent to be robbed? This would be contradictory to the verdict.

Your lordships are to take the robbery at the time of the commitment of it in the highway, and to consider whether it is found, that Salmon was robbed voluntarily, supposing there was a robbery committed by them. All the defendants saw Kelly and Ellis, but Salmon

did not. If Salmon was put in fear, says the learned serjeant, it was not what he agreed to; for the agreement was, that he should be robbed voluntarily. Now the fact was, that not knowing the persons who were to rob him, upon being used a little roughly by them, he trembled, and said, Take what I have got, gentlemen, don't use me ill.

The cases cited by the Serjeant and Mr. Aston prove, that Salmon could not be a principal to a robbery upon himself; yet he may be an accessory to that robbery which was plotted at the Bell.

If Kelly and Ellis had stolen the linen, the defendants would not have been accessories, because that was not the felony plotted.

There may be accessories without communication by privity, assent, and consent: are these defendants accessories, 'auxilio, vel precepto, vel mandato?' and though, 'delegatus non potest delegare,' yet, 'qui facit per alium, facit per se:' and so all the links of this chain are found: the whole chain hangs together, and your lordships cannot separate it. If plotting makes a man accessory, did they not plot? If consenting is necessary, did they not consent?

In December 1755, at the Old-Bailey sessions, Justice Foster pronounced the Judgment of the Court in the Case between the King and M'Daniel and others, to the effect following:

The indictment chargeth, that at the general gaol-delivery held at Maidstone in the county of Kent, on the 13th of August, in the 28th year of the king, Peter Kelly and John Ellis were by due course of law convicted of a felony and robbery committed by them in the king's highway in the parish of St. Paul, Deptford, in the county of Kent, upon the person of James Salmon, one of the prisoners at the bar; and that the prisoners Stephen M'Daniel, John Berry, James Egan, and James Salmon, before the said robbery, did, in the parish of St. Andrew, Holborn, in this city, feloniously and maliciously comfort, aid, assist, abet, counsel, hire, and command the said Peter Kelly and John Ellis to commit the said felony and robbery.

On this indictment the prisoners have been tried, and the jury have found a special verdict to this effect:

'That Kelly and Ellis were by due course of law convicted of the said felony and robbery.

'That before the robbery, all the prisoners and one Thomas Blee, in order to procure to themselves the rewards given by act of parliament for apprehending robbers on the highway, did maliciously and feloniously meet at the Bell-Inn in Holborn in this city; and did then and there agree, that the said Thomas Blee should procure two persons to commit a robbery on the highway in the parish of St. Paul, Deptford, upon the person of the prisoner Salmon.

'That for that purpose they did all maliciously and feloniously contrive and agree,

'that the said Blee should inform the persons so to be procured, that he would assist them in stealing linen in the parish of St. Paul, Deptford.

'That in pursuance of this agreement, and with the privity of all the prisoners, the said Blee did engage and procure the said Ellis and Kelly to go with him to Deptford in order to steal linen; but did not at any time before the robbery inform them, or either of them, of the intended robbery.

'That in consequence of the said agreement at the Bell, and with the privity of all the prisoners, the said Ellis and Kelly went with the said Blee to Deptford.

'That the said Blee, Ellis, and Kelly being there, and the prisoner Salmon being likewise there waiting in the highway in pursuance of the said agreement, the said Blee, Ellis, and Kelly feloniously assaulted him, and took from his person the money and goods mentioned in the indictment.

'They further find, that none of the prisoners had any conversation with the said Ellis and Kelly, or either of them, previous to the robbery. But they find that, before the robbery, the prisoners M'Daniel, Egan, and Berry saw the said Ellis and Kelly, and approved of them as persons proper for the purpose of robbing the said Salmon.'

But whether the prisoners are guilty in manner as charged in the indictment, they pray the advice of the Court.

This special verdict hath been argued before all the judges of England, and two questions have been made.

First, Whether it appeareth from the facts stated in the special verdict, that any robbery was committed by Ellis and Kelly on the person of James Salmon.

Second, Supposing that Ellis and Kelly were guilty as principals in the robbery, whether the facts found will warrant the Court in passing judgment upon the prisoners, or any of them, upon this indictment?

The second point seemeth to have been the doubt on which the jury pray the advice of the Court; and I have reason to believe, that when it first came to be considered, it was matter of great doubt with some gentlemen of the profession, whose abilities were never yet called in question.

For which reason, and because the law touching accessories before the fact is a matter of great and very extensive consequence to the justice of the kingdom, and ought to be well understood, I will deliver my thoughts upon the second question, before I come to that which will finally govern the present case.

As to the prisoner Salmon, the judges, upon consideration of this special verdict, are unanimously of opinion, that he cannot be guilty within this indictment: for unless he was party to the agreement at the Bell, there can be no colour to involve him in the guilt of Ellis and Kelly.

And on the other hand, if he did part with his money and goods in consequence of that agreement, it cannot be said that in legal construction he was robbed at all; since it is of the essence of robbery and larceny, that the goods be taken against the will of the owner.

There was a late case (Belchier and Norton's) cited in the argument on the part of the crown, which I shall consider by and bye, and distinguish from the present.

It hath been held, (Crompt. Inst. 41. b. pl. 4, 5.) and I think rightly, that a man may make himself an accessory after the fact to a larceny, of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting in his escape.

And under some circumstances a man may be guilty of larceny in stealing his own goods, or of robbery, in taking his own property from the person of another. A delivereth goods to B, to keep for him (1 Hale 513.) and then stealeth them, with intent to charge B with the value of them, (Stanf. 26. A. 3 Inst. 110.) this would be felony in A. Or, A, having delivered money to his servant to carry to some distant place, disguiseth himself and robbeth the servant on the road, with intent to charge the hundred, this, I doubt not, would be robbery in A.

For in these cases the money and goods were taken from those who had a special temporary property in them, with a wicked, fraudulent intention; which is the ancient known definition of larceny, 'Fraudulenta obtrectatio rei alienæ invito domino.' But I never did hear, before this time, of any attempt to charge a man as accessory before the fact to a robbery committed on his own person.

As to the prisoners M^r Daniel, Berry, and Egan, the judges are unanimously of opinion, that supposing a robbery was committed on Salmon, the facts found by the special verdict are sufficient to charge them as accessories in the manner they are charged in this indictment.

For the verdict findeth, that every circumstance attending the fact, the place where, and the person on whom it was to be committed, the means by which it was to be effected, and the persons by whom it was to be done; all these circumstances were settled and agreed upon by the prisoners previous to the fact: and in consequence of this consult and agreement the fact was committed.

It is indeed found, that none of the prisoners had any conversation with Ellis and Kelly previous to the robbery; and that Blee did not acquaint Ellis and Kelly with his intention to commit any robbery, but drew them to Deptford under pretence of stealing linen.

These circumstances seem to have been the foundation of the jury's doubt; and the prisoners' counsel have laid great stress on them.

As to that circumstance, that Blee's true design was not made known to Ellis and Kelly, it appeareth manifestly by the facts found, that it was part of the original agreement at the

Bell, that the true design should be concealed from them; and that they were to be drawn to the place of action under another pretence. This circumstance therefore being part of the original agreement, the prisoners cannot avail themselves of it, if the agreement upon the whole, and what was done in consequence of it, be sufficient to make them accessories.

As to the other circumstance, that the prisoners had no conversation with Ellis and Kelly before the assault upon Salmon, their counsel relied chiefly on the words of the statutes on which this indictment is founded.

The statutes are the 4th and 5th of Philip and Mary, c. 4, and the 3d and 4th of W. and M. c. 9. The words of the former, which are descriptive of the offence, are, "If any person shall maliciously counsel, hire, or command," The latter retaineth the words counsel, hire, or command, and addeth others, "shall comfort, aid, abet, or assist." From these words, which it must be admitted are descriptive of the offence, the prisoners' counsel concluded, that without a personal, immediate communication of counsels, intentions, and views, from the supposed accessories to the principals, there can be no accessory before the fact.

But the judges are all of opinion, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, and within these statutes. For what is there in the notion of commanding, hiring, counselling, aiding or abetting, which may not be effected by the intervention of a third person, without any direct immediate connection between the first mover and the actor?

A biddeth his servant hire somebody, no matter whom, to murder B, and furnisheth him with money for that purpose; the servant procureth C, a person whom A never saw or heard of, to do it. Is not A, who is manifestly the first mover or contriver of the murder, an accessory before the fact? It would be a reproach to the justice of the kingdom to suppose he is not.

It is a principle in law which can never be controverted, that he who procureth a felony to be done is a felon. If present, he is a principal; if absent, an accessory before the fact.

In the case of the earl of Somerset, [vol. 2, p. 966] who was indicted upon the statute of Phil. and Mar. as an accessory before the fact to the murder of sir Thomas Overbury, the lord chancellor Ellesmere, high-steward, in the outset of the cause, and before any evidence given, directed the peers triers, and all the judges present concurred with his lordship, that the only point in issue was, Whether the earl caused or procured the murder, or not. And accordingly the earl was found guilty upon evidence which satisfied his peers, that he had contributed to the murder by the intervention of his lady, and of sir Jarvis Elway, and Franklin, who were themselves no more than accessories, without any sort of proof

that he had ever conversed with Weston, the only principal in the murder, or had corresponded with him directly by letter or message.

The best writers on the crown law agree, that persons procuring, or even consenting before-hand, are accessories before the fact.

Lord Coke, in his Comment on West. 1, c. 14, in explaining the words 'commandment' and 'aid' as applied to accessories before the fact, saith, "Under this word 'command' are comprehended all those who incite, procure, set-on, or stir-up any to do the fact. And under the word 'aid' are comprehended all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the fact, and not present when it is committed."

Lord Hale saith, (1 Hale 374.) "Misprision of felony is concealing a felony which a man knoweth, but never consented to; for if he consented, he is either principal or accessory. (Id. 615, 616.) Again, accessory before, is he that, being absent at the time of the felony committed, doth yet procure, counsel, or abet another to commit the felony."

Many authorities to this purpose may be cited, which for brevity sake I will barely refer to.*

It was objected by the prisoners' counsel, that penal statutes are to be construed with great strictness; and that the words 'procure' or 'consent' are not to be found in either of the statutes upon which this indictment is formed.

The principle is true, that in prosecutions on penal statutes the words of the statute are to be pursued. But it is equally true, that we are not to be governed by the sound, but by the well-known, true, legal import of the words.

Some of the words made use of in the present indictment, and in one or other of the statutes upon which it is founded, are 'command,' 'aid,' and 'abet.' The passage I have just cited from lord Coke sheweth, that persons procuring, contriving, or consenting, come within the words 'aid' and 'command.' And that persons procuring are, in the language of the law, abettors, may be proved by many authorities, which it is not necessary to cite at large.†

This being so, the prisoners M'Daniel, Egan, and Berry, who were the contrivers of this scene of iniquity, agreed upon the place and manner of execution, and conducted the whole by the intervention of their instrument Blee, are accessories before to this robbery, supposing a robbery was committed. For in construction, and indeed in the language of the law, they did

command Ellis and Kelly to commit the fact, and did aid and abet them in it.

I come now to the other question, Whether, upon the state of the case in the special verdict, any robbery, in the legal notion of that offence, was committed on Salmon or no?

And the judges are of opinion, that it doth not appear, from the facts stated in the verdict, that the taking the money and goods from Salmon, by Ellis and Kelly, doth amount to a robbery, in the legal notion of that offence.

Something was said in arguing of this case upon the question, how far a person charged as an accessory, and brought to his trial after the conviction of the principal, can controvert the truth of the fact found by the verdict against the principal; or how far the supposed accessory can be let in to shew, either that no felony was committed, or that the person convicted as principal was not guilty of it.

This general question is of great extent and of mighty importance in prosecutions of this kind; and some diversity of opinion there is among the judges upon it.

But it will not be necessary at present to enter at all into it; because the Court in the present case must found its judgment upon the facts found by the verdict, and upon them alone. Now it is expressly found, that Salmon was party to the original agreement at the Bell; that he consented to part with his money and goods under colour and pretence of a robbery; and that for that purpose, and in pursuance of this consent and agreement, he went to Deptford, and waited there till this colourable robbery was effected.

This being the state of the case with regard to Salmon, the judges are of opinion, that, in consideration of law, no robbery was committed on him. His property was not taken from him against his will.

It was said by the prisoners' counsel, that the verdict doth not find that Salmon was put in fear; and, say they, there can be no robbery without the circumstance of putting in fear.

I think the want of that circumstance alone ought not to be regarded. I am not clear that that circumstance is of necessity to be laid in the indictment, so as the fact be charged to be done 'violenter et contra voluntatem.' I know there are opinions in the books which seem to make the circumstance of fear necessary; but I have seen a good MS. note of an opinion of lord Holt to the contrary. And I am very clear that the circumstance of actual fear at the time of the robbery need not be strictly proved. Suppose the true man is knocked down without any previous warning to awaken his fears, and lieth totally insensible while the thief rifeth his pockets, is not this a robbery? And yet where is the circumstance of actual fear? Or suppose the true man maketh a manful resistance, but is overpowered, and his property taken from him by the mere dint of superior strength, this doubtless is a robbery. And in cases where the true man delivereth his purse without resistance, if the fact be attended with

* See Stanf. 40. Lambard 157. Dalt. c. 161, s. 5. And see Co. Ent. Appeal pl. 5, 6. Dyer 190, 186. 1 And. 195. Rastal Appeal, pl. 15. Precedents of appeals, and indictments against accessories before the fact, all charging them as procurers of the felony.

† See Rastal's Terms le Ley. V. Abettors, Stanf. 1, 3, c. 11. Westm. 2, c. 12. Rastal's Ent. fo. 43, b. 44, a. Dyer 190.

those circumstances of violence or terror which in common experience are likely to induce a man to part with his property for the safety of his person, that will amount to a robbery. And if fear be a necessary ingredient, the law, in *odium spoliatoris*, will presume fear, where there appeareth to be so just a ground for it.

I come now to the case I promised at the beginning to consider, and to distinguish from the present case. One Norton having been informed that one of the early stage-coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavours to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise, till the highwayman came up to the company in the coach and to him, and presenting a weapon demanded their money. Norton gave him the little money he had about him, and then jumped out of his chaise with a pistol in his hand; and, with the assistance of some others, took the highwayman.

The robber (Belchier) was indicted about a year ago in this court for a robbery on Norton, and convicted. And very properly, in my opinion, was he convicted.

But that case differeth widely from the present. In that case, Norton set out with a laudable intention to use his endeavours for apprehending the highwayman, in case he should that morning come to rob the coach, which at that time was totally uncertain; and it was equally uncertain whether he would come alone or no. In the case now under consideration, there was a most detestable conspiracy between Salmon and the rest of the prisoners, that his property should be taken from him under the pretence and show of a robbery; and time, place, and every other circumstance, were known to Salmon before-hand, and agreed to by him.

In Norton's case, there was no concert, no sort of connection between him and the highwayman; nothing to remove or lessen the difficulty or danger Norton might be exposed to in the adventure. In the present case, there was a combination between Salmon and one at least of the supposed robbers, I mean Blee. And though Salmon might not know the persons of Ellis and Kelly, yet he well knew that they were brought to the place by his friend Blee, and were wholly under his direction.

So widely do these cases differ.

To conclude, all the prisoners have been guilty of a most wicked and detestable conspiracy, to render a very salutary law subservient to their vile, corrupt views. But great as their offence is, it doth not amount to felony*. And therefore the judgment of the

* (Foster's Reports, p. 121-130.) The learned judge says further, p. 364, "At a conference among the judges upon the case of M'Daniel and others above-reported, a general question was moved, how far, and in what cases

Court is, that they be all discharged of this indictment.

Afterwards, at the February sessions, 1756, in alderman Bethell's mayoralty, they were prosecuted at the expence of the crown, upon the representation of the judges, for a Conspiracy, on the following indictment:

'Stephen M'Daniel, John Berry, James Egan, (otherwise Gahagan), and James Salmon, were indicted, for that they, being persons of wicked and corrupt minds and conversations, and not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, not regarding the laws of this realm, or the pains and penalties that should befall thereon, did wickedly, unlawfully, and maliciously combine, conspire, and agree together, that one Thomas Blee should procure two persons, to wit, Peter Kelly and John Ellis, to go to Deptford, in Kent, and to take divers goods and money from the person of the said Salmon on the king's highway, who should be

the accessory may avail himself of the insufficiency of the evidence in point of fact, or of the incompetency of witnesses in point of law, produced against the principal; and in what cases he may be let in to shew, that the facts charged and proved against the principal, do not, in judgment of law, amount to felony? There was in that case no occasion to enter far into these questions; since the facts, upon which the point of law then under consideration must necessarily turn, were all found by the special verdict. The general question was therefore waived."—And then goes (p. 365,) to treat on accessories; and adds, "Therefore, if it shall come out in evidence upon the trial of the accessory, as it sometimes hath, and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged, the accessory may avail himself of this, and ought to be acquitted. This was the case of M'Daniel, and others above-cited. The youths who were convicted of the robbery, being totally ignorant of the conspiracy mentioned in the report of that case, took no advantage of it, and were convicted upon full and legal evidence. But when the whole scene of villainy came to be disclosed upon the trial of those miscreants, they were discharged from that indictment upon this single objection, that the offence of the principal did not, in the eye of the law, amount to a robbery.

"If this opinion was well founded in point of law, and shall stand the test of future times, as I think it will, every other person in the like circumstances may, upon his trial, avail himself of it, and will be entitled to a verdict of acquittal."—If any one wants to see more on this head relating to accessories, he may consult judge Foster's Reports, p. 130, 131, 366, and following pages. *Former Edition.*

'waiting there for that purpose; with intent that they should cause the said two persons to be apprehended and convicted for robbing him the said Salmon on the king's highway, and so unjustly and wickedly procure to themselves the rewards mentioned in the act of parliament, proclamation, and other parochial rewards for the apprehending of highwaymen; to the great displeasure of Almighty God, and the great dishonour and scandal of the laws of this kingdom, and the evil example of all others, against his majesty's peace, his crown and dignity, July '23, 1754.'

Upon the evidence of Blee, and others that confirmed him in every thing, the Court declined calling more witnesses, though several were in court; and the prisoners making but a trifling defence, they were all found guilty.

SENTENCE.

Stephen M'Daniel, John Berry, James Egan (otherwise Gabagan), and James Salmon, to be imprisoned in Newgate for the term of seven years; and in that time to be each of them set in the pillory* twice, in the manner following: M'Daniel and Berry in Holborn, near Hatton-Garden; Egan and Salmon in the middle of Smithfield. Afterwards M'Daniel and Berry at the end of King-street, Cheapside; and Egan and Salmon again in Fleet-street, near Fetter-lane end: and at the expiration of that time, to find sureties for their good behaviour for three years, and to pay a fine of one mark each.

Stephen M'Daniel, John Berry, James Egan (otherwise Gabagan), and James Salmon, each once stood on the pillory, viz. M'Daniel and Berry near Hatton-Garden, on Friday the 5th of March, 1756; and were so severely handled by the populace, that it was with the utmost difficulty, that one of the sheriffs, and the keeper of Newgate, who stood in a balcony just by, prevented their being utterly destroyed; and so great was the mob, that the peace-officers found it impossible to protect the prisoners from their fury; and Egan and Salmon stood in Smithfield on Monday the 8th. They were instantly assaulted with showers of oyster-shells, stones, &c. and had not stood above half an hour, before Egan was struck dead; and Salmon so dangerously wounded in the head, that it was thought impossible he could recover. Whatever punishment they might deserve from the law, it is certain they ought not to be killed through the rage of the popu-

* See the Case of Elizabeth Cellier, *ante*, vol. 7, p. 1209, and *Rex v. Bowers*, and *Rex v. Beardmore*, cited in a Note to that Case.—See, also, Mr. Barrington's Observations respecting the pillory, quoted and referred to in Notes to that Case, and to the Case of *lord Audley*, vol. 3, p. 401, of this Collection.

lace. And we find, that April 11, 1734, Edward Dalton and Richard Griffiths were tried at the Old-Bailey, for the murder of John Waller in the pillory, by pelting him with cauliflower-stalks, &c. and found guilty, and both executed at Tyburn.*

In June sessions, in alderman Bethell's mayoralty, 1756, two of the before-mentioned miscreants, M'Daniel and Berry, together with one Mary Jones, were tried for murder, upon a conspiracy of the like nature against one Kiddenden (who was convicted and executed for a robbery on the highway, and at the gallows, in the most solemn manner, declared his innocence), on the following indictment: Stephen M'Daniel, John Berry, and Mary Jones, were indicted "for the wilful murder of Joshua Kiddenden, in maliciously causing him to be unjustly apprehended, falsely accused, tried, convicted, and executed, well knowing him to be innocent of the fact laid to his charge, with an intent to share to themselves the reward, &c. Feb. 4, 1754.†

* See what was said by the Chief-Justice after passing sentence on Mr. Reading, *ante*, vol. 7, p. 310; and the charge given to the sheriff by Jefferies after passing sentence on Elizabeth Cellier, *ante*, vol. 7, p. 1209.

† "In p. 56, note (d) having mentioned Egan and Salmon, who on the 8th of March 1756, stood in the pillory, Mr. Barrington observes, 'That the offence of these criminals was undoubtedly of the most atrocious nature; nor do I see, saith he, why they might not have been indicted for murder, notwithstanding Mr. Justice Foster hath in his Reports, p. 132, intimated his opinion, that such an indictment would not lie, and chiefly because there is no such precedent.' As to this observation, I have only to remark, that Mr. Justice Foster's opinion in relation to M'Daniel, Berry, and Jones, (for Mr. Barrington mistakes in supposing, that there was any foundation for indicting Egan and Salmon of murder,) is strongly supported by sir Edward Coke, who informs us (3 Inst. 48,) That to procure the death of an innocent person, by giving false evidence against him, was not holden for murder in his time." Dodson's Preface to Foster's Crown Law, 2d edition.

"It has been much doubted whether a person wilfully giving false testimony against another, in order to accomplish his death, can be indicted of murder, if the innocent party be convicted thereon, and suffer death by the judgment of the law. The only instance of a prosecution of this sort in modern times was in the case of M'Daniel, Berry, and Jones, who were indicted for murder, upon a conspiracy of this nature, against one Kiddenden, who was convicted and executed for a robbery upon the highway, upon the evidence of Berry and Jones. They were all convicted upon this indictment, in which the special matter was set

"The fact was plainly proved against them upon this indictment, and the special matter being set forth in the indictment, the Court

forth; but judgment was respited in order that the point of law might be more fully considered, upon a motion in arrest of judgment. But the attorney general declining to argue the point, the prisoners were discharged of that indictment. Mr. Justice Foster intimates a strong opinion against the validity of such an indictment, chiefly as it seems on the ground of its disuse for many ages past; though he admits that there are strong passages in our ancient writers, which greatly countenance such a prosecution. And we have the authority of Mr. Justice Blackstone [4 Black. Com. 196,] for saying, that the attorney general, in the case of M^r Daniel and others, did not decline arguing the point of law from any apprehension that it was not maintainable, but from other prudential reasons; and therefore that nothing should be concluded from the waving of that prosecution. What the chief of those prudential reasons was he alludes to in the same passage, namely, to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions if it must be at the peril of their own lives. With respect to the offence 'in foro conscientie,' it is without doubt as aggravated a species of murder as any that can be conceived." East's Pleas of the Crown, c. 5, s. 94.

To the above passage, Mr. East subjoins the following Note:

"The author has heard lord Mansfield C. J. make the same observation;" [as Mr. Justice Blackstone] "and say, that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment."

"To treat one unkindly, to work on his fancy, and to impair his health by fear and grief, and in that way to conduct him to the grave, is not that mode of killing (however wicked and depraved it may be) that the law takes cognizance of. But, on the other hand, if injury to the person is the immediate, direct, and almost inevitable consequence of the act done, it will constitute murder, though there be no blow or bodily harm, strictly so called, flowing directly from the hand of the prisoner. Wilfully to expose a sick person, or new born infant, to the inclemency of the weather, or to do any act which places another in imminent hazard, and death follows, amounts to murder; in which class may be reckoned the case of one swearing falsely in a capital trial, to facts that produce a verdict of guilty; provided it is made out, that it was such false swearing that produced the verdict of guilty." Burnet's Treatise on the Criminal Law of Scotland, chap. 1, p. 7, Note.

"In England, there was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as

suffered them to be convicted (Death), but immediately respited judgment; in order that the point of law might be more fully considered

there hath not been an instance wherein it has been held to be murder for many ages past: I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed (Mirror, c. 1, s. 9. Brit. c. 52. Bracton, l. 3, c. 4.) The Gothic laws punished in this case the judge, the witnesses, and the prosecutor; 'peculiari poenâ judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maximâ auctorem, ut homicidam.' (Stiernh. de jure Goth. l. 3, c. 3.) And, among the Romans, the 'lex Cornelia, de sicariis,' punished the false witness with death, as being guilty of a species of assassination. (Ff. 48, 8. 1.) And there is no doubt but this is equally murder 'in foro conscientie' as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such." Blackst. Comment. book 4, ch. 14, vol. 4, p. 196. And in another place (book 4, chap. 10, s. 16,) he says, "It has sometimes been wished, that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation; as it is universally by the laws of France. [Montesq. Sp. L. b. 29, chap. 11.] And certainly the odiousness of the crime speaks strongly in favour of the French law. But it is to be considered, that there they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In such a constitution therefore it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown; on whom alone the prisoner's fate depends: so naturally does one cruel law beget another. But corporal and pecuniary punishments, exile and perpetual infamy, are more suited to the genius of the English law; where the fact is openly discussed between witnesses on both sides, and the evidence for the crown may be contradicted and disproved by those of the prisoner. Where indeed the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment: which our antient law in fact inflicted. [Britton, c. 5.] But the mere attempt to destroy life by other means not being capital, there is no reason that an attempt by perjury should; much less that this crime should in all judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted: and therefore it seems already

upon motion in arrest of judgment.* But the attorney-general declining to argue the point of law, the prisoners were at a subsequent session discharged of that indictment.

"This prosecution, I am satisfied, arose from a laudable zeal for keeping the fountains of justice pure and unpolluted, and a just indignation against an offence of this signal enormity.

"It must be confessed, that there are strong passages in our ancient writers, which greatly

(except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law; which has adopted the opinion of Cicero [de leg. 2, 9.] derived from the law of the twelve tables, 'perjuria poena divina, exilium; humana, dedecus.'

By the Commons' Journal it appears, that on November 17, 1692, the House gave leave to bring in a bill that perjury, and subornation [subordination in the printed journal] of perjury in capital cases, shall be felony without benefit of clergy.

On December 5, the bill was presented and read a first time, and on the 19th, 20th, and 29th of the same month, and the 3d and 19th of January, different orders were made for reading it a second time, but I find not any further mention of it.

The session was terminated by prorogation, on March 14th following.

* Foster's Reports, p. 131, 132.—"There being a doubt, whether the facts proved against them amounted in law to murder, which was to have been argued before the judges, if the attorney-general had not declined it. It is a doubt which could not have arisen in any other country, where the Roman law is allowed to have any weight; for by that law it is expressly declared, That witnesses, who by a false and malicious testimony procure an innocent man to be capitally condemned, shall be deemed guilty of murder. 'Quive falsum testimonium dolo malo dixerit, quo quis publico judicio rei capitalis damnaretur,' Digest. lib. 48, tit. 8, § 2." *Former Edition.*

countenance a prosecution of this kind. But those writers must always be read with great caution upon the subject of homicide.

"Bracton, whom the writers of that age for the most part follow, was a doctor of both laws before he came to the bench. It is no wonder therefore, that having before him no tolerable system of the English law, then in its infant state, he should adopt what he found in the books of the civil and canon law, which he had read, and seemeth to have well understood.*

"Succeeding writers of that age refined upon him, and in their loose way wrote upon the subject rather as divines and casuists than as lawyers; and seem to have considered the offence merely in the light in which it might be supposed to be considered *in foro cali.*

"But the practice of many ages backwards doth by no means countenance their opinion.

"And during all the violence and rage of the prosecution against Dr. Oates, it seemeth not to have entered into the imagination of those concerned in it, or of the Court, who would not have spared him if they could have taken their full blow at him, that the offences of which he was convicted could have been so charged as to have reached his life. Though the judgment they passed on him, the most cruel, I believe, that ever was given in Westminster-hall in case of a misdemeanor, might probably have ended in his death."†

Egan was killed in the pillory, but M^r Daniel and Berry continued in Newgate under their former sentence till Feb. 26, 1762, when John Berry died in Newgate; and the year following M^r Daniel procured himself to be sent abroad for life to the Indies, as a soldier.—Salmon, I take it, died in Newgate before.

* See Dig. l. 48, tit. 8, ad Legem Corneliam de Sicariis: l. 9, tit. 2, ad Legem Aquilianam. And the writers on the canon law, collected by Linwood, l. 1, tit. 11. V. Ne Occides. *Former Edition.*

† See the proceedings against him, and what fell from the Court at the time of giving judgment, in vol. 10, p. 1315.

536. The Trial of WILLIAM BARNARD, at the Sessions-House in the Old-Bailey, before the Right Hon. Sir Charles Asgill, knt. Lord-Mayor of the City of London, Sir Michael Foster, knt. one of the Justices of the King's-Bench, Sir Sidney Stafford Smythe, knt. one of the Barons of the Exchequer, Sir William Moreton, knt. Recorder, and others his Majesty's Justices of Oyer and Terminer, for the said City, and County of Middlesex, on Wednesday the 10th, and Thursday the 11th of May, on the Black Act; for sending a Letter in a fictitious Name to Charles Duke of Marlborough, demanding a genteel Support for Life : 31 GEORGE II. A. D. 1758.

MIDDLESEX JURY.

| | |
|-------------------|-------------------|
| William Spinnage, | Benjamin Lester, |
| Edward Barlow, | Francis Phillips, |
| John Chilton, | Simon Pawson, |
| Edward Turner, | Richard Airey, |
| John Mills, | John Lugg, |
| Benjamin Bailey, | John Turner. |

• WILLIAM BARNARD, late of the parish
• of St. James's, within the city and liberty,
• of Westminster, in the county of Middle-
• sex, yeoman, was indicted, for that he being
• an ill-disposed person, and seeking wicked
• gain, and little regarding the laws and sta-
• tutes of this kingdom, or the pains and penal-
• ties therein contained, after the 1st day of
• June in the year of our Lord 1743, to wit, on
• the 3d day of December, in the 31st year of
• the reign of our sovereign lord George the
• second, king of Great Britain, &c. 1758, with
• force and arms, at the parish aforesaid, in the
• county aforesaid, knowingly, unlawfully,
• wickedly, and feloniously, did send a certain
• letter in writing, with a fictitious name, to
• wit, with the fictitious name of Felton thereto
• signed and subscribed, to the most noble
• Charles duke of Marlborough, and directed
• to the said duke, by the title and description
• of his grace the duke of Marlborough, de-
• manding therein a certain valuable thing, to
• wit, a genteel support for the life of him the
• said William Barnard, against the form of the
• statute in such case made and provided, to
• the evil example of all others in the like case
• offending, and against the peace of our said
• lord the king, his crown and dignity.'

After Mr. Moore had opened the indictment,

Mr. Serjeant Dary spoke as follows :

May it please your lordships, and you gentlemen of the jury ;

I am counsel in this cause for the prosecution against the prisoner at the bar, who stands indicted on an act of parliament made in the ninth year of his late majesty, very well known by the

name of the Black Act. That act of parliament, reciting the several mischiefs, and constituting several felonies, amongst other things, enacts, That if any person shall knowingly send any letter, without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing ; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.

It is on that act that this indictment now comes before you, that you have heard read. You see it is for sending a letter ; for it is on the first of these letters that the present indictment is founded ; the others are sent in consequence of the first, and explanatory of his intentions.

I will open to you, as concisely as I can, the several circumstances we have in evidence, in order to affect the prisoner at the bar : they are circumstances of that nature, corresponding so exactly with the prisoner's case, affecting him so very minutely, that the several circumstances do infer, I had almost said an impossibility of his innocence: you will find they all tally so exactly, they are so particularly relative to him, that it will be offering violence to every rule of reason, not to find him guilty.

Gentlemen, on the 29th of November, a letter was found under the door of the Ordnance-office, directed to his grace the duke of Marlborough : upon opening this letter, which was wrote in imitation of print-hand, bearing date that day the 29th of November, it will be necessary, for the sake of the following circumstances, to desire your attention to the several parts. These are the words :

" To his Grace the Duke of Marlborough.

" xxviii November.

" My lord ; as ceremony is an idle thing upon most occasions, more especially to persons in my state of mind, I shall proceed im-

mediately to acquaint you with the motive and end of addressing this epistle to you, which is equally interesting to us both. You are to know then, that my present situation in life is such, that I should prefer annihilation to a continuance in it: desperate diseases require desperate remedies; and you are the man I have pitched upon, either to make me, or to unmake yourself. As I never had the honour to live among the great, the tenor of my proposals will not be very courtly; but let that be an argument to enforce the belief of what I am now going to write. It has employed my invention, for some time, to find out a method to destroy another, without exposing my own life; that I have accomplished, and defy the law. Now for the application of it. I am desperate, and must be provided for: you have it in your power, it is my business to make it your inclination, to serve me; which you must determine to comply with, by procuring me a genteel support for my life; or your own will be at a period before this sessions of parliament is over. I have more motives than one for singling you out first, upon this occasion; and I give you this fair warning, because the means I shall make use of are too fatal to be eluded by the power of physic. If you think this of any consequence, you will not fail to meet the author on Sunday next, at ten in the morning, or on Monday, (if the weather should be rainy on Sunday) near the first tree beyond the stile in Hyde-park, in the foot-walk to Kensington: secrecy and compliance may preserve you from a double danger of this sort; as there is a certain part of the world, where your death has more than been wished for, upon other motives. I know the world too well, to trust this secret in any breast but my own. A few days determine me your friend or enemy.

"FELTON."

"You will apprehend that I mean you should be alone; and depend upon it, that a discovery of any artifice in this affair will be fatal to you: my safety is insured by my silence; for confession only can condemn me."

This letter containing every thing that is dreadful, that might raise apprehensions of terror, subscribed by a name which is painful to almost every ear—the name Felton! That was the name of the assassin that stabbed the duke of Buckingham at Portsmouth.

My lord duke, not intimidated by the letter, though greatly surprized at it, and willing to find out the author, was not afraid to endeavour to apprehend him; he went alone to the spot, and at the time appointed; however, there was some attendant on his grace at a distance, in order to observe what passed on the occasion. My lord duke had been there some time on horseback, and as much undressed as a man of his quality is. He had pistols before him; he had been there some time, and saw nobody at all at that particular place. After waiting some considerable time, he was returning, and observed a person come to the particular spot just

VOL. XIX.

by the tree beyond the stile in Hyde Park, by the foot-walk to Kensington: that person held a handkerchief to his mouth in a seeming disconsolate manner, looking into the water, and stood still a very considerable while. Upon his grace seeing this, that the man was not pursuing any way, the duke had no doubt in his own mind, but that this man (be he who he would) must be the person who had sent him this letter. The man sauntering just at the place, the duke rode up to the spot, expecting the person would speak to him: his grace asked the man, Whether he wanted to speak to him? He said, No.—Sir, said the duke, do you know me? I am the duke of Marlborough; telling you that, perhaps you have something to say to me.—No, my lord.—No notice being taken, the duke came away.

Gentlemen, you see, this was an appointment on a Sunday to meet at a place where several people might be supposed to be walking. What was the view of that person may be seen by and bye. The author of this letter speaks of his being exceedingly guarded against the possibility of a detection; he boasts of the care and caution he had used for that purpose,—he defies the law,—nothing but confession could condemn him,—his safety was insured by his silence,—he knew the world too well, to trust this secret in any breast but his own.

A few days after, in the same week, the duke received a second letter. This also was put under the door of the Office of Ordnance, and was also wrote in imitation of a print-hand: but the directions of both the letters are not; there will be occasion to take notice of that circumstance by and bye. The second letter is in these words:

"To his Grace the Duke of Marlborough.

"My lord; You receive this as an acknowledgment of your punctuality as to the time and place of meeting on Sunday last, though it was owing to you that it answered no purpose. The pageantry of being armed, and the ensign of your order, were useless, and too conspicuous: you needed no attendant; the place was not calculated for mischief, nor was any intended. If you walk in the west isle of Westminster Abbey, towards eleven o'clock on Sunday next, your sagacity will point out the person, whom you will address by asking his company to take a turn or two with you. You will not fail, on inquiry, to be acquainted with the name and place of abode; according to which directions you will please to send two or three hundred pound bank notes the next day by the penny post. Exert not your curiosity too early: it is in your power to make me grateful on certain terms. I have friends who are faithful; but they do not bark before they bite. I am, &c. &c. F."

Gentlemen, you see, the writer of the second letter speaks of being himself in the Park, or at least of knowing that the duke was there, at the time and place appointed: and therefore this was a farther circumstance to convince the

3 G

duke, that the person, whom he had seen the Sunday before in Hyde Park, and spoke to, was the writer of the second letter. You see it speaks of the duke's punctuality as to the time and place of meeting, the particular dress his grace was in, and assigns that as the reason of not speaking to him the Sunday before: so you see, gentlemen, that circumstance, which was a little unaccountable of itself, of the duke's not being owned by the person whom he had seen the Sunday before, is by this second letter accounted for;—"The pageantry of being armed, and the ensign of his order." He had then only a star on, and that perhaps an old one, so as not to be conspicuous: so that this accounts for the person's not speaking to the duke in Hyde Park. There can be no doubt at all, but that the writer of the second was the writer of the first letter.

The consequence then of this second appointment to meet the writer of the letters in the west isle of Westminster-abbey, you will observe public places were appointed, and at public times; the first in Hyde-park, the second in prayer-time at Westminster-abbey, where the duke was "by his sagacity to point out the person"—the writer of this letter. The duke accordingly went to Westminster-abbey, to the west-isle (though indeed, properly speaking, we don't know which to call the west isle, the church standing east and west). His grace went to the western-most part of the Abbey, and observed nobody lurking or standing in circumstances suspicious: after a little time, his grace was surprized to see that the same person, whom he had seen the Sunday before exactly at the spot in Hyde-park, appeared just in this place at the west end of Westminster-abbey; but he was surprized the more, that this person did not speak to him. Perhaps his grace had not then considered the tenor of this letter; for it was not to be expected, that the writer would address the duke, but rather refers to the duke's sagacity:—"Your sagacity will point out the person," it then directs, "whom you will address by asking his company to take a turn or two with you." His grace perhaps did not consider this exactly; but waiting some time for the person to speak to him, and finding he did not, his grace asked him, "Sir, have you any thing to say to me?" No, my lord.—"Have you nothing at all to say to me?" No.—"Have you nothing at all to say to me?" No, he had nothing to say to him. Now I should have mentioned to you, when this person came into the Abbey, another person came in with him, who seemed by his appearance to be a substantial tradesman, a good sort of man. These two persons, after stopping and looking about at the monuments near the west gate of the Abbey, the duke being sure one of them was the same man he had seen before in Hyde-Park, his grace thought proper to go and stand by them, to see if that person would speak to him. Seeing the duke took no notice of him, they both went towards the choir: the stranger went into the choir, and the man that his grace

had seen in the Park, came back again (leaving his friend there) to the spot where the duke was. The duke then asked him, Whether he had any thing to say to him? No, he had nothing at all to say to him. No, he had nothing at all to say. Then the duke walked a little on the other side of the isle, to see whether the man would follow him, or had a mind to speak to him at another spot. He observed the man looked eagerly at him; may-be it may be understood, he expected the duke's "sagacity would point out the man." However, the duke did not do what the letter required, that is, Ask him to take a turn with him.

At this second time there was somebody that was with the duke (when I say with him, I don't mean close to him, but) near enough, so as to take notice what passed, in order to apprehend the person, so as to put it beyond all doubt that he was the author of those letters. The duke, and this attendant of his, went out at the west door of the Abbey, in order to go to his coach. Now you will find by-and-bye, in the next letter, that the writer of these letters took notice of this attendant, but was under no apprehension of being watched by any body else; and that will account for those circumstances I am going to mention: as soon as the duke went out of the Abbey, that man, whom the duke had seen at both these places, watched the duke out of the Abbey, and as soon as his grace had passed the door of the Abbey, he went up, hid himself in a corner, concealed from a possibility of being seen by his grace in case he had looked back, and so watched him into his coach. It may be asked, Why his grace, upon having such clear conviction in his mind, that that person must be the writer of both the letters, did not apprehend him? his grace will tell you, he did not think himself justified in so doing; he could not reconcile it to his own mind to take up a man, where there was a possibility of his innocence.

Gentlemen, a few days after this, came a third letter to the duke, wrapped up in a very small compass, and directed to his grace the duke of Marlborough at his house. You will see, by comparing the direction, that this third letter was wrote by the writer of the first letter: It begins, "My lord, I am fully convinced you had a companion on Sunday." So far it is proved, that the writer of these letters was in the Park on the first Sunday, and saw the duke there; and was in the Abbey on the second Sunday, and saw the duke there; and that it was the same man that the duke saw at both these times.—"I interpret it as owing to the weakness of human nature: but such proceeding is far from being ingenuous, and may produce bad effects, whilst it is impossible to answer the end proposed."—Guarded through all. "You will see me again soon, as it were by accident, and may easily find where I go to; in consequence of which, by being sent to, I shall wait on your grace, but expect to be quite alone, and converse in whispers. You will likewise give your honour, upon meeting, that no part

of the conversation shall transpire."—So that you see, as he was guarded before, he was determined to make it impossible to be discovered: if they were to converse in whispers, and to be quite alone, it was impossible for other evidence to rise up against him—"These and the former terms complied with, insure your safety; my revenge, in case of non-compliance, (or any scheme to expose me) will be slower, but not less sure, and strong suspicion the utmost that can possibly ensue upon it."—You see, how artful he had contrived it: he was determined that nothing more than strong suspicion should ever be in evidence against him—"While the chances will be tenfold against you. You will possibly be in doubt after the meeting, but it is quite necessary the outside should be a mask of the in. The family of the Blooms is not extinct, though they are not in my scheme."—The word Blooms is in capital letters. That is a dreadful name! As Felton was the villain who assassinated the duke of Buckingham, so this is the name of the fellow who seized the duke of Ormond, and was going to carry him to Tyburn to execute him, and also who stole the crown out of the Tower of London.

You see, gentlemen, by this third letter, that the duke was to expect to hear something farther from the writer of these letters. It contains no appointment, but leads the duke to expect he shall see the writer again as by accident, and was to observe where he should go to, that the duke might know where to send for him; and that he would come in consequence of being sent for; but when he came to the duke the terms were, to be a secret conversation, not in the presence of a third person, and that too by whispers, and the duke promising, upon his honour, that no part of it should transpire, without which he was not led to think the writer should disclose any thing at all. The first letter was dated and received the 29th of November, the second received the next week, the third in the second week of December, and the last was some time in April.

The duke waited, expecting to hear farther; but heard nothing more until the middle of April. About the 14th there came a letter to his grace, wrote in a mean hand, but not in imitation of a print hand, as the others were. These are the words of the fourth letter:

"To his Grace the Duke of Marlborough.

"May it please your grace; I have reason to believe, that the son of one Barnard, a surveyor in Abingdon-buildings, Westminster, is acquainted with some secrets that nearly concern your safety: his father is now out of town, which will give you an opportunity of questioning him more privately. It would be useless to your grace, as well as dangerous to me, to appear more publicly in this affair.—Your sincere friend,

ANONYMOUS."

"He frequently goes to Storey's-gate coffee-house."

Gentlemen, the duke sent for Mr. Barnard,

the son of Mr. Barnard, according to the directions in that letter. This letter, you will see, bears no date at all; no memorandum, or any thing which could possibly indicate when the letter was sent, or when the duke received it. The duke, when Mr. Barnard came, was sitting in his room; and though upon opening the door of the outer room (which was at threescore yards distance from where the duke was), yet the moment Mr. Barnard entered the room, he was sure that was the man he had seen both in the Park and in the Abbey. Though the duke had no doubt in his own mind on the former circumstances, that the person whom he had seen before was the writer of the first letter, now he was fully convinced that he was the writer of all the letters. The duke was determined the scheme should not so far take effect, as to engage himself upon his honour, that no part of the conversation should transpire; if so, nothing could have prevailed upon him to prosecute: therefore you are not to expect he complied with a conversation in whispers, and a promise on the duke's part, that no part of the conversation should transpire. The third letter will tell you, that the person that entered the room was the writer of all these letters. As soon as he came into the room, the duke took him to the window, and asked him, whether he wanted to speak with him? "No, my lord."—No, Sir! I have received a letter, which tells me, that you are acquainted with some circumstances that nearly concern my safety.—"Not I, my lord." This is very surprizing, Sir! this is the letter; and shewed him the last letter. Still the duke had not given him any promise at all of not exposing the conversation. "Sir, it is very odd that you should be pointed out to me, to acquaint me with some circumstances relating to my safety, because it mentions some circumstances as to the time, the place where you are to be found, your father's being out of town, and the like." The prisoner incautiously said immediately, "My lord, my father was out of town at that time."—"At what time, Sir? The letter bears no date, nor have I mentioned to you a syllable when I received it: how came you to know when I received this letter, that you should tell me, your father was not in town at that time? You speak clearly, as knowing when I received this letter; therefore give me leave on this occasion to tell you, that I do not only suspect you know of this letter, but that you have sent to me some other letters that I have received before:" then acquainting him with the other three letters, his grace observing upon them, that it was very odd and strange, that the letters corresponded so certainly and decisively on him, he being always at the places at the times appointed, and that he being the person named in the fourth letter too, and that he knew the time of the duke's receiving that letter, the duke put it upon him, "Sir, I am surprized at the writer of this letter; one should suppose from the style, and its being grammatically wrote, that the person who

wrote it, had had some share of education ; at least I am surprized that a man that has had any education at all, can descend to such a means of getting money." " My lord, your grace need not be surprized at that ; a man may be learned, and very poor." Very fond was he of softening things. " My lord, you need not be affrighted : I dare say the writer of these letters is a very madman." Why ! you are very much concerned to apologize for the writer hereof, said the duke. Picking out this circumstance, The man does not know me, he expresses his very great surprize at my appearing in the Park with the ensign of my order, and my being armed—as incautious as he had been before, he is incautious upon that too, and said, " Indeed I was surprized to see your grace armed." " Was you so," said the duke ? " Was you surprized to see me armed ? Can any man doubt a moment who wrote these letters ? But, however, Mr. Barnard, as you insist upon it, and declare so solemnly your innocence, I will not so far invade the laws of hospitality, whatever crime you have done." (He would not for the world apprehend a man in his own house whom he had sent for ; he let him go safe home again ; it was for that reason he would not give his promise not to reveal the conversation ; but in regard to the public he was determined to prosecute.) The duke said to him, " Sir, If you are not the writer of these papers, it much becomes you to find out who is ; for your name is particularly mentioned in this last letter ; either you are the writer, or allow me to say, somebody else owes you very ill-will that was the writer of them." I am relying merely on the terms of the last letter, wherein he was to inform his grace of some secrets that nearly concern his safety : what was the answer that the prisoner made ? First, what would have been the answer ? Must not a man be struck with astonishment, to hear he was one that was to inform his grace of things that nearly concerned his safety, so much to the hazard of his own life ? What became him, as having a regard to his own reputation and safety ? To determine, as far as in his power, to find out the writer ; nay to have given the duke assurance that he would do it : instead of that, what was his behaviour ? A smile of contempt—an unmannerly laugh in the duke's face, as if it did not concern him at all.

Gentlemen, I should think that to this there can hardly be a circumstance added more clearly to convince any man alive of the circumstances of this man's being the author of these letters ; but you will find afterwards the prisoner (for what reason let him tell if he can) told his grace, he had desired his companion that was with him in Westminster-Abbey to leave him : Why ? " Because he thought the duke wanted to tell him of some place he had for him." Good God ! how could he imagine he wanted to tell him of a place ? A person whom he had never seen before he saw him in the Park, how could he expect that ? This

was his awkward reason for desiring his companion to leave him.

I beg pardon, if I have omitted any thing ; these are the circumstances that have occurred to me on this occasion ; they are so strong and necessary in the proof of the prisoner's guilt, that I will venture to say, it is much more satisfactory to an indifferent person, than positive testimony—the positive testimony of any man, as men are liable to mistakes, as a mistake in time, a mistake in persons, will exceedingly vary the case ; but variety of circumstances, which tally in their own nature, cannot lie or deceive.

This prosecution is commenced merely for the sake of justice ; I am instructed to say from his grace, it is perfectly indifferent to him what will be the issue of this trial : he thought it his duty to come here, and leaves it to his country to determine as they shall think proper.

The Duke of Marlborough sworn.

D. of Marlborough. I received this letter from an unknown hand, dated the 29th of November, and directed to me, appointing me to meet the writer on a certain spot in Hyde-Park.

The first Letter read :

To his Grace the Duke of Marlborough.

[With care and speed.]

" My lord ; xviii November.

" As ceremony is an idle thing upon most occasions, more especially to persons in my state of mind, I shall proceed immediately to acquaint you with the motive and end of addressing this epistle to you, which is equally interesting to us both. You are to know, then, that my present situation in life is such, that I should prefer annihilation to a continuance in it : desperate diseases require desperate remedies ; and you are the man I have pitched upon, either to make me, or to unmake yourself. As I never had the honour to live among the great, the tenor of my proposals will not be very courtly ; but let that be an argument to enforce the belief of what I am now going to write. It has employed my invention for some time to find out a method to destroy another, without exposing my own life ; that I have accomplished, and defy the law. Now for the application of it. I am desperate, and must be provided for : you have it in your power, it is my business to make it your inclination, to serve me ; which you must determine to comply with, by procuring me a genteel support for my life ; or your own will be at a period before this sessions of parliament is over. I have more motives than one for singling you out first upon this occasion ; and I give you this fair warning, because the means I shall make use of are too fatal to be eluded by the power of physic. If you think this of any consequence, you will not fail to meet the author on Sunday next, at ten in the morning, or on Monday if the weather should be rainy, on

Sunday) near the first tree beyond the stile in Hyde-Park, in the foot-walk to Kensington: secrecy and compliance may preserve you from a double danger of this sort; as there is a certain part of the world, where your death has more than been wished for, upon other motives. I know the world too well, to trust this secret in any breast but my own. A few days determine me your friend or enemy.

"FELTON."

"You will apprehend that I mean you should be alone; and depend upon it, that a discovery of any artifice in this affair will be fatal to you: my safety is insured by my silence; for confession only can condemn me."

Q. What did your grace do upon the receipt of this letter?

Duke of Marlborough. I went to the place at the time appointed. It was at the first tree near the stile in Hyde-Park, in the way to Kensington, at the end of the Serpentine water, betwixt that water and a little pond. I was there some time, and saw nobody stop that I could suspect to be the person; upon which I was going away: but as I came to Hyde-Park corner, I turned my horse, and saw a person stand loitering, and looking at the water over the bridge. This was, I believe, within twenty yards of the tree, and this induced me to go back again. I rode up to the person very gently, and passed by him once or twice, expecting him to speak to me; he did not. I made him a bow, and asked him, if he had something to say to me? He said, No, I don't know you. I said, I am the duke of Marlborough; now you know me, I imagine you have something to say to me. He said, No, I have not. Then I rode away.

Was your grace armed?—I had pistols before me.

Had your grace any great coat on?—No, I had not. My star might easily be seen.

Does your grace see any body here that you saw there?—It was the prisoner at the bar.

Had your grace any servant or attendant with you?—I had no servant with me; there was a person, a friend of mine, at a good distance in the Park. A day or two after, I cannot be sure whether it was the next day, or the day after that, I received a second letter.

Counsel for the Prisoner. I am under a great difficulty, whether I shall object against this letter being read or not. Your lordship sees the first is a letter sent to the duke of Marlborough, demanding a very valuable thing, viz. a genteel employment for life. This is to the same noble duke, not demanding that valuable thing; but demanding two or three three hundred pounds in bank-notes. These demands are very different and distinct from one another: so different and distinct, that they seem to me to be different felonies. My lord, I apprehend one felony, whoever it may affect, cannot be evidence of another felony; nor can this letter, supposing there is any thing in it

amounting to a felony, be evidence to another felony—

but there were some acknowledgment in that directly affecting the prisoner at the bar; but I am inclined that the whole of this matter shall come before the Court, from my opinion of the defendant's innocence, and the substantial merits of his defence; and I think myself very happy that I have the assistance of such a Court, who are always counsel for the prisoner, where the life, property, and character of a man is at stake; and who, under these circumstances, will do that which is right, admit or not admit what is not proper evidence. I don't firmly object to it; I don't think it for the interest of my client to suppress it, who is called upon to answer in this matter; therefore I leave the Court to do as they think proper.

Counsel for Cr. I desire, if you have any objections, to make them now.

Court. The use made of this letter is to support the evidence of the first letter, let the contents be what they will. The use they make of it is to shew, that the prisoner at the bar was the writer or sender of the first letter.

The second Letter read:

To his Grace the Duke of Marlborough.

"My lord; you receive this as an acknowledgment of your punctuality as to the time and place of meeting on Sunday last, though it was owing to you that it answered no purpose. The pageantry of being armed, and the ensign of your order, were useless, and too conspicuous: you needed no attendant; the place was not calculated for mischief, nor was any intended. If you walk in the west-isle of Westminster-Abbey, towards eleven o'clock on Sunday next, your sagacity will point out the person, whom you will address by asking a company to take a turn or two with you. You will not fail, on inquiry, to be acquainted with the name and place of abode, according to which directions you will please to send two or three hundred pound Bank notes the next day by the penny-post. Exert not your curiosity too early: it is in your power to make me grateful on certain terms. I have friends who are faithful; but they do not bark before they bite. I am, &c. &c. F."

What did your grace do upon the receipt of this second letter?

D. of Marlborough. I went to Westminster-Abbey at the time the letter appointed. I had been walking there about five or six minutes before I saw any body that I suspected; then I saw the person I had seen before in Hyde-Park, and another person who seemed to be a good-looking man, a substantial tradesman: they came in and looked on the monuments. I knowing the person again, went and stood by them; but the prisoner said nothing to me: soon after they both of them went towards the choir: the stranger, I may call him, went into the choir, and the prisoner turned back and

came towards me, but did not speak to me. Then I asked him, if he had any thing to say to me, or any commands for me? He said, No, my lord, I have not. I said, Sure you have? He said, No, my lord. He walked up and down one side the isle, and I the other to give him a little more time; but he did not speak: then I went away out at the great door, and left him in the Abbey. I looked back to see if he watched me going out, but I did not see him.

Had your grace any body with you in the Abbey?—There were two or three people placed in disguise, ready, if I had given them the signal, to have him taken up. Though I was certain it was the same person whom I had seen and spoke to in the Park, I thought not proper to give the signal, but to run a little longer risk rather than to take up an innocent man. Very soon after this I received another letter; this is it.

The third Letter read :

To his Grace the Duke of Marlborough.

"My lord; I am fully convinced you had a companion on Sunday. I interpret it as owing to the weakness of human nature; but such proceeding is far from being ingenuous, and may produce bad effects; whilst it is impossible to answer the end proposed. You will see me again soon, as it were by accident, and may easily find where I go to; in consequence of which, by being sent to, I shall wait on your grace, but expect to be quite alone, and to converse in whispers. You will likewise give your honour, upon meeting, that no part of the conversation shall transpire. These and the former terms complied with, insure your safety: my revenge, in case of non-compliance, (or any scheme to expose me) will be slower, but not less sure; and strong suspicion the utmost that can possibly ensue upon it; while the chances would be ten-fold against you. You will possibly be in doubt after the meeting, but it is quite necessary the outside should be a mask to the in. The family of the BLOODS is not extinct, though they are not in my scheme."

Duke of Marlborough. At about two months after the receipt of this, I received another letter; this is it.

The fourth Letter read :

To his Grace the Duke of Marlborough.

"May it please your grace; I have reason to believe, that the son of one Barnard, a surveyor in Abingdon-buildings, Westminster, is acquainted with some secrets that nearly concern your safety; his father is now out of town, which will give you an opportunity of questioning him more privately. It would be useless to your grace, as well as dangerous to me, to appear more publicly in this affair. Your sincere friend,

ANONYMOUS."

"He frequently goes to Storey's Gate coffee-house."

Duke of Marlborough. There is no date to this letter. About a week or ten days after I received this letter, I sent a message to the coffee-house, by Mr. Merrick, who returned and told me he found Mr. Barnard there, and that he said, What could the duke of Marlborough want with him? He had spoke with him once in Hyde-Park, and another time in Westminster-Abbey. The messenger told me, he said he would wait on me, which he did at Marlborough-House, about half an hour after ten o'clock, I think, on the Friday following.

Prisoner. It was Thursday, my lord.

Duke of Marlborough. I cannot be sure as to the day. When he came in, I knew, at first sight, it was the same person that I had seen in the Park and in the Abbey. I desired him to walk with me into a room, and immediately shut the door when we were in. I asked him as before; he said, he had nothing to say to me; then I told him of the last letter I received, that it mentioned his name, and that he knew something concerning my safety; he said, he knew nothing of it. Then I recapitulated all the letters, beginning with the first, and remarked to him, that it was strange to me, that a man that wrote so very correct, without false English in any shape, should be guilty of so low an action; he said, A man may be very learned, and very poor. I then took notice of the second letter, and said, there must be something very odd in the man; he said, I imagine the man must be mad. I said, he seems surprised that I should have pistols; said he, I was surprised to see your grace with pistols, and your star on. I said, Why was you surprised at that? His answer was, after stopping a moment, It was so cold a day; I wondered you had not a great coat on: then I afterwards shewed him the letter again where his name was mentioned, and walked with him to the window; and as I read it, when I came to that part where it said his father was out of town, he said, It is very odd, my father was then out of town. I said nothing to him of that, though it struck me a good deal, as there was no date to the letter. I said, if you are innocent, it behoves you much more than me to find out the author of those letters, particularly the last; for it was an attempt to blast his character behind his back; he seemed to give me a smile, and away he went. I did not apprehend him then.

Counsel for the Prisoner. In what manner did your grace receive this first letter?

Duke of Marlborough. I am Master of the Ordnance. Somebody or other had put it in under the door of the office in the night-time, and the keeper of the door sent it to me the next day.

As to the second letter, which way did your grace receive that?—That was sent the same way, by being put under the door as the other.

Counsel. In consequence of the first letter, your grace went into the Park on horse-back, and was there some time without seeing any body you suspected, Were there not people

there?—D. of *Marlb.* I saw several people on horse-back, and some few walking in a hurry on foot.

Pray, my lord duke, after you had seen this person loitering, was there any thing going forward, such as hunting a duck, or the like?—No, nothing in the world as I saw; it was a very cold day.

Your lordship said there was another person at a distance, an attendant on your grace; How far might that person be off when you was speaking to the prisoner?—I cannot tell exactly. I had spoke to him to keep a great way off.

Was he in view of your grace?—I dare say he was.

Might not any person equally see that person as well as your grace?—I suppose he might.

Was your grace there at the time?—I was there rather before the time, I believe.

Did he in the least offer to follow your grace?—No, he seemed to go the other way.

With respect to the second letter, your grace went according to appointment to Westminster Abbey, and saw the prisoner and another person come into the Abbey; before that other person had left him, had your grace been near him?—I had; I stood by him in hopes he would speak to me, if he was the person that wrote the letters.

Whether the circumstance was not such, that that other person might very well believe your grace wanted to speak to the prisoner?—That I cannot tell. I stood very near the prisoner, wanting him to speak to me. It is possible he might think so.

Whether there were not at that time several persons attending on your grace?—There were two or three.

Did your grace speak to either of them in the Abbey?—No, I did not.

Whether, if there was any other person in Westminster Abbey at that time, whether that third person might not have taken Mr. Barnard for your grace's companion, as your grace spoke to him?—Upon my word, I cannot tell that.

Could there be a person to whom that expression, in the third letter, might be applied, referring to your grace's companion, besides Mr. Barnard?—Yes, it might be applied to a gentleman that went away with me in the coach from the Abbey.

Whether your grace did not bow several times to the prisoner before you spoke?—No, I don't think I did.

Counsel. With respect to the third letter, your grace heard no more of that till the fourth came?—D. of *Marlb.* I did not; and when the fourth came I sent to Mr. Barnard.

Did your grace know Mr. Barnard before you received these letters?—No, I did not at all.

Does your grace now know whether he was a person in such situation in life, as answered to the description in the letters?—I don't know

the least thing of him, either character or circumstances.

Then, abstracted from these circumstances, should your grace have entertained any suspicion of him more than of any other person?—I did not know there was such a man in the world.

When he came to your grace's house, did he come in very readily?—He did.

Whether his answer was, 'I was surprised to see you armed too,' or 'I was surprised to see you armed?'—I cannot take upon me to say whether he laid such an emphasis on it or not.

Then he made no secret of seeing your grace in the Park?—No.

Nor in the Abbey?—No.

Your grace mentioned, he said, It is very odd, my father was out of town then! could your grace apply that, in the manner it was spoke, that his father was out of town when the message came to him?—I really understood him, that he knew his father was out of town at the time of his writing the letter.

Did your grace mention the time you received it?—No, I did not mention any time.

Did he come (punctually) to his time?—He did; I think the messenger said he would wait on me about half an hour after ten.

In what manner was he apprehended?—I do not know; I understood he was summoned.

It has been said, he went away with a smile; Pray, my lord duke, might not that smile express the consciousness of his innocence as well as any thing else?—I shall leave that to the Great Judge.

He said, A man might be very learned, and very poor; Does your grace know whether this person at the bar is either learned or poor?—I do not know indeed.

May not that expression fall from any man whatever?—I cannot say as to that.

James Merrick sworn.

Merrick. I was directed from his grace to carry a message to Storey's-Gate coffee-house; I went, and there was the prisoner at the bar: I told him, the duke of Marlborough wanted to speak with him; he expressed some surprise at what the duke should want with him, but no fear.

When was this?—This was on Tuesday the 25th of April, in the evening; and he said, he would wait on the duke on the Thursday following, between ten and eleven o'clock.

Cross-examination.

What reason did he give for not waiting on his grace sooner?—His excuse was, he was going out of town.

Did he say any thing to you of his having seen the duke before?—He did, he said, he had seen his grace three times in his life, once in Hyde-park, and once in Westminster-abbey, and once at the camp at Byfleet; he said, he did not know the duke when he saw him in Hyde park, till the duke himself told him who he was.

Did he tell you what had passed either in the Park or in the Abbey?—He told me, that in the Park the duke rode up to him, and asked him, Sir, do you want any thing with me? his answer was, No. Then the duke asked him, If he knew who he was? he answered, No, again. Then the duke told him, he was the duke of Marlborough; then he made his bow: and in Westminster-abbey he told me he thought the duke had spoke to him; but on turning about he said, he did not; and he turned and went away.

Where had you this conversation?—This was in the room in the coffee-house by ourselves.

Did he tell you this voluntarily?—He did. At first he seemed surprised, and then said, he recollected these circumstances.

Did he express any signs of fear?—No; but he seemed much surprised.

William Marsden sworn.

Marsden. I was appointed by his grace the duke and justice Fielding to watch the duke in Westminster-abbey, and had two constables there in order to apprehend the person, if his grace had thought proper to give the signal.

Were you all together?—No, but so dispersed that our intention might not be known; I was within the choir hearing the prayers for some time; there was a gentleman near the duke with a sword, whom I thought the person at first, but I learned afterwards, he was an acquaintance of his grace's; I was not apprised that any such person would attend him: I saw Mr. Barnard and another person come in, and his eye was fixed on his grace as he walked in the aisle; they walked down the middle aisle, not directly to his grace; in a little time I observed his grace to meet them, and as I thought by the behaviour of Mr. Barnard, that he spoke first to the duke, presently after that Mr. Barnard's partner went off from him; then Mr. Barnard went and stood looking at the duke; then I thought Mr. Barnard was the person; so I did not mind the other: I saw his grace speak to him again, but was not near enough to hear what they said: after that, his grace walked backwards and forwards once or twice, and went out at the door he came in at; the other gentleman immediately followed the duke; I followed to see what passed; the gentleman, the duke's acquaintance, walked opposite to the duke; Mr. Barnard was got looking behind a post; any body that was on that side he was on could see him, but a person on that side his grace was on could not; I believe it was impossible for his grace to see him at that time; he looked after his grace a considerable time, then walked back: I followed his grace, and told him what observations I had made; his grace immediately told me, the man in black was the man that he had seen in Hyde-park: then I said, I wonder your grace did not give the signal to have him apprehended; his grace said the same

as repeated here, He would rather let it be a little longer, than to take up an innocent man; he should hear of him again, he apprehended, for he seemed to be afraid to speak to him at that time.

Was he apprehended after this?—He was. I procured him to come before justice Fielding, by a sham summons, in which he was accused with assault and battery: he was not taken up till he came there, then he seemed surprised.

Did he tell you about any thing that happened in Westminster-abbey?—I was with him in the dining room at Mr. Fielding's, in order to take his examination; I went as it were out of complaisance to him not to leave him alone; he talked a great deal, but I did not make such observations of it as I should have done if I had thought of his coming here: I remember he said he ordered his friend to walk off, that he might see what the duke wanted with him; and said, he thought the duke must come there by appointment: he mentioned something about the duke's giving him a place or post; I think he said he ordered his friend to walk off, to see if the duke would give him some place; or, Perhaps the duke wants to give me a place.

Are you sure he said the duke wanted to give him a place? or that his friend said, Go towards him, perhaps the duke wants to give you some place?—I cannot be sure which; I know the word 'place' was mentioned.

Cross-examination.

Where is the summons?—This is the summons (producing one); I did not serve it on the day it bears date; it was made out on Saturday the 29th of April. I was to have given him it that afternoon, but I was told he was gone to Brentford; so I went early on Monday morning following, and gave it him: this was only made out as a decoy; the name in it is one of the constables that was fixed in Westminster-abbey, named Roger Boucher.

Did he shew any unwillingness to come?—No, none at all; he looked at it, and said, It is a summons from Mr. Fielding; he read it over, and said, Roger Boucher! I know nothing of him: give my compliments, tell him I will wait on him.

As to this place that he looked through, which door is it at?—It is the west gate near the gate-house; just at the corner there is another gate, and next to the wall is a sort of a post, which is what he looked through, or by.

Is not that gate, as you call it, a close wainscotted door?—It is a door, but the place where I mean is a post; he peeped between the post and the wall. I have never been since to look at it; if there is not a hole between that and the wall, he must look by the other side of it.

Which way was his head?—That was towards the gentleman who was close to the wall, opposite him; he must have turned his head farther from the wall to have seen his grace, as his grace was going to take coach.

PRISONER'S DEFENCE.

Prisoner. I am entirely innocent of this affair with which I am charged. I leave it to the Court and the jury, with the evidence that will be produced.

For the Prisoner.

John Barnard sworn.

J. Barnard. I am father to the prisoner at the bar.

What is his employ?—He is employed in my business as a builder and surveyor principally; in not only that, and drawing plans, but also in receiving great sums of money.

Have his accounts always stood right and clear?—They always have.

Do you look upon him to be a sober man?—I have had great reason to believe him such, more particularly lately.

Has he been possessed of large sums of money?—He has, of considerable sums; I have oftener asked him for money than he me.

Had you any occasion to send him to Kensington on Sunday the 4th of December?—I had nothing, but circumstances brought the day to my mind since: I gave him an order on that Sunday morning, when we were at breakfast, to go to Kensington, to know whether there was some money paid by the treasurer of the turnpikes for gravel: I have a brother there, named Joseph; he went there and did his business, and dined with my brother.

How do you know that?—Because he told me so; and the solicitor of the turnpike told me he had been with him, and in consequence of which I had my money afterwards.

Have you ever heard your son take any notice of his meeting with the duke of Marlborough that day?—When he came home, he told me, he had met the duke of Marlborough, and these circumstances of his grace's taking notice of him; he mentioned it as an extraordinary thing. I asked him, if he had not looked a little impudently (as he has a near sight) at him, or pulled his glass out? He said, he saw another gentleman at a distance, and the duke was armed; and he imagined there might be a duel going forwards; he has from that time to this mentioned it as a very strange event several times in my house, without any reserve at all.

Cross-examination.

At the time you sent your son to Kensington on the 4th of December, suppose you had not given him an order to go there, whether he was not at liberty to go where he pleased?—Yes; I never restrain him.

Did he say he was surprised to see the duke without a great coat?—I cannot remember that particular.

Did you hear him mention his seeing the duke of Marlborough in Westminster-Abbey?—I have very often, and very publicly, and with some surprise; as he has that in Hyde-Park. I said to him, I would not have you be

public in speaking of things of this kind, lest a use be made of it to your disadvantage.

Thomas Barnard sworn.

T. Barnard. I am first cousin to the prisoner at the bar. On Saturday the 3rd of December I was at Kensington, and lay at my uncle's house there and dined there. On the Sunday the prisoner came there before dinner, he said he had been to do some business that way. He dined with us; there were my uncle, aunt, he and I; he related that circumstance to us of meeting with the duke of Marlborough in Hyde-Park; he said he rode up to him, and asked if he knew who he was; he answered, No; he replied, I am the duke of Marlborough. He related it with some cheerfulness, though as matter of surprise.

How long have you known the prisoner?—From his birth: he is in business with his father; I always understood he would succeed his father; I never knew him to behave any otherwise than well in my life. I never thought him extravagant, nor never heard so; I had always looked upon him to be an honest man; his father is in very great business.

Should you look upon it, that a small place would be equal to the chance of succeeding his father in his business?—I should never have thought of such a thing; I look upon his situation in life to be a very extraordinary thing: I thought he would give the preference to that above any thing else.

Cross-examination.

Do you think he would refuse a good place?—No man would refuse a place that is to his advantage.

Joseph Barnard sworn.

J. Barnard. I am uncle to the prisoner at the bar; I live at Kensington; my nephew, Thomas Barnard, lay at my house on the Saturday night, and dined with the prisoner at the bar on the Sunday. I remember he then mentioned having met with the duke of Marlborough in Hyde-Park, while we were sitting at dinner. I said I was surprised he should meet with him that day; he said he saw but one gentleman at a distance, and the duke was armed; and his grace looked him full in the face, very earnestly (which he seemed to speak with a great deal of pleasure to me); he is very near-sighted, he can see nothing at a distance without the use of a glass. I have heard him since speak four or five times of seeing the duke in Westminster-Abbey.

How long ago?—About a month ago. He is brought up under his father in very considerable business, and a man of some property besides, and was employed as his clerk or book-keeper.

Is he a sober man?—Very sober; I never heard to the contrary; neither did I ever hear his father speak of him as idle or dilatory.

Thomas Calcut sworn.

T. Calcut. I live at Kensington: I remem-

ber the prisoner coming there on a Sunday morning; a very cold, foggy morning: with some message from his father to me, to know whether the solicitor had paid some money or not. He was under his father, as I am under mine; he desired me to go with him; I said, Stay and dine with me: he said, he could not promise, because he had promised to dine with his uncle Joseph: he went into the parlour, and said, It is vastly cold: there has been the oddest accident happened as I came over the Park! the duke of Marlborough came up to me, and asked me, if I knew him? I said, No. He asked me, if I wanted any thing with him? I told him, No. He said, I am the duke of Marlborough, if you want any thing with me; then the duke went away, and he came there. He expressed a great surprize at it, and I thought it a very odd affair.

Henry Clive, esq. sworn.

H. Clive. I have known the prisoner two years; I remember dining with him on the 8th of December, at his father's house, with a great deal of company; I heard him then say at dinner, that some few days before, he had met the duke of Marlborough in Hyde-park; that the duke asked him, if he had any business with him? He said, No; he then told him who he was, and asked him the same again; he said, No. That the duke seemed in some confusion, and was armed; and he thought he was about a duel; and indeed I thought it was a very great lie. I have gone very frequently to his father's in relation to Brentford Bridge. I have no other acquaintance with him, only going to his father's, so cannot say any thing to his character, either frugal or extravagant.

Can you name any body that dined there that day?—Yes, there was Mr. Wilson and his lady, Mr. Tunstall and his lady, another gentleman and his wife, and the prisoner's younger brother that is at Westminster school.

Mrs. Mary Wilson sworn.

Mrs. Wilson. I dined at Mr. Barnard's on Thursday the 8th of December; the prisoner I remember said he had been in Hyde-Park some days before, and there he saw a gentleman on horseback come up to him, and asked him, if he had any thing to say to him? He said, No; then he said, I am the duke of Marlborough, now you know me, have you any thing to say to me? He said, No. He talked of this very freely to us all.

James Greenwood sworn.

Greenwood. I live at Deptford, with a relation in the brewing-way; I came from Deptford on Saturday to the prisoner's father's; and on the Sunday following I was there at breakfast; I solicited the prisoner to get himself dressed to go with me into the Park, being to meet a person at twelve o'clock; I with a good deal of difficulty got him to dress himself; I put my shirt on in the parlour, and after that he put on his; I fancy we break-

fasted about nine o'clock; when we got to the end of Henry the 7th's chapel, the prisoner would have gone the other way into the Park without going through the Abbey; I took hold of his sleeve, and said, Barnard, you shall go through the Abbey; this was a little after eleven; this was no unusual thing; we have several times walked in the Park, and sometimes parted.

Which is the nearest way to the Park?—I do not know which is the nearest way, through the Abbey, or by the side of it; this was the first time I believe that I ever saw the monument of general Hargrave. After that we walked down to the monument erected at the public expence for captain Cornwall; the preacher was in the pulpit; when we were standing at captain Cornwall's monument, the prisoner made some observation on the execution of it in his own way. After we had stayed there some time, I saw his grace the duke of Marlborough, who was got pretty near us: upon seeing the duke, I jogged him by the elbow, and said, Step this way; he seemed to look at him.

Had you heard what happened in Hyde-Park, previous to this?—I had; I believe it was told me by the prisoner at the bar; on my jogging him we walked up the middle aisle towards the choir. I said, Did you see that gentleman in the blue coat, or do you know him? No, said he, not I. No, said I, it is the duke of Marlborough; we will walk to the monument again. The duke came, and placed himself pretty near me a second time; after this we walked away. I believe we walked some considerable time in that aisle in which is the monument of sir Godfrey Kneller, there I believe we passed and repassed again.

Why did you jog him?—Because he is very near-sighted. At last I think it so happened, we passed the duke between two of the pillars; and as I had hold of his arm walking together, there was barely room for three people to pass a-breast; the duke rather gave way, and made, as I thought, a kind of a bow. Upon this I said, The duke of Marlborough's behaviour is extremely particular; he certainly has something to say to you; I suppose he does not chuse to say it while I am with you, I will go into the choir, and do you walk up and down here, and he will possibly speak to you. While I was there, I looked; the first thing I saw was the duke of Marlborough and the prisoner at the bar, with their heads bowing together, as if it was the first salutation.

Had the prisoner the least inclination to go into the Abbey before you proposed it to him?—No: he did not discover any.

Did he discover any inclination to be left alone, when you proposed to go into the choir?—No, he did not in the least; in some few minutes after, the prisoner and I met together, he told me the duke of Marlborough was gone out of the Abbey, he had seen him go out. I said, What passed? To which he replied, The duke said, did you speak to me? or who spoke first I cannot tell.

In this transaction did the prisoner appear openly, or as if he had some secret transaction to do with the duke?—No, it was open and clear.

Did you see the duke come in?—No, I did not; we were employed in looking at the monuments; we looked at several.

What did you do when you first came in?—We walked along, and looked on the monuments.

Did you see the prisoner's eye fixed on any person?—No, I did not.

Is Mr. Barnard very near-sighted?—He is; I question whether he can be able to see a person across this room.

Where did you go, when you went out of the Abbey?—We went immediately into the Park; and after walking there, we met with two ladies whom I knew, and to whom Mr. Barnard was not unknown, to whom we related this affair; he always repeated these things, that is, this and that in Hyde-Park, as matter of great curiosity.

How long have you been acquainted with him?—I have been acquainted with him seven years.

What is his character?—I know nothing to the contrary but that he is an industrious, sober young man.

Did you ever hear that he was a profligate, expensive man?—No, never.

His father is in great business, is he not?—His father's business is a very considerable thing.

William Ball sworn.

Ball. I am the master of Storey's-gate coffee-house; I remember Mr. Merrick coming to my house, to inquire for Mr. Barnard; he asked me, if Mr. Barnard was at my house? I said, leave any message, I will deliver it to him; he said, he wanted to see him that evening; he left his message, I delivered it to him, and he came rather before eight o'clock to him. He has used my house some years, always a well-behaved man; I never perceived any extravagancy in him, always a sober, regular man. I have heard him speak of having met the duke of Marlborough, but not till after this; he said he had been to his grace at his grace's house; this was as he called at my house, after he had been there.

Did he mention what had passed?—No, he did not; only that he had seen his grace.

Cross-examination.

Did he not tell you any thing that passed?—He did not tell me a syllable of it.

What did you say to him?—I told him, may-be he was going to have a commission; he said, he would not thank his grace, except it was a very good one.

How did he appear as to cheerfulness, or dullness, or the like?—He seemed to be very cheerful, not in the least concerned; the same as usual, composed, rather more cheerful.

Counsel. We will now shew his behaviour after he was apprehended.

Mr. Ford. While he was in custody, Mr. Fielding did me the honour of sending for me; he told me it was upon some business which concerned the duke of Marlborough's life; he asked me to go along with him and Mr. Box to New Prison, which I consented to; we went together in a coach; this was about twelve at night, and Mr. Barnard was then in bed; I have really forgot what day it was: Mr. Fielding told him, he had omitted examining his pockets at the time he was before him; he then searched his pockets, in order to see whether he had any letters or any writings that might give light into the affairs; he very readily let me look into his pocket-book and papers. Mr. Fielding with great candour told him, he was in the hands of a very honourable prosecutor, and one that would be as glad to discover his innocence as his guilt. Mr. Fielding asked him for his keys, and he gave him the keys of his scrutoire and computing-house with great readiness; and I remember that I then told him, that, if he was guilty, some copies might be found to correspond with the original letters; and if nothing of that sort did appear, it would be a circumstance in his favour.

Did you or Mr. Fielding tell him he was not obliged to part with his keys, and did he do it as matter of choice?—I do not recollect that; I know he parted with them very readily.

The Rev. Dr. Markham sworn.

Dr. Markham. I have known the prisoner some years; I have always considered him as a young man of remarkable sobriety and attention to business: I have had some experience of him; I entrusted him with the execution of some matters of importance relating to myself, in regard to surveying and valuing estates, in which he acquitted himself ably and honestly; that is the character he always had: he lives in my neighbourhood, his father is a man of considerable property, and carries on a large business.

Then you don't suppose the prisoner to be in distressed circumstances?—I never supposed it, I have no reason to imagine it; if he had come to me, wanting money, he might easily have imposed on me, he might have had any thing of me; he is one of the chief persons I trusted, and I don't know a man on whom I would have had a greater reliance; I thought him remarkably able in his business, and very likely to be a considerable man; and I never was more astonished in my life than when I heard this strange story.

Samuel Cox, esq. sworn.

S. Cox. I have known Mr. Barnard about the space of three years last past. The beginning of my acquaintance was on the account of his surveying of houses in the New-Square, Dean's-Yard; the surveys were generally made by him; he did his business with such accuracy, that I have always thought him a man very attentive to his business, and very

unlikely of being charged with this fact; and upon his being employed upon public schemes, I employed him in my own affairs; I employed his father to finish some houses for me at Hammersmith, the son was constantly employed till the 6th of April last; I have at different times paid to Mr. Barnard about 700*l.* all paid into the hands of the prisoner, except 60 or 70*l.* of it. He has appeared as the person that managed his father's business: if he had come to me, and mentioned any want of money, upon his father's being out of town, or the like, he might have had 2 or 300*l.* at any time. When I first was acquainted with him, I observed he had a remarkable short sight; when he has looked full at me, I have thought he sneered at me; he has such a fall with his eye-lids on the account of his short-sightedness; I have found his eyes so fixed upon me, that I have been going to speak to him, which by my long acquaintance with him I since found was only an accident.

Robert Vansittart, esq. sworn.

R. Vansittart. I have known Mr. Barnard about five or six years; my acquaintance with him was by being acquainted with his father, who was employed in carrying on a large building for Mr. Lee, an acquaintance of mine in Oxfordshire; and these five years I have been acquainted with the son, and frequently in company with him. In the beginning of April he was in my chamber, putting up some book-cases; I remember one morning at breakfast he told me the circumstance of meeting the duke of Marlborough in Hyde Park and in Westminster Abbey, in the same way as the Court has been told from his grace and the rest of the witnesses: it appeared to me to be a very strange story, and he seemed to tell it as such, as I or any body else would have told it. I suspended my judgment upon it, and never related it to any body, only to my father and another gentleman, and they looked upon it as a great lie that Barnard had invented; I, knowing his character, did not take it as such, but thought he must have known it to be as he said.

What is your opinion of him as to his business?—From my own personal acquaintance with him, and from the many surveys I have seen of his, he certainly is very capable and master of his business. I never heard any thing ill as to his private character.

Did you ever see him write?—No; he draws very well; I have seen him draw.

John Smith, esq. sworn.

J. Smith. I have known him eight or ten years, and his father's family twenty-five. He always appeared an industrious, sober, diligent man, particularly within these four or five years, since he has come into business with his father. I considered him as a very promising genius in his way, and one capable of conducting his business with reputation and character.

Did you look upon him likely to be driven to

distress, or in want of a place?—No, I did not. I can with great truth say, most of the payments in my counting-house, on his father's account, have most of them been paid by the hands of this young man; except the last 500*l.*: then Mr. Barnard and his wife came over and dined with me, and paid it; and then I blamed him for not bringing his son.

What are you?—I am a timber-merchant.

Joshua Smith, esq. sworn.

Josh. Smith. I am in partnership with my father, the last evidence. I have known the prisoner several years; I always thought him a very honest, sober man, capable in his profession: the money that has been paid to us lately, except that 500*l.*, has been by him; they never paid less than 100*l.* at a time, except once.

Have you any reason to imagine him in desperate circumstances?—There is no reason as I know of to imagine so.

Robert Tunstall, esq. sworn.

R. Tunstall. I have known him two years.

What is his general character?—He is industrious, and very capable of his business. His behaviour has been prudent; he is the principal man in his father's business in drawing and scheming.*

Mr. Peter Brushell sworn.

P. Brushell. I have known him from a child.

What is his character?—I always took him to be a very sober, honest man. His father has done a great deal of business for me, and is now at work for me.

Who did you generally pay the money to?—I generally paid the father; if the prisoner had applied to me, I would have let him have 100*l.* at any time.

Is he capable of business?—He is very capable: he drew a plan for me last Saturday was se'nnight.

Do you look upon him to be in desperate or distressed circumstances?—No, I do not.

Has he been always a visible man?—Always.

Mr. Jelfe sworn.

Jelfe. I am the king's mason. I have known the prisoner seven years or more.

Do you look upon him to be capable of his business?—I believe he is a very capable man in his business.

What is his general character?—Always a very worthy, honest man.

Did you ever see him guilty of any extravagancy?—No, never.

Do you live near him?—I am a very near neighbour to him, and keep him company on evenings, within this year or two more particular.

* Mr. John Barnard, the father of the prisoner, built Kew bridge for this Mr. Tunstall.

William Robinson, esq. sworn.

Robinson. I have known him about six or seven years.

Is he a person capable of his profession?—I believe he is.

What has been his behaviour?—I always looked upon him to be a very sober, diligent, frugal man.

Did you look upon him to be in desperate circumstances?—No, not at all.

Thomas Kynaston, esq. sworn.

Kynaston. I have known him six or seven years.

What are you?—I belong to the board of works.

What is your opinion of the prisoner's situation?—I think he is in a good one.

What has been his behaviour?—That has been always good.

Mr. Keynton Cowse sworn.

Cowse. I have known him seven years, and been in his company many times.

What is his character?—He is a very worthy young man, sober and industrious, always attending his father's business.

Mr. Uffort sworn.

Uffort. I have known him about six or seven years; he is a sober, sedate young man as ever I met with. I have done business for him several times.

Mr. Brent sworn.

Brent. I have known him upwards of three years.

What is his character?—He has a good character; he is a very industrious man. I have frequently paid him money.

Mr. Jones sworn.

Jones. I have known him several years.

What is his general character?—He is very honest; no ways extravagant, that could lead him into a desperate state; he is as moral a man as any I know, and has as good a character.

Mr. Wilson sworn.

Wilson. I have known him about seven years.

What has been his behaviour during that time?—It has been always very well. I always looked upon him as an honest man.

Did you ever look upon him to be in a desperate way in his fortune?—No, never.

Q. to Mr. Barnard the elder. Where was you when your son was sent for to the duke of Marlborough's?—*Mr. Barnard.* I was then out of town. I have not been in town above one week these five or six weeks.

Mr. Serjeant Davy:

My lord, and gentlemen of the jury; I am sorry to take up any more of your time; but the defence consisting of various parts, I would

beg leave to trespass a little longer on your patience, and make a very few observations on the case, as it now stands before you. I do not claim any merit at all for their not opposing any evidence, as was attempted on the other side; I am sure I shall be justified in your opinion. Nothing has passed in the course of this prosecution, but what clearly manifests that the duke is totally indifferent about the issue of it: in this matter he is only a friend to justice, and would wish for the prisoner not to be disturbed in any method he should take in the course of his examination: be that as it may, I have done what I have thought right, and am very glad they have done every thing they could for the prisoner.

I shall now consider two general questions: the first is, Whether the several circumstances that have been given in evidence, on the part of the prosecution, independently, are in themselves sufficient to convince a reasonable understanding of the prisoner's guilt; I mean your understandings as jurymen. The second question is, Whether the defence that has been set up, those circumstances are sufficient to repel the weight of the evidence; I mean, whether the defence is reconcilable to the suspicions of the prisoner's guilt; for if they are irreconcilable with the prisoner's guilt, (as I do not intend to impeach the credit of any one witness) I am content upon that supposition, he may be acquitted: I don't mean that any witness has laid a single circumstance before you that is not strictly true, but that they may be reconcilable with the suspicion of his guilt.

I do not mean to draw your attention back to the several circumstances of the prosecution; they are all before you, and they are too strong and striking to be easily forgot; they would be diminished considerably by attempting to recapitulate them, and therefore I shall not attempt it: and, as I said at the opening, they are irreconcilable with any supposition of the prisoner's innocence, independently of the defence set up for him, if they are so strong in themselves, as it would be offering violence to one's understanding, not to consider them as circumstances necessarily inducing his guilt.

It will remain for your consideration, it is now the capital question, Whether these circumstances laid before you, consisting of five or six parts on the part of the prisoner, may be reconciled with the suspicion of his guilt? Because, if they may, it is no defence at all.

Gentlemen, the first is, the prisoner being sent by his father to Kensington on this Sunday on which he met the duke in Hyde-Park. I did not chuse by any means to ask the father any question; I should have disobliged my noble client if I had done it. As, why he was sent to Kensington? What conversation might have led to that matter? What happened at breakfast with his father was the sole occasion of his going there. The son, you see, is principally concerned in conducting his father's business; he might, or he might not propose the expediency of such a journey. It is a lit-

the extraordinary, this business (not being urgent in its own nature) should be appointed by the father to be transacted on the Sunday, when the father might as well have employed his time in going elsewhere: going to ask whether a sum of money had been paid on the account of gravel, to make it necessary to be sent just at church-time. His father talked of his going; he did go—what does that prove? Does it prove he was not to go to Hyde-Park any other way? Whoever was the writer of these letters, certainly intended to have a meeting on both the Sundays, in the Park and in the Abbey, in a very public manner; and that agreeable to the tenour of the letter, he did provide himself with a defence in case of need. Now, be the author of these letters who it may, the author did contrive a subterfuge for himself afterwards, in order to reply to a charge of that nature.

Gentlemen, the next part of the defence is, that he at several times and to several people related the meetings he had had with the duke, and the extraordinary occurrences. This indeed corresponds with the observations I made: the writer of these letters proposed to meet the duke at a time that people were walking out on a Sunday, and in the Abbey, the most public places, and at the most public times: is that irreconcilable with the suspicion that the prisoner (if he was the author of these letters) might have been contriving with other persons, telling people of the several meetings he had had with the duke, and the substance of those meetings? But one observation will arise, perhaps not much to his service; and that is, when he told those people of his seeing the duke, he spoke to his seeing an attendant, which corresponds with the second letter: what does he say about it to the persons to whom he relates the meeting? He saw he was armed—he saw one likewise at a distance, and he thought there was a duel going forwards. Now, when he spoke to the duke of the surprize he had entertained on seeing the duke armed, does he assign that as a reason of apprehending a duel? No; it was because it was cold weather, and he wondered to see him without a great-coat: so that the same man that speaks of it to his friends as a circumstance that might induce a surprize, speaks of it at another time as being surprized, without giving that as a reason for it.

The next circumstance is, Mr. Greenwood's evidence of going with him to Westminster-Abbey. There are two or three things a little particular: after breakfast, about nine o'clock, he solicits the prisoner to dress himself in order to go to the Park. The prisoner seemed unwilling to go there. He said, it was not an unusual thing, when they were to go together, for them to differ, and upon that occasion to part. Supposing the prisoner wanted to get rid of this companion of his, who had laid there, and was not easily to be got rid of, why might not that account for his being unwilling to dress himself at nine in the morning, in order to get rid of him? For he had time enough

to dress himself an hour after that, and to meet the duke in the Abbey at eleven. It is a little odd, that the prisoner wanted to go another way, and expressed a reluctance in going through the Abbey. It is clear, he did not mean to be seen by Mr. Greenwood in the Abbey: but when he could not get rid of that, and he plucked him by the coat for that purpose, did they prosecute their design in going to the Park, and yet saunter a good while in the Abbey? (No reason why they did so.) First they went to general Hargrave's monument, then to captain Cornwall's monument; there they stayed some time, the duke's behaviour being in Mr. Greenwood's evidence particular; from the duke's bowing, he thought that the duke wanted to speak to him in private. How is this reconcilable? There is not a circumstance in all that part of the story of Mr. Greenwood's evidence, which suits so well as this of his guilt: first he wanted to get rid of Mr. Greenwood, and when he could not do that, then making no secret of having seen the duke, and make that tally with his telling him he had met him.

The next circumstance is Mr. Ball's; and if that circumstance of his evidence strikes you as it did me, I wonder he was produced as a witness; for, you see, he was very forward: he was blamed for it by one of his witnesses; he thought he talked too much of having met the duke, that was so singular, that it demanded animadversions: yet notwithstanding, when he had had a third interview with the duke, and there appeared so very material a circumstance of the duke's having charged him with a very extraordinary and wicked proceeding against him; when he had told him of all these letters, and one of them set forth his name, as a person that could inform his grace of something which nearly related to his safety, and hinted to him the strangeness of these letters, and charged them upon him; and after having pretended a total ignorance of this matter, he afterwards conceals all this from Mr. Ball: and what is another circumstance, Mr. Ball says, he was rather more cheerful in relating what he did than usual. God knows, he had no reason to be cheerful! for the duke had charged him home with a capital offence; the duke had admonished him, and told him, either he was the author of the letters, or he was used exceedingly ill by the person that did write them. Yet, you see, in mentioning these things to his friend Mr. Ball, Ball considers it as a fruit of the duke's benevolence to him, and says, he will give you a post in the army. The prisoner replied, It must be a very good one, if I accept it.

These are all the circumstances that they have insisted upon as proofs of his innocence, except one, that is his character. They have called to that many witnesses; they say he is very expert in his business, a very diligent, sober man; nothing about him as marks of distress; no vices to which they find him inclined, which give him an occasion for a de-

mand of this kind ; and that, upon the whole, he has passed as a very honest man.

Gentlemen, when you come to consider that, character goes but a very little, and indeed no way at all, towards proving his innocence.

In the first place, character can only be of service to a man, where his case hangs as it were in equal scales, and it is doubtful whether innocent or guilty ; there it is that a good character stands in some stead, and will balance the scale in his favour. But this is that sort of a case, that this particular character they have given of him will have no weight to repel those several suspicious circumstances that tally so exactly as to his guilt. Might it not happen, that a man betwixt twenty and thirty years of age, dependant in some measure on his father, might have a secret call for money, which he would wish his father, and those friends that are fond of lending him money, not to be acquainted with ? We know very well, there are certain circumstances, some in this capital city of London, where a man might be very hard driven for the want of money, which he would chuse to hide from his friends.

I know nothing of the prisoner's particular character ; but it is enough for this purpose, that it possibly may be his case : if so, What then has the present character to do with it ? If

the circumstances of the outlines are such, can any doubt about believing he is guilty or not ? Then all those other circumstances will have no weight at all to counterpoise the weight of the former.

As I said at first, if upon any circumstances offered on the part of the prisoner, if the weight of evidence on the part of the prosecution is sufficient to charge him, there is nothing in the defence that will lessen it at all.

Gentlemen, he is safe in your hands. I doubt not but that you will do your duty : if you think him guilty, you will find him so ; if not, you will acquit him. With regard to the duke, his grace has discharged his duty which he owed to the public, which he will at all times do, and is perfectly indifferent about the issue of it.

The Jury acquitted the prisoner.

He was a second time indicted by the name of William Barnard, for feloniously sending another letter to the most noble Charles duke of Marlborough, signed F. demanding two or three hundred pounds ; but no evidence appearing against him, he was acquitted.

For other proceedings respecting this matter see the King v. Fielding, esq. 2 Burr. 719.

537. The Trial of JOHN STEVENSON, late of Bickerton, in the County of Chester, Cheesefactor, at Chester Assizes, upon Friday the 27th Day of April, before Mr. Justice Swinnerton, and Mr. Justice White, for the Murder of Mr. Francis Elcock, late of Nantwich, in the said County, Attorney at Law : 32 GEORGE II. A. D. 1759.

ABOUT nine o'clock in the morning, the Court being sat, the prisoner was brought to the bar.

Counsel for the Crown. Mr. Hall, Attorney-General for Cheshire, Mr. Falconer, Mr. Hayward.

Counsel for the Prisoner. Mr. Townsend, Recorder of Chester, Mr. Perryn, Mr. Maddox.

Prothonotary. Prisoner, hold up your hand. You stand indicted by the name of John Stevenson, late of Bickerton, in the county of Chester, yeoman, for that you, not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, on the 21st day of March, in the 32nd year of the reign of our sovereign lord George the second, now king of Great Britain, &c. with force and arms, at Bickerton aforesaid, in the county aforesaid, in and upon one Francis Elcock, in the peace of God, and our said lord the king then and there being,

then and there feloniously, wilfully, and of your malice aforethought, did make an assault ; and that you the said John Stevenson a certain gun of the value of ten shillings, then and there charged with gunpowder and one leaden bullet ; which gun you the said John Stevenson in both your hands then and there had and held, to, against, and upon the said Francis Elcock, then and there feloniously, wilfully, and of your malice aforethought, did shoot and discharge ; and that you the said John Stevenson, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gun-powder shot, discharged, and sent forth as aforesaid, the aforesaid Francis Elcock, in and upon the left side of the belly of him the said Francis Elcock, then and there, with the leaden bullet aforesaid, out of the gun aforesaid, by you the said John Stevenson, so as aforesaid shot, discharged, and sent forth, feloniously, wilfully, and of your malice aforethought, did strike, penetrate, and wound ; giving to the said Francis Elcock, then and

there, with the leaden bullet aforesaid, so as aforesaid shot, discharged, and sent forth out of the gun aforesaid, by you the said John Stevenson, in and upon the left side of the belly of him the said Francis Elcock, one mortal wound, of the depth of five inches, and of the breadth of one inch; of which said mortal wound the said Francis Elcock, on the aforesaid 21st day of March, in the year aforesaid, for the space of ten hours, at Bickerton aforesaid, in the county aforesaid, did languish, and languishing did live; on which said 21st day of March, in the year aforesaid, the said Francis Elcock, at Bickerton aforesaid, in the county aforesaid, of the mortal wound aforesaid died: and so the jurors aforesaid, upon their oath aforesaid, do say, that you the said John Stevenson, the said Francis Elcock, in manner and form aforesaid, feloniously, wilfully, and of your malice aforethought, did kill and murder, against the peace of our said lord the king, his crown and dignity.

Prothonotary. How say you, John Stevenson, are you guilty of the murder and felony whereof you stand indicted, or Not Guilty?—*Prisoner.* Not Guilty.

Prothonotary. Culpit, how will you be tried?—*Prisoner.* By God and my country.

Prothonotary. God send you a good deliverance.

Prisoner. Amen: God send me a good deliverance.

Then the Jurors were called and sworn.

JURY.

William Brown, of Stockport-Etchels, foreman.

John Bennet of Marple.

John Hodson, of Raby.

Henry Price, of ditto.

John Lee of Tranmore.

Samuel Jones, of Over-Bebbington.

Joseph Wright, of ditto.

Richard Jackson, of ditto.

Thomas Robinson, of Ncwhall.

George Woodhouse, of Buerton.

John Cliffe, of Audlem.

Samuel Lea, of Baddiley.

N. B. The Prisoner challenged Abraham Darlington, of Bridley, as he came to be sworn; but no cause was assigned for such challenge.

Mr. Attorney-General challenged Edward Hamnett, of Newhall, as he came to be sworn; as Mr. Hamnett owned he was related to the Prisoner.

Prothonotary then read the indictment.

Mr. Attorney General, counsel for the crown, opened the case to the following effect:

Gentlemen of the Jury; The prisoner, John Stevenson, stands indicted before you, for the murder of Mr. Francis Elcock, late of Nantwich in this county, an attorney at law; which crime he (the prisoner) perpetrated and committed upon the 21st day of March last: and

it is now my duty, as counsel on behalf of the crown, to use my endeavours for the obtaining that justice and restitution, which the law requires for crimes of this horrid nature. To which end, it may be necessary, that I point out some facts and circumstances antecedent to the commission of the murder, which I doubt not we shall be able to prove, and hope you will be satisfied in your consciences, that the prisoner did kill and murder Mr. Elcock, as laid in the indictment; and if so, that you will find him guilty.

Gentlemen, at the time this murder was committed, Mr. Elcock was doing a legal and a commendable act: he was endeavouring to subdue the prisoner, and to bring him to a just sense of, and an obedience to the laws, which he had but a little while before violated, by an outrageous contempt of, and rebellion to those laws, which have been wisely (and happily for us) made, for the preservation of the lives, and security of the properties of the subject. The prisoner, gentlemen, has been for many years a cheese-factor in this county; but failing in his credit some years ago, has since then taken sanctuary in his house at Bickerton, and there kept himself confined, to prevent the effect of a civil process, and to evade the payment of his just debts. Common attempts for justice to the creditors were vain: the sheriff's officers too well known, and indeed persons in general (except a few confidants) too hardly suspected, to gain admittance: art and policy became necessary. The unfortunate young gentleman, whose death you are now to enquire into, was employed as an attorney, for one of the prisoner's creditors, to sue out a writ against him, which he accordingly did, and obtained the sheriff's warrant thereon, and delivered it to one of the officers named therein, with directions to arrest the prisoner. But the officer apprehending he should be denied admittance to the prisoner, had recourse to a stratagem, not unlikely to prevail. He wrote a letter to the prisoner, signifying, that the gentleman who sent it wanted to buy some young trees from the prisoner, and desiring that the bearer of the letter might be permitted to view the trees, or to that purpose. The officer went to the prisoner's house with this letter; and knocking at the door, a person came to the window, to whom it was delivered; and as soon as the prisoner had read the letter, the officer was admitted to him. After some discourse relating to the trees, the bailiff acquainted the prisoner Stevenson with the real errand he came upon, namely, to arrest him; and accordingly the bailiff did then and there actually arrest the prisoner, by laying his hand upon him, and telling him that he had the sheriff's warrant against him, which he produced. What was the prisoner now to do in this situation? Must he tamely submit to the legal authority of the bailiff, and quit his asylum, till he had given security, or rendered to the plaintiff satisfaction for his debt? No.—After a short pause, and taking a turn or two in his house, he suddenly pre-

sented a pistol at the breast of the officer, and swore, if he did not immediately leave the house, he would blow his brains out; and without waiting for an answer, actually snapped the pistol at him, which missed fire. But he could not rest here; his temper was too hot to put up with the affront of being lawfully arrested for a just debt: he snapped the pistol three times at the officer's breast, which providentially did not go off.—It was high time for the bailiff now to retire; the preservation of his life required it: he had no chance, unarmed and alone, to maintain his arrest against a loaded pistol, and there was no time for words to soothe a man of so desperate and outrageous a disposition into a peaceable compliance; and therefore the officer thought fit (and I think very prudently too) to leave his prisoner. But after his miraculous escape, he went to Mr. Elcock, who was in the neighbourhood, and told him that he had arrested the prisoner, who rescued himself by snapping a pistol at him three different times, and desired Mr. Elcock to get him assistance, for the re-taking the prisoner; whereupon Mr. Elcock, and the plaintiff in the action, with one or two other persons, returned with the officer to the prisoner's house, which they found locked; and Mr. Elcock going to one of the doors demanded entrance, and desired the prisoner to yield to the arrest. But the prisoner's resentment could not relish a capitulation of this sort; he was determined still to oppose the authority of the law, and to refuse any obedience to it. Resolved upon the death of somebody or other, no matter whom, he took up a gun loaded with gunpowder and ball, and discharged it through the door against which Mr. Elcock stood, and unfortunately killed him. It seems unnecessary for me, gentlemen, to make any observations with respect to the intention of the prisoner to commit murder: his keeping of firearms loaded in his house; his snapping a loaded pistol three different times at the bailiff, in the execution of his duty, after he had arrested the prisoner; and his discharging the gun, whereby the deceased was killed, too fatally evince, beyond the least shadow of doubt, that the prisoner did intend and design an unlawful killing: and although the prisoner might not have seen Mr. Elcock, when he discharged the gun which killed him, yet his shooting at random was an unlawful shooting, for the purpose, and with an intent to kill somebody then at the door; and therefore that shooting at random can be no justification or excuse to the prisoner.—We, who are counsel for the crown, shall now proceed to examine the witnesses in support of the indictment; and doubt not but we shall be able to make out the case, as I have stated it; and if so, you will then find the prisoner guilty, that he may receive the punishment justly inflicted by law upon those who shall be guilty of the horrid crime of murder.

Mr. Falconer, counsel for the crown. Gen-
VOL. XIX,

lemen, Mr. Attorney has represented the case so fully, that it is quite unnecessary for me to enlarge upon it; and therefore shall not take up the time of the Court, but proceed to the examination of the witnesses.

Cryer calls John James, the bailiff, who arrested the prisoner.

John James sworn.

Counsel for the Crown. Do you know the prisoner at the bar?—*James.* Yes.

Did you know the deceased Mr. Francis Elcock?—Yes.

Were you, at any time, employed to arrest the prisoner for debt; and what happened in consequence of it? Speak up, that the gentlemen of the jury may hear you.—Yes, I was employed to arrest the prisoner for a debt due to John Atkin.

By whom were you so employed?—By Mr. Elcock, an attorney.

You mean, I suppose, the deceased Mr. Elcock, him that was shot?—Yes.

Go on.—Being so employed to arrest Mr. Stevenson, I went to his house, and knocked at the door. Somebody came to the window, and asked me, what I wanted? I told the person who came to the window, that I had a letter for the master of the house, which she took through the window; and I suppose it was delivered to Mr. Stevenson.

Why do you suppose so?—Because, in a little time after, Mr. Stevenson opened the door.

The prisoner opened the door, you say?—Yes, and he asked me, whether I lived with the gentleman who sent the letter, or from whom the letter came? I told him I did; and Mr. Stevenson invited me in.

Well; What happened afterwards?—I went into the house with Mr. Stevenson, and we then went together towards the back door; and at the back door Mr. Stevenson stood still, to call his servant.

Whereabouts at the back door did the prisoner stand still, to call his servant? Was it within-side of the door, or at the out-side of the door?—He stood still upon a step, at the back door, the out-side of the door; and I was within-side of the door.—I then took the warrant I had against Mr. Stevenson out of my pocket, and I laid my hand upon his shoulder, and said, Sir, I hope you will excuse me—

Was the prisoner then out of the door?—Yes. I said, Sir, I hope you will excuse me; for the letter I gave you was to decoy you. I am a bailiff; this is a warrant against you; and you are my prisoner in the king's name.

What did the prisoner say then?—He shrieked out, and said, I had used him ill.

What did you do afterwards?—Mr. Stevenson and I returned into the house; and when we got into the kitchen, he called to Betty, who I believe was his house-keeper, and said to her, We have done ill in letting this man into the house; for he has arrested me.

He told her, you had arrested him, you say?—Yes.

3 I

Well; What happened then?—The prisoner went then towards the fire, and turned to the screen on the right hand, and stood at the further end of the screen.

What did he do then?—He turned all of a sudden upon me, with a pistol in his hand, and said, he would blow my brains out, if I did not get immediately out of the house.

Did he present the pistol at you?—He did.

What did you say then?—I told him, that was not the way to do business. Mr. Stevenson then snapped the pistol at me, but it missed fire.

Are you sure he snapped the pistol at you?—Yes, very sure.

Well; what did you then?—I went backwards through the kitchen, and Mr. Stevenson followed me; and in a narrow passage leading from the kitchen towards the door, he snapped the pistol at me again; and he snapped the pistol at me a third time, but I was then out of the house.

When you got out of the house, where did you go then?—I went to the next house, I think Mr. Nevill's, where Mr. Elcock promised to be. Mr. Elcock saw me, and met me, and asked me, if I had arrested Stevenson? I told Mr. Elcock, that I had arrested him, and that he had snapped a pistol at me three different times, which obliged me to come away.

What did Mr. Elcock say to that?—Mr. Elcock said, I had done enough.

How did you proceed afterwards?—I told Mr. Elcock, if I had a pistol, I could bring him away; and he said, I should not want that. Then Mr. Elcock sent a man to the plaintiff John Atkin's, and to bring arms from his father's.

Where did Atkin live?—At Cholmondley, not very far from Bickerton.

Did the messenger return with arms?—Yes.

What did you then?—After the arms and assistance were brought, we went again to Mr. Stevenson's house.

Who went to the prisoner's house?—I went, and the plaintiff John Atkin, and a servant of his, I think. Four or five persons, I believe, came with me.

Was there another sheriff's officer with you?—Yes, a man tolerated by the sheriff, one John Jones.

Did Mr. Elcock go to the prisoner's house with you?—Yes.

What happened when you all returned to the prisoner's house?—As we were all running towards the prisoner's house, I saw the prisoner and another man out of doors; I called to Mr. Stevenson, and said, You may as well stay, for we are coming for you.

Did the prisoner hear you say this?—I believe he did.

Did the prisoner stay for you?—No; he and the other man with him, ran into the house.

Well; when you came up to the house, pray what followed?—When we came up to the house, I said to Mr. Elcock, I know the way to that door; go you to the other.

How many doors were there to the house?—Three.

Did you know all the three doors?—Yes, I knew them all.

You bid Mr. Elcock go to one of the doors, I think, you say?—I bid Mr. Elcock and the others to take care of two of the doors, and I would go to the other.

How far was the door that you said you would go to, from the door you desired Mr. Elcock to take care of?—It was a good way distant, in going round about.

You said, you would go to the third door; did you know the way to it?—Yes, very well.

Did Mr. Elcock say any thing to the people in the house, when he came up to the door?—I cannot tell whether he did or not, because I was not present, for I ran to the other side of the house.

Pray, was the door you went to locked, or made fast?—It was fast.

When you all came up to the doors, as you have been mentioning, pray, what followed?—In a very little time, almost immediately after I came up to the door, I heard a noise; I heard a gun go off.

Which way did the noise come? Where did you apprehend the gun went off? In what situation were you from the noise, or report of it?—The noise came as betwixt me and them; betwixt me and the people who came with me.

How far distant might you be from the door where the gun was fired?—Nine or ten yards, it might be, from Mr. Elcock.

When you heard the noise, and the gun go off, what did you do then? It must have alarmed you?—When I heard them crying out on the other side, I went backwards to an hedge, and looking over it, I saw Mr. Elcock held by two men sitting on a block.

You saw Mr. Elcock sitting on a block, supported by two men; how did he look?—Very piteously indeed.

Did you hear him say any thing?—Yes, I heard him say, Oh! I am shot, I am shot.

Was Mr. Elcock at a great distance from the gun at the time he received the wound, or was he near it?—I cannot tell whether he was at a great or a small distance from it.

What did you do, after you had seen Mr. Elcock sitting on the block?—I returned again to my own door, to prevent the prisoner's getting out.

Did you see Mr. Elcock afterwards?—In about ten minutes afterwards, I saw two men carrying him down the lane.

Were you with Mr. Elcock at the house he was carried to?—No.

Did you see him afterwards?—No, I did not see him after the two men carried him down the lane.

Have you the warrant whereby you arrested the prisoner?—I have.

Pray produce it. Is this the very warrant, under the authority whereof you arrested the prisoner?—It is.

Pray, who delivered to you this warrant to execute?—Mr. Elcock himself.

Were there any holes in the door that the ball came through which killed Mr. Elcock, besides the shot-hole?—Yes, there were two holes in the door, besides the shot-hole.

Was there ever a slit in the door?—That I do not know.

Were the two holes in the door higher than the shot-hole, or lower, or how?—The two holes were higher than the hole which the ball had made.

Could you see through the two holes? Were they large enough to see, and know a person through?—Yes, I could see through them; I did look through, and saw into the kitchen plainly. I and several others did so.

Pray, what business did Mr. Elcock go about, when he went with you to the prisoner's house?—To assist me in re-taking Mr. Stevenson.

Do you know the sheriff's hand-writing?—Yes, very well.

Is the warrant whereby you arrested the prisoner, all of the sheriff's hand-writing?—All is of his hand-writing, except two names.

Are you positive to the sheriff's hand-writing?—Yes, to Mr. Baxter's hand-writing, who acted as sheriff, and made out the warrant, and delivered it.

Pray, what are the two names that were not written by Mr. Baxter?—My own name, and the name of John Jones, another bailiff.

Who wrote your name, and the name of John Jones in the warrant?—Mr. Elcock.

Are you sure of that?—Yes; for I saw him write them.

Are you usually employed as a bailiff for the executing of the sheriff's warrants?—Yes, I get my bread by it; and am often sent for, fifteen or twenty miles round the country.

Was your name inserted in the warrant, as the sheriff's own bailiff, or as a special bailiff?—I was a special bailiff, for that time, appointed by the sheriff.

How do you know that?—I have been informed so: I think it is so expressed in the warrant.

Had you executed any warrants from the sheriff of the county of Chester the year before?—Yes, many; twenty, or more.

Had you executed any warrants from the present sheriff, under his authority?—Yes, I executed attachments under that authority, under Mr. Baxter. I had four or five warrants, upon process out of the Exchequer, at the time I arrested Mr. Stevenson, and have executed several warrants since Mr. Harrison became sheriff.

How long had Mr. Harrison been sheriff, before you arrested the prisoner?—A week or a fortnight it might be.

Court. Read the warrant, whereon the prisoner was arrested by the witness.

(The warrant was then read, and it appeared, that the words, "bailiffs for this time only," after the names of John James and John Jones, the special bailiffs, were written by Mr. Baxter.

The warrant was dated the 1st of March, and there was an indorsement thereon, "Take good ail for eighteen pounds eight shillings and ten pence halfpenny, by affidavit filed." And underwritten, "Elcock by Lowe, by the said sheriff.")

Did John Evans, the sheriff's bailiff named in the warrant, go with you, when you attempted to re-take the prisoner?—No; he did not.

When did the plaintiff John Atkin come to you? Was he with you before, or at the time you attempted to re-take the prisoner?—John Atkin came when assistance was sent for, but not before. He came with us, when we went to re-take Mr. Stevenson.

[Cross-examined.]

Counsel for the Prisoner. I think you say, you took the warrant out of your pocket, and put your hand upon the prisoner's shoulder, and arrested him?—James. I did.

Pray, where did you first see that warrant, whereon you arrested the prisoner?—I saw it first at Nantwich.

Who shewed it you?—The deceased Mr. Elcock.

When you first saw the warrant, was your name in it?—No.

Was the warrant, when you first saw it, under the seal of the sheriff?—I believe it was.

Was the name of John Jones (the other special bailiff) in the warrant when you first saw it?—I believe it was not.

Was the name of John Evans, the sheriff's officer, in the warrant then?—Yes, it was.

Who wrote Evans's name in the warrant?—The sheriff put it in.

Of whose hand-writing is the warrant?—It is all of Mr. Baxter's writing, except my name, and the name of John Jones.

Are you sure of that?—Yes.

Who is Mr. Baxter?—Mr. Baxter acts for the under-sheriff.

Of whose hand-writing are the names, John James and John Jones, now appearing in the warrant?—My name and John Jones's were written in the warrant by Mr. Elcock.

Are you sure that the names John James and John Jones were written in the warrant by Mr. Elcock?—I am very sure of it; for I saw him write them.

Were they written by Mr. Elcock, after you first saw the warrant at Nantwich?—Yes.

Is the warrant in the same situation, in every part of it, as it was when you first saw it at Nantwich?—It is, except the addition of the names made since.

Where does Mr. Baxter live?—In this city (Chester).

Do you know Mr. Hollins?—Yes.

Who is he?—The under-sheriff.

Do the sheriffs always keep their office in the city?—They keep their office in the city, where they please to appoint; I believe so.

And is that the place where the sheriff's

warrants are always made out?—That is the place where they apply for warrants.

How far does the under-sheriff live from this city?—Twenty miles, I believe.

Was Mr. Elcock appointed by the sheriff to make out warrants?—I do not know that he was.

Had Mr. Baxter authority to make out warrants?—I don't know.

You say, the under-sheriff always keeps an office in the city of Chester?—Yes; where the sheriffs, when they come in, are pleased to fix it.

You say, you went to Mr. Elcock after you had arrested the prisoner?—Mr. Elcock met me, as I was going to him.

And you then told Mr. Elcock you were forced to retreat?—I told him so, and so it was.

Is it the practice, for the names of the sheriff's own bailiffs, or those bound to the sheriff, to be put into warrants in the office; and blanks to be left in the same warrants for the names of other bailiffs, to be put in by attorneys, after the warrants come from the office?—It is the practice.

Did you give security to the sheriff, for being his bailiff?—No, not at that time.

Where did you stay, after you had arrested the prisoner, till assistance came to you?—I and Mr. Elcock stayed at a gentleman's house, the next house to Mr. Stevenson's, Mr. Robert Nevill's house, till assistance came.

Who went for the assistance?—John Jones, the other bailiff named with me, I believe.

What number of people came to your assistance?—I don't well recollect the number; but I remember the plaintiff John Atkin, and his servant, (whose name I know not) Richard Bowker, John Jones, and myself made five.

Did you desire Mr. Elcock to stay where he was, at Mr. Nevill's house, and not go to the prisoner's house?—I did not.

Pray, had not you an iron crow with you, when you all went to the prisoner's house?—Yes.

Where had you that crow?—I told Mr. Elcock I wanted a crow, and he borrowed one from the woman of the house, Mrs. Nevill.

You say, you went to different doors, when you came to the house; pray, were these doors on one side of the house, at the corners of the house; or how were they situated?—I said, I went to a door on one side of the house, and desired Mr. Elcock would stay at a door on the other side of the house.

Did you yourself speak to the prisoner when you came to the house, and demand entrance from him?—I did not.

Did John Jones demand entrance?—I don't know: John Jones was not on the same side of the house with me.

Did you desire Mr. Elcock to demand entrance, as you were going to the house, or before you came to the house?—No, I did not.—But when we were going to Mr. Stevenson's, I saw Mr. Stevenson out of doors, and called to him to stay, and told him, we were coming for him.

How far might you be from the prisoner at that time?—It might be threescore yards.

Were Mr. Elcock and John Jones at one door of the house?—I don't know.

Did you, from the other side of the house, desire Mr. Elcock to demand entrance?—I could not see Mr. Elcock from the other side of the house.

Prisoner. Is the warrant you have shewn to the Court, the same warrant you produced to me?—*James.* Yes, the very same. [*Prisoner* desires to see the warrant. He looks at it, and says,—It is not the warrant].

Court to the Prisoner. Leave the questions to be asked by your counsel; they know best how to act for your defence. Consider, you stand upon trial for your life. Your condition is a most melancholy one, and very perilous; therefore refer yourself to the judgment of your counsel in matters of so great importance to you.

James. It is the very warrant upon which I arrested the prisoner. [Then the witness withdrew.]

Cryer, call John Atkin.

John Atkin sworn.

Counsel for the Crown. Do you know the prisoner at the bar?—*Atkin.* Yes, very well.

Did you know Mr. Francis Elcock, deceased?—Yes.

When were you last in company with the deceased?—I was in company with him upon the 21st day of March last, at the house of John Stevenson in Bickerton.

Did you go with the deceased to the prisoner's house on that day?—Yes.

What was the occasion of your going thither with Mr. Elcock?—John James sent for me, to come to assist the bailiffs.

To do what?—To re-take John Stevenson.

And did you go accordingly for that purpose?—Yes.

Who went with you?—Mr. Elcock, and John James and John Jones. We all went to take the prisoner by force, John James having sent for me to assist him, after the prisoner had snapped a pistol at him. We all went, because John Stevenson had drove the bailiff from the house, by snapping a pistol at him.

Who told you, that the prisoner had snapped a pistol at the bailiff?—John James, the bailiff, told me so.

Did you see the prisoner, in the house, when you came there?—I did not.

Did you go with Mr. Elcock?—Yes.

How far were you from Mr. Elcock, when you came to the house?—Within three or four yards of him.

Then you did not see the prisoner?—No.

Did you see any people in the house, when you came there?—No; but I imagine people were in the house, when Mr. Elcock and I came to it.

Did you hear any people in the house?—Yes, we heard people, but saw nobody.

Were the doors locked, or made fast?—Yes; the doors were made fast.

When you came up to the house, did John James give Mr. Elcock and you any directions about the business you were to do there?—Yes; when we came up to the door, John James ordered Mr. Elcock and me to attend that door.

Which door was it?—It was the back kitchen door.

When you came to the door, did Mr. Elcock say any thing to the people in the house?—As soon as we came to the door, Mr. Elcock said, Open the door, open the door, or we will break it down. I thought they were making the door fast.

Was the door opened?—No.

What was done afterwards, when the people within would not open the door?—As soon as Mr. Elcock said so, he bid me strike an iron crow under the door, in order to lift it off the hinges; and I accordingly put the crow under the door.

Was it Mr. Elcock, who ordered you to put the crow under the door?—Yes.

When you put the crow under the door, pray, what happened?—As soon as I had put the crow or ringer under the door, Mr. Elcock said to me, John, run to the other door, for fear Stevenson gets out of it; whereupon I left the crow sticking under the door upon the sill, and went away towards the other door, and had not gone above three or four yards from the door, before I heard a gun go off.

Did you see Mr. Elcock when the gun went off?—Yes.

Did he say any thing then?—Yes; I heard him say, I am shot, I am shot: and he fell on one side of his back down two steps. Richard Bowker and I took him up: then Mr. Elcock took up his shirt, and shewed us the wound.

Who was this Bowker?—He was an assistant, who came with me to re-take John Stevenson.

What did you do with Mr. Elcock, after you and Bowker took him up?—He hung about our shoulders, and we carried him to a wooden block, where he desired to rest.

You say, he pulled up his shirt, and shewed you his wound; pray, on what part of his body was he wounded?—He was wounded on the side of the belly, above his groin.

Were there any holes in the door where the ball came through, besides that which the ball made? Did you see the hole which the bullet made?—I saw the hole which the bullet came through; and there was also a slit in the door, which seemed big enough for a person to see through; and there were two holes besides in the door.

How large were the two holes that were in the door, besides that which the bullet made?—One of the holes was an inch-and-half hole; the other bigger. But the slit was afterwards lathed on the inner side of the door.

Could you have seen the prisoner through those holes?—No doubt of it, if he had

been opposite to me when I looked through; but he was not, and therefore I could not see him.

Were you present when the prisoner surrendered himself?—I was.

Had he any fire-arms in the house, when he surrendered?—He had fire-arms at that time. I fired off one of the pistols the day after the prisoner killed Mr. Elcock.

What day of the month was that?—The 22d of March. Mr. Elcock received his mortal wound upon the 21st, about three o'clock.

What other fire-arms had the prisoner when he surrendered besides the pistol you fired?—There were two pistols; one besides that which I fired; and a gun.

Were they loaded?—Yes.

How do you know they were loaded?—That pistol which I fired off, was very heavy loaded: the other pistol was discharged against an ash-tree, and I saw the hole which the bullet had made in the tree; and the gun was fired into the air.

When the prisoner surrendered himself, did he acknowledge that he had fire-arms in the house?—He said, he had but one pistol. But the woman in the house being asked, whether there were any more fire-arms; she told them, there was another pistol and a gun.

You say, you discharged one of the pistols yourself; Did you?—I did, and fired it into the air.

Did you see the pistol discharged against the ash-tree?—I did; and looked at the hole which the ball had made. The gun was fired into the air.

Cross-examined.

Counsel for the Prisoner. When you came to re-take the prisoner with Mr. Elcock, what orders did John James give you?—*Atkin.* He ordered Mr. Elcock and me to stay at the door, and he ran to the other.

What orders had John Jones received? Was he to have no hand in re-taking the prisoner?—John Jones was ordered by John James to attend a woman, Stevenson's house-keeper, I believe, and not let her come near him.

Was neither John James, nor John Jones, with you and Mr. Elcock, at the door where you were stationed, in order to re-take the prisoner?—Neither of them.

Was John Jones within sight of you?—I think he was.

Did you all act as assistants to the bailiff?—Yes.

And by his orders?—Yes.

Then the Witness withdrew.

Cryer, Call William Griffith.

William Griffith sworn.

Counsel for the Crown. Do you know the prisoner at the bar?—*Griffith.* Yes, very well.

Do you remember any thing about the prisoner's discharging or firing a gun at any time? Pray, speak up, that the jury may hear

you, and acquaint them with what you know of the matter.—Yes, Sir, I was in Mr. Stevenson's house at Bickerton, when Mr. Elcock was shot.

What part of the house were you in at that time?—I was in the house-place, and Mr. Stevenson was in the back-kitchen.

Was any body in the house, besides the prisoner and yourself?—Yes; a woman was in the house,—a servant-woman.

Did you see the prisoner fire the gun?—The prisoner did fire the gun at the back-door, and brought it in afterwards, and took it into the parlour.

After the gun was fired, did you hear no noise out of doors? Was there no alarm made about it?—Yes; the people without shouted, Murder!

From what place did the prisoner take the gun which he fired?—He took it from the mantle-piece in the kitchen.

Was the prisoner accustomed to keep fire-arms in the house with him?—I cannot tell.

How long was it after the gun was fired, that you heard the people shout, Murder?—In about a minute or two after the gun was fired.

I suppose you were curious enough, after the gun was fired, and you heard the cry of murder, to know, whether any body was hurt, or not; were not you?—I went to a window, and looked out; and saw a man in blue clothes supported or held up between two men.

Did you say nothing to the prisoner upon this occasion?—Yes; I told Mr. Stevenson, that I believed there was never a man killed, but there was one hurt, and they called him Mr. Elcock.

And pray, when you told the prisoner there was never a man killed, but a man hurt, and his name was Mr. Elcock; what did he say to you?—He said, I don't know what business a man of his coat had among such men as those. I am glad of it.

What do you apprehend he meant by the words, "A man of his coat?" I don't know.

Counsel for the Prisoner. You will please to observe, the witness told the prisoner there was a man hurt, but nobody killed; and that was immediately before the prisoner said, he was glad of it—Glad that nobody was killed.

Then the Witness withdrew.

Cryer, Call Mr. Cooper.

Mr. Cooper sworn.

Counsel for the Crown. I think you are a surgeon?—Cooper. Yes, Sir.

Where do you live?—At Nantwich.

Did you know the deceased Mr. Francis Elcock?—Yes, very well.

Were you sent for at any time, and when, to attend Mr. Elcock, upon account of his having received a wound, by the firing of a gun, or otherwise? Pray, acquaint the Court and jury with what you know of this matter.—Upon Wednesday the 21st day of March last, a messenger came to me about three

o'clock in the afternoon, desiring me to go to Bickerton, to Mr. Francis Elcock, who, the messenger told me, was shot. I went accordingly with the man, and got to Bickerton about five o'clock in the evening. When I came there, I found that Mr. Rowe, a surgeon from Malpas, had been sent for likewise, and had been there for some time before. Mr. Rowe and I went up stairs together, to the room where Mr. Elcock was, and we found him ill in bed. Almost so soon as he saw me, he pulled up his shirt, and showed me where the ball was lodged, and seemed impatient to have it taken out: upon seeing the wound, I took the ball between my finger and thumb, and perceived I could easily dislodge it. I then examined the wound, where the ball had entered, and found it cut about two inches from the hip on the left side of his belly: it passed through his belly, by his bowels, no doubt, and lodged five or six inches below the right hip, almost through the skin. As soon as I saw this, I took Mr. Rowe into another room, to consult what was fittest to be done; and I told him, it was my opinion, that Mr. Elcock was a dying man, and that I did not know whether it would be of any use to take the ball away, although it could be so easily effected. But considering that it would give him some satisfaction, and perhaps ease too, by taking the ball from the place where it did lie, Mr. Rowe and I went into the room again, and I took out the ball. After I had taken the ball out, and dressed the wound, and put a bandage about it, I asked Mr. Elcock, how he did? He said, he was easier. Doctor Hayes came in afterwards; and when I had told him the nature of the wound, he looked upon the case to be extremely dangerous. The doctor stayed with him two or three hours, and then went away; but Mr. Elcock desired me and Mrs. Nevill to sit with him; which we did, and his father did so too, till ten minutes past three the next morning, and he then expired. (The witness produces the ball.)

Do you believe that the wound which Mr. Elcock received was the occasion of his death?—I firmly believe, that the wound which he received was the occasion of his death.

Did Mr. Elcock say any thing to you in his agonies, upon the melancholy occasion, and what?—Mr. Elcock told me, that he was shot, as he was stooping down, with a crow in his hand, striving to open the prisoner's door.

Did he tell you from what part of the house he was shot?—He said, he received the wound at the door of the prisoner's house.

Pray, how came the ball to be made so flat, in that uncommon form?—I believe its going through the door was the occasion of its being in that form. [Then the Witness withdrew.]

Cryer, Call Mr. Baxter.

Mr. Robert Baxter sworn.

Counsel for the Crown. Pray, Mr. Baxter, are you concerned in any, and what manner,

for Mr. Harrison, the present sheriff of the county of Chester?—*Baxter*. Yes, Sir, I am concerned for the sheriff, and keep his office.

Do you make out warrants for the sheriff?—I do.

Did you receive at any time, and when, a writ against the prisoner, at the suit of John Atkin?—I received a writ against him upon the 1st of March last. (Which he produces.)

Look upon that warrant. Did you make out that warrant upon the writ, in order to arrest the prisoner?—I did.

And are you sure that is the same warrant you did make out?—Yes; I am sure it is.

(The Writ was read, and upon the back of it was written, 'Take bail for eighteen pounds eight shillings and ten-pence half-penny, by affidavit filed.'—And another indorsement, viz. 'I promise to indemnify the sheriff in the execution of the writ, as to the special bailiffs. JOHN ATKIN.'

Is it usual for the sheriff to appoint a gentleman in this town to execute the office, and to act for him?—It is usual. I have been several times appointed myself.

Do you receive all the writs that are sued out, directed to the sheriff of this county?—I do.

And do you make out the warrants upon such writs?—I do.

And return the writs?—Yes.

Do you execute all other acts that the sheriff would do, if he resided here himself?—Yes; except attending the assizes and sessions.

And has this been the constant practice in this county?—Yes, during all my time.

Has it been usual, when plaintiffs would have special bailiffs appointed, to leave blanks in the warrants for their names to be inserted?—Yes, upon the sheriff being indemnified.

Have you done this yourself?—Yes.

Have you known others to do it?—Yes, several others, to my knowledge.

Did you ever know it to be refused?—No, never, upon the sheriff being indemnified, and the attorney is known to be a fair practiser. I have known it refused, where the practiser was not liked, or where the sheriff run any risk or hazard, and the indemnity was not approved; but when the attorney, or practiser, and the indemnity are liked, it is usually done.

Pray, what is the nature of the indemnity given to the sheriff upon this occasion?—It is, that he should not suffer by escapes or rescues.

And has this been the constant practice used by the persons who have acted in the sheriff's office in the capacity you now act?—It has been so all the time I have known the office.

How long, pray, is that?—Seven or eight-and-twenty years.

To leave blanks in the warrants for the names of the special bailiffs to be inserted?—Yes.

Pray, whether is such practice convenient to the plaintiffs and suitors in the court, or inconvenient to them?—It is looked upon to be very convenient for the plaintiffs.

Do you think so yourself?—I look upon it in that light.

Had Mr. Lowe or Mr. Elcock, or both of them, a right to insert the names of the special bailiffs in the blank left in the warrant, whereon the prisoner was arrested?—I apprehend either Mr. Lowe or Mr. Elcock had a right to do so.

Is it usual for attorneys in the country to send their directions to their agents in Chester to take out writs?—Yes.

And is the agent's name generally put to the writ, or the name of the attorney in the country only?—The agent's name is generally added to the name of the country attorney, in the writ, since the late act of parliament for that purpose; but before that, the name of the attorney was only put to the writ.

And you say that either Mr. Lowe or Mr. Elcock had a right to insert the names of the special bailiffs?—Yes, I apprehend so.

Cross-examined.

Counsel for the Prisoner. Do not the attorneys, and other persons, usually send the names of the special bailiffs to be inserted in the warrants by the sheriff, or by those who act for him?—*Baxter*. Sometimes people do send the names of the special bailiffs to be inserted.

Has it not been the most usual way in your time to do so?—It was when I first knew the office the most usual way, in 1732, and 1733. But warrants went out with blanks then.

Did John Evans, the bailiff named in the warrant, indemnify the sheriff?—He has given security to the sheriff, I believe. But the indemnity was for the special bailiffs.

In the year 1732, or 1733, were blank warrants sent out, and not the names of the special bailiffs inserted?—When I was concerned for Mr. Page, who was sheriff in 1732, or 1733, several blank warrants were sent out, and not the special bailiffs inserted.

How many warrants were sent out, with blanks for the names of the special bailiffs, in Mr. Page's time?—I cannot tell.

Were not warrants oftener delivered, with the names of the special bailiffs inserted in the office, before they were sent out, than warrants with blanks, for the names of the special bailiffs to be afterwards inserted by the attorneys?—I believe, warrants were oftener sent out with the names of the special bailiffs inserted, than with blanks.

Is that the warrant you made out on the writ the 1st of March against the prisoner?—(Looks at the warrant.) It is the same warrant.

Is it in the same situation it was, when you delivered it out of your hands?—No.

How has it been altered? how does it differ?—The names John James and John Jones have been since inserted.

Pray was the seal to the warrant before you delivered it out of your hands?—Yes.

Are you sure of that?—Yes, for I put the seal to it myself.

Court. Do you remember, that any arrest was ever set aside, or disputed on account of

a blank warrant having been sent out?—*Baxter*. No, never.

Coun. for the Pris. Through all the course of your practice, has it not been most usual to make out warrants after you received the names of the special bailiffs, than without them;—than making out blank warrants?—

Baxter. Yes, it has been most usual, I think.

When the names of the special bailiffs are sent, do you always insert them in the warrants?—Yes, I do.

Pray, how is the under-sheriff of Cheshire appointed?—He is appointed by the sheriff, by deed.

Have you any written authority from the sheriff?—No further than by letters sent me sometimes about the business of the office.

How were you appointed?—The night before the sheriff was sworn, I snupped with him, and it was agreed, I should act for him.

Who were present, when you were appointed to act for the sheriff?—The sheriff and under-sheriff were both present, and appointed me.

Were you appointed by any instrument in writing, or not?—I was not.

Is it usual for the sheriff and under-sheriff both to appoint an agent to act for the sheriff?—I believe, the usual way is by the under-sheriff only.

Is there no other method of appointing a person to act for the sheriff, but by parol?—I don't know of any other way.

Is the seal to the writ the seal of office?—It is.

Have the persons concerned for the sheriff of this county usually that sort of seal?—Yes.

Where had you this seal?—I had this from Mr. Griffith, having lost my own.

Then the Witness withdrew.

Mr. *Gastrell*, clerk to Mr. *Lowe*, an attorney in Chester, was then called, to prove that John Atkin signed the indemnity given to the sheriff, when the blank warrant against the prisoner was sent out. But the Court thought it unnecessary to examine him.

Mr. *Cross*, an attorney in Chester, sworn.

Counsel for the Crown. Are you acquainted with the method of suing out process in the court of session for this county?—*Cross*. Yes.

Is it usual to send out warrants from the sheriff's office, with blanks for the names of the special bailiffs to be inserted?—When special bailiffs are desired, warrants frequently issue with blanks, for their names to be inserted.

Do you know this to be frequently done?—Yes.

Coun. for the Pris. But is it not more usual for the names of the special bailiffs to be put into the warrants in the office, before they are sent out, than for warrants to issue with blanks, for bailiffs to be inserted afterwards?—*Cross*. Sometimes the names of the special bailiffs are inserted in the office.

I say, is it not oftener done? more frequently?—I don't know but it may.

Coun. for the Cr. Don't you think it prudent, sometimes, not to send the names of the special bailiffs to the office;—to conceal the names till they are inserted by the attorney?—*Cross*. I do.

Mr. *Fluit*, an attorney in Chester, sworn.

Coun. for the Cr. Did your father ever act as agent for the sheriff of this county?—*Fluit*. He did.

Was it customary for your father to send out warrants with blanks, for the names of the special bailiffs to be inserted afterwards?—He did leave blanks often in the warrants.

I suppose you understood that your father had authority so to do?—I always understood that he had authority to do it.

Coun. for the Pris. But did your father never refuse to send out blank warrants, to your knowledge?—*Fluit*. Yes; he sometimes did, when he suspected the attorney; but never, when he knew the attorney to be a fair practitioner.

Here ends the Evidence on behalf of the Crown.

Court to the Prisoner. Have you any witnesses to examine? This is the time for making your defence.

The Prisoner called no witnesses, nor said any thing in his defence.

Mr. Recorder *Townsend*, of counsel for the prisoner. The prisoner, I believe, has no witnesses to call to his defence, except one woman, and I do not know yet, that it will be necessary to examine her.

The occasion, my lord, of my appearing this day, as counsel for the prisoner at the bar, is, on all sides, a very lamentable occasion indeed, which must unavoidably affect every body, who has the least degree of tenderness and humanity; and glad I should have been, if the prisoner had submitted to the arrest, how illegal soever, rather than to have taken the desperate methods he did for delivering himself from it; and I could wish, that it was now in his power to satisfy the gentlemen of the jury, upon the present trial for his life, that he did not discharge the gun, nor kill the unfortunate young gentleman Mr. Elcock, rather than to have recourse to the sanction of the law for a justification of his rashness: yet, as the unhappy condition of the prisoner at the bar does require all the aid and assistance which the law can allow him, for the saving of his life, I hope, I shall incur to myself no imputation in the discharge of my duty, by endeavouring to satisfy your lordship, under the authority of the law, that, although the prisoner did discharge the gun whereby Mr. Elcock was killed, yet, that he is, by law, acquitted from the crime of murder; and that, under the circumstances of his case, such killing will not amount to more than manslaughter.—My lord, I humbly conceive, that no warrant or process from the sheriff can be executed by any persons, but by those whom the sheriff appoints to execute them. The high-sheriff undoubtedly may appoint his de-

puty to act for him; and the appointment of the under-sheriff of this county was by deed, and not a parol appointment. Under that appointment, the under-sheriff is armed with a power of doing the lawful duty and business of the sheriff himself.—But, my lord, in the present case, Mr. Baxter, who made out the warrant against the prisoner, was a person acting under the under-sheriff: he was not appointed by any deed, or instrument in writing; but he was appointed by parol, by word of mouth only: and Mr. Baxter, as assistant to the under-sheriff, under this defective appointment, made out a warrant against the prisoner, and sent it out, after it was sealed, with a blank left therein for the names of the special bailiffs to be inserted in it. The names John James and John Jones were not in the warrant, when Mr. Baxter delivered it out, under the seal. It was taken twenty miles, to Nantwich, to have the names afterwards inserted in it. This is proved by John James himself, who swears, that he saw Mr. Elcock write his name, and the name of John Jones, in the warrant at Nantwich.—My lord, I humbly apprehend, that no warrant whatsoever from the sheriff, can or ought to receive the least addition, diminution, or alteration, after it passes the seal of office; and that if any person in the execution of a warrant, which shall receive any addition or diminution, or any alteration whatsoever, after it has passed the seal, shall be killed, such killing cannot be murder.—And if a person not lawfully authorised shall attempt to deprive a man of his liberty, although by a legal warrant, and is killed in such attempt, the killing in that case also, is not murder. My lord, I have the authority of as great a man, as eminent a lawyer, as ever lived, which, I humbly apprehend, is directly in point, Hale's Pleas of the Crown, p. 457, where my lord Hale lays down the law in these words: "If a sheriff's bailiff comes to execute a process, but has not a legal authority; as if the name of the bailiff, plaintiff, or defendant, be interlined, or inserted, after the sealing thereof, by the bailiff himself, or any other; if such bailiff be killed, it is but manslaughter, and not murder." And, my lord, notwithstanding the evidence given by Mr. Baxter, and Mr. Fluit, that warrants have been generally sent out with blanks, for the names of the special officers to be afterwards inserted, I humbly contend, that the warrant, whereon the prisoner was arrested by James, the special officer, at the suit of John Atkin, was an illegal warrant, inasmuch as the names of the bailiffs were added to, or inserted in the warrant, after it had passed the seal; and it was at the peril of the party executing that warrant, whether death, or any other mischief, ensued upon it: and notwithstanding warrants have sometimes been sent out by the person acting for the sheriff with blanks left in them for inserting the names of the bailiffs, after the warrants have been sealed, yet that usage or practice cannot be considered to extend to over-rule or set aside the known law,

set down by my lord Hale.—My lord, this is a point of law, which I hope your lordship will look upon to be worthy of consideration, and not be left to the determination of the jury. It has likewise appeared in evidence, that when John Atkin and John Jones came to the assistance of John James the bailiff, all that James ordered Mr. Elcock to do, was to stay at the door: he gave him no authority, nor orders to break open the prisoner's house; all he was to do, was to guard the door.—But, it appears in evidence, that Mr. Elcock, in a very extraordinary degree, exceeded the limits of the orders which the bailiff had given him: for, a crow or ringer was thrust under the door, (that very door which he was ordered to stay at only) poisoning it open; and Mr. Elcock himself, in his agonies, declared to Mr. Cooper the surgeon, who attended him, that he was striving to break open the door with the crow, when the gun was fired: and therefore I submit it to your lordship, whether Mr. Elcock did not exceed the orders and authority given him by James, supposing that James had, in himself, any power at all, (which I humbly conceive he had not) and could have transferred any power or authority to Mr. Elcock. These are two questions, my lord, which appear to me to be in favour of the prisoner, and to deserve consideration; and if the Court shall be of the same opinion, I humbly hope, you will not suffer a general verdict to go against the prisoner, but reserve those points for the consideration of the Court.

Mr. Perryn,* also of counsel for the prisoner. The only question, my lord, is, Whether the killing Mr. Elcock, in manner given in evidence, ought to be considered as murder, or manslaughter. It appears clearly, that the names of the two bailiffs were not inserted in the warrant, when it issued under the seal of the sheriff; and therefore it was an illegal warrant, under which James could not derive any lawful authority to arrest the prisoner: for, according to lord Hale, the warrant should have been a full and complete warrant, when it passed the seal, and ought not to have been a blank warrant, Hale's Pleas of the Crown, 457, (quoted by Mr. Recorder.) And the present fact proved by James and Mr. Baxter, that the two special bailiffs were inserted after the warrant was sealed, comes under the words of this great authority. My lord, you will observe, that the sheriff's own bailiff, named in the warrant, was not called upon, nor employed to execute it, nor did he attend the execution of it: but the arresting of the prisoner was entirely left to the special bailiffs, who, I humbly apprehend, had not the least power or authority to execute it.—My lord, I shall quote other authorities, which, I humbly apprehend, will make in favour of the prisoner, and those are, Hawkins's P. C. 80. Cro. Car. 372. 1 Jones

* Appointed in 1776 a baron of the Exchequer.

346, 373. 1 Leo. 91. 12 Coke 49. And I mention those authorities, to shew, that if a warrant be in the least defective, the arrest cannot be justified.—With regard to the power derived to Mr. Elcock from James the bailiff, I hope it will appear to your lordship's satisfaction, that James had not the least power or authority whatsoever in himself, and therefore could not transfer any to Mr. Elcock. But supposing the bailiff had any power to call assistance, and to have given his orders to Mr. Elcock, yet Mr. Elcock should have strictly observed the orders which had been given to him—he should have pursued the directions, namely, to stay at the door; and not have exceeded the limits of his authority, in the manner he did, in attempting to break down that door, which he was only directed to guard, or stay at, and had not any orders or authority to break down. There are other authorities, which I humbly conceive will be of use to the prisoner, when they come to be considered, 2 Lev. 144. 2 Inst. 105, 143, and 3 Lev. 146. They treat of arrests, and the authority of the bailiffs, and their assistants. No request was made from the bailiff to Mr. Elcock, to break down the door, which should have been previously done, before Mr. Elcock could have had the least colour or pretence for attempting to break open the door of the prisoner's house. *Bretton and Cole. Salk. 409. 1 Ray. 305.*—Upon the whole, I hope your lordship will think that those points deserve the consideration of the Court, and that they ought not to be left to the determination of the jury.

Mr. Maddocks. I am also of counsel with Mr. Recorder Townsend, and Mr. Perryn, for the unhappy prisoner at the bar, and hope your lordship will be of opinion, that a good deal of nicety attends this case, not proper for a jury to determine upon; and that several points of law have arisen, well worth the consideration of the Court. The law, my lord, arises out of the fact. This appears to be an indictment against the prisoner for the murder of Mr. Francis Elcock, who, when he was murdered, was assisting to re-take a person making his escape from an arrest: and I shall consider the case according to its nature. First, If Mr. Elcock was a trespasser, then the prisoner's killing him could be only manslaughter, not murder.—Secondly, Whether upon the writ, the special bailiff and Mr. Elcock derived an authority for what they did. And here I shall mention one authority, *Hawkins's P. C. 86*, which shews, (although the case is not exactly the same with this) that the general rule is, if a party, under colour of authority, not having legal authority, shall attempt to take away a man's liberty, and is killed in the attempt, the killing of that party is not murder, but manslaughter: and whether Mr. Elcock was a trespasser or not, will depend upon the authority he derived under the writ.—The writ itself does not appear to be void, and therefore I won't speak upon it; but shall confine my-

self to the warrant made out for arresting the prisoner, in obedience to the writ. As to the facts given in evidence, it appears, that the warrant was issued by Mr. Baxter: that Mr. Baxter then acted for the sheriff, as an assistant, by parol agreement, and delivered the warrant under the seal of the sheriff's office: that the name of John Evans, a bailiff, was then in it, and none others, and that it was carried so to Nantwich: that Mr. Elcock was at Nantwich, and there inserted the names of John James and John Jones. Now the general question is, Whether this warrant was good in point of law? In the first place, The person granting the warrant must have lawful authority for so doing. Mr. Baxter, on his examination, has said, that the night before the sheriff was sworn, he supped with him, and it was then agreed, he should act for the sheriff: that the sheriff and under-sheriff were both present, and appointed him, but that it was by word of mouth only. And it fully appears, that Mr. Baxter had no authority from the high sheriff in writing.—An under-sheriff, my lord, may be admitted into his office by parol; he is to execute the whole office: but Mr. Baxter is only to execute a particular part of it. The under-sheriff was appointed by deed: but Mr. Baxter, who did some things for the sheriff, but did not execute others, such as attending the assizes and sessions, was appointed by parol. I apprehend, if a person is to act for the sheriff under a limited authority, that authority ought to be in writing; and where the sheriff delegates a part only of his authority to another, it should be by writing; and therefore, I humbly conceive, that the appointment of Mr. Baxter to act for the sheriff, was not a good appointment, and that his authority to make out the warrant upon the writ for arresting the prisoner, was a very defective authority.—Now, whether the warrant was a legal warrant, or not, is in the next place to be considered. And that will depend upon a variety of circumstances;—upon the nature of the instrument itself, and matters attending it. A warrant is always under seal, and therefore is a deed:—I say, this warrant was a deed under seal: and nothing binds the parties, but what is contained in a deed, when executed: no interlineation, or addition afterwards made, can affect the parties who had executed it, unless the deed be re-executed; and there has been no evidence given, that this deed, this warrant, was re-executed. Then, if this be the case in general, at the time the sheriff sealed this warrant, the names of the two bailiffs, James and Jones, were not in it. No authority was given to any person, but to Evans the bailiff who was then named in the warrant.—Cites *Hale's P. C. 457*, (quoted before by the other counsel.) Every iota of this case is parallel, and is agreeable to law and common sense. How can this case be distinguished from the general law? Can it by custom? by *lex loci*? It may. What is then incumbent to be done, to establish this distinction? Why,—the custom must be immemorial

rial, must be uniform, must be certain; and there is no evidence here of such a custom. Mr. Baxter says, he sometimes leaves blanks in the warrants, and sometimes he inserts the names of the special bailiffs, and that he has known it so done for seven or eight-and-twenty years. This custom is not a custom immemorial, it is not proved to have been an immemorial custom; neither is it uniform, nor proved to be certain.—On the contrary, it has been proved, that the inserting the names of special bailiffs in the warrants at the office, is more usual than sending out blank warrants. And therefore, supposing the instances of custom to be of any consequence, upon the determination of this point, the custom must make for the prisoner at the bar, because the putting in the names of the bailiffs at the office has been more usual. The general law therefore is supported; the custom, or *lex loci*, not being immemorial, nor uniform, but uncertain. We are now to stand on the general law of the land; and if the warrant fails, neither the bailiff, nor Mr. Elcock, nor any of their assistants, acted under any legal authority; and therefore the killing of Mr. Elcock cannot amount to more than manslaughter. The authority, my lord, which Mr. Elcock had, was given him by James; John Evans, the proper bailiff, was not there, but James was the acting bailiff. If James had a mind that Mr. Elcock should have attempted the breaking open the door, surely he would have desired him to have done so, and not bid him stay at the door only. The bailiff acts under a limited authority, can he then do what he is not authorized?—James acted under a limited authority; and whether he had power to call assistance, without an application to the sheriff, seems to me a great doubt; but I humbly apprehend, that a person, to whom a limited power is delegated, cannot depute another to execute any part of that limited power.—In cases of Rescous, a writ of Rescous may be had.—Upon complaint made, that the party is rescued, a writ of Rescous issues.—In criminal cases, I allow, an officer can call another to his assistance: but this was a civil case; the prisoner was out of sight; it was not a criminal matter, nor an escape from an execution. If James the bailiff had an authority to break open the prisoner's house, it has not been proved that he gave Mr. Elcock this authority, but the reverse. James bid him only stay at the door: Mr. Elcock himself sent for, or borrowed the crow, the plaintiff Atkin put it under the door, and Mr. Elcock poised it with an intent to take it off the hinges. No particular authority was given by James; but Mr. Elcock took the management upon himself. It was his business only to watch the door. Atkin put the crow under the door, and Mr. Elcock poised it; neither of them had any order or directions to break open the house; and Mr. Elcock, having exceeded the limits of the authority given him, became a trespasser; and the unfortunate killing of him, in the commission of that trespass, can only be man-

slaughter, and not murder.—My lord, I apprehend, that upon an escape, or Rescous from an arrest upon mesne process, an outward door cannot be broke open. This was an outward door: the Rescous was at an end for two hours, and there ought to have been a request to assist on the Rescous; and a request to assist on a Rescous is traversable.

Court. It must be left to the jury, whether there was a request, or not.

Mr. Maddocks. In short, if Mr. Elcock was a trespasser, the killing of him can be only manslaughter. I humbly apprehend, that John James had no authority under the warrant for the arresting the prisoner: his name was not inserted in the warrant, till after it had passed the seal of office. He delegated only a particular authority to Mr. Elcock.—Mr. Elcock exceeded that authority. Mr. Elcock was a trespasser. The prisoner fired a gun, which killed Mr. Elcock in the commission of the trespass, when he was breaking open the prisoner's door: and therefore I hope your lordship will be of opinion, that these are points so essentially in favour of the prisoner, that you will not prevent him from having the benefit of the law which may result from a judicial determination of them, nor suffer the prisoner's life to be left at the hazard of a general verdict.

Mr. Justice Swinnerton. Can you shew any case to the Court, where an arrest under a blank warrant has been superseded?

Mr. Maddocks. No, my lord, I know of no case at present.—But the thing speaks for itself: it is not likely there should be many cases of this kind.

Mr. Justice Swinnerton. Is the doctrine of my lord Hale laid down in any part of Hawkins' Pleas of the Crown?

Mr. Maddocks. I have not looked over Mr. Hawkins for it; but if it is omitted to be inserted in his Pleas of the Crown, I hope, that omission cannot be considered to repeal or invalidate my lord Hale's authority.

Mr. Justice White. This case does not seem to me to come under the doctrine of lord Hale. For here a bailiff was named, and inserted in the warrant, before it was sealed; and I think it was a good warrant.

(Court distinguishes the warrant from a deed; for a deed must be delivered, and the sealing and delivering make a deed.)

Mr. Maddocks. The warrant was directed to the bailiffs, jointly and severally. The name of John Evans was then, only in the warrant; John Evans never acted in the execution of it; and therefore the warrant must be illegal, *quoad* James.

Mr. Hall, of Counsel for the Crown. I should have almost thought it unnecessary for me to have troubled the Court further on so plain a case, but that the objections made to the authority of Mr. Baxter seem to require, that something should be said, to prevent a notion from prevailing, that he had not a right to make out the warrant.—By the common law,

an under-sheriff may be appointed by parol, or deed; and several under-sheriffs for different purposes.

Court. Shew your cases.

Mr. Hall proceeds. One sheriff in London has two under-sheriffs, two compters, two prisons: the business is carried on by different persons.—And there is a sheriff's office in Furnival's-Inn, the business of which is executed by a clerk; and those persons are appointed by parol. *Mr. Baxter* has been appointed in the same manner, and it has been usual to make out blank warrants for a great number of years. Prescription for thirty years is good, unless the contrary appears; and here nothing does appear to the contrary. *Mr. Baxter* swears, it has been the custom all his time, which he limits to seven or eight-and-twenty years, to make out blank warrants, for the names of the special bailiffs to be inserted. *Mr. Baxter* did make out this warrant against the prisoner, and directed it to *John Evans*, a bailiff, and left a blank for the attorney to insert two other names; *Mr. Elcock* did put in those two names, and must be considered as clerk or agent to the sheriff; and if so, *John James* was lawfully authorised to arrest the prisoner upon that warrant, and did actually arrest the prisoner, who afterwards by violence rescued himself from the custody of the bailiff. The law, upon a rescous, gives authority, for the purpose of taking a defendant, to break open doors, and justifies all persons aiding and assisting the officer, whether they be requested or not.—If a bailiff takes a man by the hand out of a window, it is an arrest, and he may justify the breaking open of doors after the defendant, if he should attempt to escape; and I humbly apprehend, the reason for breaking open the door was stronger in this case.—Cites *Peer Williams*, the corporation of *Bewdley*, relating to *Venires*.—Though upon complaint of a rescous, a writ of rescous may be sued out; yet I apprehend, that does not prevent taking other remedies, such as breaking open doors. The sheriff may return a rescous upon a meane process, but cannot upon an execution: he must raise a *Posse Comitatus*; but that does not hinder him from raising the *Posse Comitatus* for a rescous from an arrest upon a meane process, if he thinks fit.—It was the duty of every man to aid and assist *John James* the bailiff, to retake the prisoner, after he had rescued himself from the hands of justice, by the force and violence given in evidence by *James*; and *Mr. Elcock* did what was right, in endeavouring to suppress the arrogance and outrage of the prisoner, and to bring him under a subjection to those laws, which are too authoritative to be trampled upon, and treated with contempt and disobedience. The authority in *lord Hale*, cited by the prisoner's counsel, is a very old authority. My lord *Hale*, I admit was a great man, and I pay the highest regard to his reports; but I don't find this authority named in *serjeant Hawkins's Pleas of the Crown*, and therefore I apprehend the *serjeant* doubted it.

Mr. Falconer, also of Counsel for the Crown. The practice of the officer, acting for the under-sheriff, in granting blank warrants, has never been complained of as an irregular or unlawful practice, nor has any arrest made upon those sort of warrants been ever superseded or set aside: such blank warrants have always been held good, and the acting under them legal; and it would be of most dangerous consequence to attempt to vitiate proceedings, under which justice has, for time immemorial, been administered to the suitors of the Court. Cites *Hale's P. C.* 459.

Prisoner's Counsel. That is upon an execution.

Mr. Hayward, likewise of Counsel for the Crown. My lord, I humbly conceive, that the arguments made use of by the prisoner's counsel, for invalidating the practice of issuing blank warrants, will have little weight with your lordship, it having been the usage for time immemorial, for persons acting under the sheriff of this county, as *Mr. Baxter* now does, to send out such warrants, and that practice was never known to be controverted: and if your lordship is satisfied, that such has been the allowed practice, then I humbly contend, that the special bailiff, *John James*, had a legal authority to arrest the prisoner, by virtue of the warrant which he received from *Mr. Elcock*; and that upon his rescuing himself, as has been given in evidence, the officer had a right to call assistance, and to break open doors for the purpose of re-taking him.—Cites *McCulloch's Case*, 9 *Coke*.—If a *Capias* instead of a *Distringas* be executed by an officer, and the officer is killed, it is murder; surely then, it can be no less a crime than murder, to kill an officer after he has executed a *Capias*: if then the authority under which *James* acted was a good authority, *Mr. Elcock* did what was legal, though I heartily wish he had acted with better caution. Cites *Palmer 52. White's Case*. And the killing *Mr. Elcock*, or any of the persons who assisted in re-taking the prisoner, after he had rescued himself, was murder. If a sheriff can appoint a deputy generally by parol, I humbly apprehend he may appoint a person to act in any particular part of the office by parol: I see no reason why he may not do it in one case as well as in the other.—As to a warrant being the same thing in effect as a deed, with regard to the execution of it, as the counsel for the prisoner contend, surely there is not the least foundation for the comparison: a warrant is only sealed; but signing, sealing, and delivering, are necessary to make a deed. It has been argued by the counsel for the prisoner in his defence, that *James*, the bailiff, had no right to call assistance for the re-taking the prisoner, because, as they say, it was a civil case; it was not a criminal matter, nor an escape from an execution: but, my lord, I humbly insist, that from the moment the prisoner had refused to submit to the arrest, and had rescued himself from the

officer, by snapping a pistol at him, it ceased to be a civil case; it became a criminal matter: the prisoner was a transgressor and violator of the laws of his country; he broke his majesty's peace, and became a criminal offender; and therefore the bailiff had a right to call, and every person ought to give him, assistance for apprehending him: his house remained no longer an asylum, or sanctuary for him: he forfeited the safety which the law had given him in the close retirements of his house before he was arrested: his doors could be afterwards no security to him from the hands of justice; and therefore his killing Mr. Elcock in the pursuit of him for the purpose of bringing him to a due submission and obedience, was (I humbly conceive) murder, and not manslaughter. The life of a man (says my lord Coke) is to be favoured, but the life of the law more so. The law was established for the security, defence, and protection of every individual, and is the life, strength, and support of the community. Upon the whole, I humbly apprehend, your lordship will be of opinion, that the points insisted upon by the counsel for the prisoner cannot entitle him to any indulgence from the Court; but, on the contrary, that you will think them too weak and insufficient to induce you to direct a special verdict to be found; and that therefore your lordship will now sum up the evidence to the jury, that they may consider it, and find a general verdict.

Mr. Attorney produces a case, Harris against Ashley, determined by lord Mansfield, the sittings after Michaelmas Term 1756, in the King's Bench, where a sheriff's clerk filled up the assignment of a bail bond, and it was held good.

Mr. Townsend, for the Prisoner. I humbly contend, that the warrant, by reason of the inserting the bailiffs after the sealing of it, is not a legal warrant;* and if so, my lord Hale's

* "In the case of arrests upon process, whether by writ or warrant, if the officer named in the process give notice of his authority, and resistance is made, and the officer killed, it will be murder; if in fact such notification was true, and the process legal: for, after such notice, the parties opposing the arrest acted at their own peril.

"I said above, by way of caution, if the process be legal: but I would not be understood to mean any thing more than, Provided the process, be it by writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case. There may have been error or irregularity in the proceeding, previous to the issuing of the process; and if the sheriff, or other minister of justice, be killed in the execution of it, this will be murder: for the officer to whom it is directed, must at his peril pay obedience to it; and therefore, if a *Capias ad Satisfaciendum, Fieri Facias, Writ of Assistance*, or any other writ of the like kind,

doctrine is to the point, and clearly for the prisoner. The king's counsel themselves admit lord Hale's Reports to be an authority, and therefore, I hope, the prisoner is well entitled to the benefit of this authority. Though the sheriff may appoint a deputy by parol, and that deputy depute his authority to a third person, yet, if that third person had not a right of deputing, Mr. Elcock could not act as agent or clerk to the sheriff; and I humbly insist, Mr. Elcock had not a right to do so, unless the sheriff himself gave an authority appointing him. Mr. Serjeant Hawkins omitting to insert my lord Hale's Case in his Pleas of the Crown, is no reason for its not being a resolution of as great authority as any extant; and it would be a pity, as well as cruel, that the prisoner's life should be forfeited for that omission. It was an omission not probably intended; he might have over-looked it, or it might have been left out by some other accident: no authority contradicts it; and therefore I contend, that it is still an authority, in full force and effect, and available to the prisoner, and not abolished or affected by the custom, which the counsel for the crown have set up in opposition to it. Custom, my lord, must be supported by usage for time immemorial; custom must be uniform and certain, before it becomes a law: this custom carries with it none of those qualifications. What Mr. Baxter has said, therefore, cannot overturn the rules of the common law. I never knew, during all the time of my own clerkship, a blank warrant sent out, without an indemnity by deed; and the attorney always sent, with the names of the special bailiffs, indemnities, either by deed or assumpsit, on the back of the writ: and I humbly insist, that the inserting of the names of the two bailiffs in the warrant, which James had to arrest the prisoner, is directly within the words and sense of my lord Hale's Case, as to those two bailiffs.

Court. Persons coming to the assistance of the constable the law gives the same sanction

issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant.

"But, if the process be defective in the frame of it; as if there be a mistake in the name or addition of the person on whom it is to be executed; or if the name of such person, or of the officer, be inserted without authority, and after the issuing of the process, or the officer exceedeth the limits of his authority, and is killed, this will amount to no more than manslaughter in the person whose liberty is so invaded."—Foster's Reports, p. 311, 312. *Form. Edit.*

See, too, East's Pl. of the Cr. c. 5, § 87, and Leach's Hawkins's Pleas of the Crown, book 1, c. 21, § 65; and in this Collection the Case of Reason and Tranter, vol. 16, p. 1, and the Note to p. 9, of Porteous, vol. 17, p. 923, and of Broadfoot, vol. 18, p. 1323.

to, as to those called by name. One point occurs, not yet spoken to, Whether the warrant may not be considered as an escrow. Suppose a person gives a bond to another, sealed and delivered, with a blank in it for the sum, and desires him to insert two hundred pounds, or any sum in it, and he to whom the bond is given, fills up the blank accordingly, it is good. I should be glad you could produce one instance, where a person who has been arrested upon a blank warrant, has been discharged.

Mr. Justice White. No other person was concerned in the transaction, but the party giving the warrant, and the party executing it. No instrument or writing is a deed, until it is delivered; but a warrant is a warrant as soon as it is sealed.

If a Court see a blank indorsement on a note, they will afterwards suffer it to be filled up. What a dangerous confusion would be created in the country, were the proceedings upon arrests made by blank warrants to be now set aside? To what a precarious situation would the property of the subject be exposed? And how unsettled the distribution of justice, heretofore administered upon the foundation of such arrests? As to the question, Whether the bailiff's authority to Mr. Elcock was for a particular purpose, or general—by the bailiff's calling out after Stevenson to stay; they were coming for him—I should think, that Mr. Elcock was with the bailiff to give him general assistance. This is matter of fact, not law.

Mr. Townsend again, for the Prisoner. I hope, the points of law that have arisen in the course of this trial, will induce your lordship to direct the jury to find a special verdict, that the prisoner may have the benefit of the law, and that you will not suffer a matter, which so nearly endangers the prisoner's life, to be determined by a jury: the authority of lord Hale furnishes me with an expectation, that you will grant this indulgence to the prisoner.

Mr. Justice Swinnerton. I must, in justice to you, Mr. Recorder, and the other counsel for the prisoner, say, that you have discharged yourselves, through the course of this trial, with great decency and judgment, and have done every thing for the unhappy man, that could possibly be expected from gentlemen at the bar. As for my own part, I have the greatest inclination to mercy, and no person would more readily extend compassion to a proper object, than I would: but, I could wish that it had not been my province to hear, and be a judge of so shocking and melancholy an event; for this being an inquisition for blood, to delay the execution of justice, may tend to overset and destroy justice. However, if you, gentlemen at the bar, of counsel for the prisoner, will give this Court your honour, that you verily believe the points of law, which seem to have arisen upon this trial, will in the end avail the prisoner, and that you think judgment of murder may be averted from him upon the de-

cision of those points; and that you do not ask indulgence for the sake of delay, but from reasonable hopes that the prisoner may be acquitted of murder, when the facts come to be argued; I will most readily consent to direct the jury to find a special verdict: but if, on the other hand, you think that the prisoner may not be availed by the determination of the Court upon those points, I rely upon your honour, and hope you will not request it.

Mr. Townsend. With great submission to the Court, we humbly apprehend, that the prisoner will receive the utmost advantage upon the determination of the facts to be stated: we have the authority of lord Hale on our side, and shall have time to consult other authorities, which may probably give us further assurances, that the prisoner's life in the end will be saved by the decision of those points. But if we should fail, I have no doubt upon me, but the conduct of myself, and of the other counsel for the prisoner, will be clear from every imputation, inasmuch as we request this indulgence under the patronage of my lord Hale, and not to delay or protract justice, but that the prisoner may receive that benefit from the law, which we humbly conceive he is intitled unto; and for these reasons only we desire, that the Court will give the prisoner an opportunity of having those points argued.

The Court consented.

Then the Facts were stated, and found by the Jury as follows:

The Jurors find the Capias with the indorsement of indemnity.

That the said John Atkin, plaintiff in the said Capias, signed the indorsement of indemnity.

That the sheriffs of the county of Chester have always appointed a person, residing in the city of Chester, to receive writs, make warrants thereon, and to return them.

That Mr. Robert Baxter, the night before Samuel Harrison, esq. sheriff of the said county of Chester, was sworn into office, but after he had received his appointment as sheriff, was in company with the said Samuel Harrison, then and now sheriff of the said county, and John Hollius, gentleman, under-sheriff of the said county; and the said Robert Baxter was then appointed for the purposes aforesaid; under which appointment the said Robert Baxter has acted ever since. That the said sheriff was sworn into office the day following such appointment: that the said Robert Baxter after that time, and in pursuance of such appointment, did make out a warrant upon the said Capias, under seal of the said sheriff, in the words following, that is to say, [Here the warrant is to be set forth in the record of the Special Verdict. But,

Note,—In setting forth the warrant in the Special Verdict, the words "John James, and John Jones," are to be omitted.]

That the said Robert Baxter delivered the said warrant, so under seal as aforesaid, to Mr.

Lowe, then agent to Francis Elcock since deceased, which said Francis Elcock was attorney for the plaintiff John Atkin.

That the same warrant so sealed, was sent to the said Francis Elcock, to Nantwich in the said county (a blank being left in the said warrant).

That it has been the practice, in the sheriff's office of the said county of Chester, to grant warrants with the names of the sheriff's bailiffs inserted, and that blanks have been left therein, for the purpose of inserting the names of special bailiffs, to be added to such sheriff's own bailiffs, to act jointly or severally; and that it has also been the practice for the sheriff's agent to insert the names of all the special bailiffs therein, before the same hath been delivered out to the bailiffs, when such names have been sent to the sheriff's office;* and that the said Francis Elcock afterwards, at Nantwich aforesaid, by the permission of the said Robert Baxter, inserted in the said warrant, in the blank left for that purpose, the words and names following, to wit, "John James and John Jones." That the said warrant was delivered to John James, by virtue whereof he the said John James alone arrested the said John Stevenson. That the said John Stevenson, after he was so arrested, rescued himself, went into his house, and shut the doors. That the said John James applied to the said Francis Elcock for arms and assistance to retake the said John Stevenson (the said Francis Elcock then being at an house in the neighbourhood). That the said John James, the said Francis Elcock, and several other persons, as assistants to the said John James, made fresh pursuit, and went to the house of the said John Stevenson, as soon as they could, in order to retake him the said John Stevenson; but that John Evans, named in the said warrant, never was there, and that all the doors of the said house were shut. That the said John James, upon his going to retake the said John Stevenson, and before he the said John James got to the said John Stevenson's house, saw the said John Stevenson out of doors, but going towards the said house; and before he the said John Stevenson got into the said house, he the said John James called out to the said John Stevenson in these words, "You may as well stay, for we are coming for you." That when the said John James, the said Francis Elcock, and others, as assistants to the said John James, came up to the said house, the said John James told the said Francis Elcock to take care of two of the doors of the said house, and the said John James went to a door on the other side of the same house, out of the sight of the said Francis Elcock.

* If a warrant be filled up by the magistrate before he issue it, though after he have signed it, the warrant is regular, and killing the officer in the execution of such warrant is murder. Per Kenyon, Ch. Just. in *Rex v. Winwick*, 8 T. Rep. 455, cit. in a note to *East's Pl. Cr. ch. 5, sect. 87*.

That the said Francis Elcock demanded entrance, while the said John James was at another door, out of sight of him the said Francis Elcock. That the said John Atkins, the said plaintiff, was at the same door with the said Francis Elcock, with an iron crow in his hand. That the said crow was brought there, together with other arms, by the direction of the said John James. That the said Francis Elcock bid the said John Atkin to put the said iron crow under the same door, to break it open; whereupon the said John Atkin put the said crow under the same door for that purpose, and endeavoured to lift the same door off the hinges; but failing, he the said John Atkin then left the said crow sticking under the same door, and went towards another door of the same house, to prevent the said John Stevenson escaping, and left the said Francis Elcock at the same door, where the said iron crow was. That there were two holes in the same door, through which the said John Stevenson might see who was on the out-side of the same door. That the said John Stevenson took a gun from the mantle-piece in his said house, loaded with gun-powder and a bullet, and shot and discharged it, and shot the said Francis Elcock, through the same door, in the part mentioned in the indictment, of which he the said Francis Elcock died, as in the said indictment is mentioned.

And if, upon the whole matter, the Court shall be of opinion, that the said John Stevenson is guilty of murder, the jury say, that the said John Stevenson is guilty of murder.

And if the Court shall be of opinion, that the said John Stevenson is guilty of manslaughter, the jury say, that the said John Stevenson is guilty of manslaughter, and not guilty of murder.

"Thursday, August 6, following, the Special Verdict was argued at the assizes at Chester, before the hon. Mr. Justice Noel, chief justice of Chester,* and Taylor White, esq. the other justice, when the Court took time till the next morning for delivering their opinions; and accordingly on Friday morning, Mr. Justice Noel, in an ingenious and pathetic speech, supported by adjudged cases, and the doctrine of the wisest sages of the law, and also by arguments of reason and conscience, declared, That the prisoner's crime, found by the special verdict, could amount at most to manslaughter only. Whereupon the prisoner was burnt in the hand, and discharged from the indictment of murder." *London Magazine*, for August 1759.

As to the law respecting homicide upon arrests, or attempts to arrest, or in detaining or attempts to detain persons in custody, see *East's Pl. Cr. ch. 5, sect. 62—92*.

* He was also at the same time one of the justices of C. B.

In the law of Scotland, insufficiency in a warrant seems not to furnish to a person who resists the officer executing, or attempting to execute such warrant, that degree of justification or excuse which under the law of England is afforded to him, by its jealous anxiety for the security of personal freedom.* And the like may be said of resistance to an officer irregularly executing, or attempting to execute a warrant in itself sufficient. (As to this, see the Case of Reason and Tranter, vol. 16, p. 1.)

Mr. Hume, in his Commentaries (Description and Punishment of Crimes, chap. 6,) after considering generally what kinds and degrees of provocation will justify, excuse, or extenuate homicide, proceeds thus :

"From what has been said with regard to the degree of injury which will extenuate the guilt of slaughter, there results an important, but it should seem an unavoidable consequence, touching the construction of that slaughter, which is committed in resistance of defective and irregular warrants, or warrants executed in an irregular way. A messenger by mistake arrests John instead of James, or on a warrant against John, he arrests that person who knows him not, without saying who or what he is ; or he arrests John on a warrant which bears an erroneous description of him, or is otherwise not in due form of law. In some of these cases the prisoner suffers a degree of provocation at the time, and it may be said, that in all of them there is a wrong or trespass on the part of the officer, who ought to see that his warrant is good, and should proceed lawfully in the execution of it. But to hold, which seems to be the rule in the neighbouring kingdom, that it is such a wrong as will excuse the party thus molested, if on mention of the mistake, and in some instances even without that warning, he straightway kill the officer with a mortal weapon, and though no personal harm have yet ensued :---this is far from being in the disposition or analogy of the law of Scotland. Very suitable it may be to the rest of the English practice, which holds that a pull by the nose or a filip on the forehead (injuries not more material than a rude invasion of a person's liberty) is a provocation to extenuate the guilt. But as suitable as such a rule is to their practice, as unsuitable it would be to ours, which is quite a stranger to any plea of extenuation grounded on such trivial offences, and requires a proof of bodily distress and agitation of spirits in the case of assault by any ordinary man, and much more will require it in the case of an officer of the law, who may indeed be in the wrong, or fall into an error, but has commonly some colour of excuse, and opinion of duty, more or less, for what he doth. Though he

do err, still he is not divested of his character of servant of the law, which is itself entitled to regard ; as well as in all cases where he is known to be acting in that capacity, the motive, scope, and extent of his purpose are at the same time evident to the party, so that by compliance, which is here a safe measure, all fear of farther violence shall be at once at an end. Not to mention the more certain means of redress of the wrong, and punishment of the offender, which the person aggrieved enjoys in all cases of this description. If therefore instead of submitting for the time, as any man of a well regulated mind would be disposed to do, he shall take the advantage of the mistake, straightway to stab or shoot the officer, before any great struggle has ensued, or any grievous harm of body been sustained by him, certainly in consistency with the rest of our law he cannot be found guilty of any lower crime than murder.

"But the case that a sheriff's officer having warrant against a criminal,* has ignorantly followed him beyond the bounds of the sheriffdom, and having overtaken him, has laid hold of him by the collar of the coat, to keep him, but without striking, or offering other violence to his person. If in this situation the prisoner draw a knife and stab the officer, he can neither be justified nor excused. Because even between man and man, and supposing one party not to be an officer of the law, nor the other a felon, this purpose of detention, and executed in so moderate a way, is not a wrong of that degree, which would at all extenuate the guilt of slaughter. And surely if it is not more, the case is at least not less favourable to the officer, on account of these circumstances in the relative situation of the parties. If a struggle and beating ensue on the attempt, it will depend on the degree of violence, as in other cases, whether this will bring down the charge to culpable homicide. Or if the officer, being roasted, strike the felon so as to put him in danger of his life ; still, to be completely justified, the felon must observe the 'moderamen inculpatae tutelae' in his defence, for so he must have done on occasion even of a causeless and malicious quarrel, fastened on him by any one of the people without pretence of warrant, or opinion of duty to support him. On the whole there seems to be the highest equity and reason in considering the hard situation of an officer of the law, to whom the defect of his warrant may often be utterly impossible to be known, and who as often cannot judge of the defect, and is obliged by his duty to proceed in the execution of it, and yet, according to the supposed doctrine of the law of England, may be killed with impunity by a ruffian equally igno-

* For the expressions of Scots lawyers concerning the value of personal freedom and the high importance of providing for it, see a Note to the Case of Sommersett the negro, A. D. 1772.

* I conjecture that the learned commentator employs this word 'criminal' to include a person against whom a criminal charge has been brought ; under the law of England no person is accounted a criminal until he have been convicted.

rant of that defect as the officer, and who is only actuated at the time by malignity and brutal rage."

So Mr. Burnett (*Treatise on the Criminal Law of Scotland*, chap. 1, p. 19.)

"If the law of Scotland is, in the general case, slow to listen to the defence of provocation, and is, at the same time, jealous of any resistance to its ministers and servants, it will, in most cases, listen with extreme caution in cases of homicide, or resistance of the officers of the law, to any defence founded on a defect of their warrant, or alleged excess in the execution of it. The law, while it extends its protection to the servants of justice, gives ample redress to those who may be injured by the abuse of their authority; but its disposition is, to restrain, as far as can be, the assumption of redress, and still more, the exercise of vengeance by the individual, and to leave him to seek his remedy by the operation of the law; conceiving it of less moment the temporary inconvenience, or even suffering of the individual, in such cases, than the shew of contempt and resistance to the ministers of justice. 'Laws' (as M'Kenzie has well expressed it) 'are only the idea, or picture of justice, but execution is its life, and, though those who have the execution of law, and sentences committed to them, be ranked but amongst the lowest servants of justice, yet they have the happiness to be those who complete that great work, and amongst whose hands it becomes perfect; and, therefore, the law having committed its most excellent part to them, it should be, and is, in a most eminent way, careful of them; and in providing for their safety, secures its own honour.' In short, it may, in the general case, be laid down, as the rule of the law of Scotland, that any defect in the warrant upon which the officer acts, or any irregularity committed by him in the execution of it, is not that species of provocation which will justify resistance, to the effect of depriving the officer of his life."

And afterwards (chap. 1, p. 66,) the same author says,

"Another important particular, as to which our practice may be said to afford no precedents, is the precise degree of irregularity on the part of the officer in the execution of his warrant, or in the warrant itself, which will go to weaken his privilege or plea in justification, in the event of his killing the person to whom the warrant applies. We had occasion, in another place, to say something on this subject, in treating of the plea in justification, founded on the same circumstance, but urged by the party against whom the warrant is issued, and who kills the officer or his assistants in the execution of the warrant; and it may be here observed, as the general rule of law with us, that the officer's privilege in this particular, stands much higher than that of the party; that although the former will be justified in

VOL. XIX.

certain cases, in killing the party who resists the execution even of an irregular warrant, the latter will not in the same circumstances be justified in killing the officer. As to the former, the rule laid down by Mr. Hume on this important subject seems to be the just one, and the most consonant to the principles of our law: 'that the officer shall lose his privilege in the case only of such vices which are in the immediate frame and texture of the warrant, and that he is not affected by those more remote and extrinsic, and to him unknown and unsearchable irregularities, which have happened in the way of applying for the warrant, or in the proceedings which have been the grounds of obtaining it.'"

Of homicide in resistance of officers Mr. Burnett reports the following Case:

"In April 1795, an act was passed entitled, 'An Act for enabling the magistrates in the several counties in Great Britain to raise and levy, under certain regulations, such able bodied and idle persons as shall be found within the said counties, to serve in his majesty's navy;' which, while it strictly enjoined and required the justices of the peace and magistrates in each county to use their utmost care and diligence that his majesty's service be not neglected, empowered them to issue out their warrants from time to time, under their hands and seals, requiring the constables within their several limits, and those who might assist them, to make, 'or cause to be made, a general search throughout their several and respective limits, for all such men as they can find, who are, or shall appear to them to be, within any of the descriptions of this act; and to convey all such persons before the justices, or other magistrates acting in, or for such division or place, at such time and place as shall have been prefixed for their next and subsequent meeting; and which time and place shall be expressed in the said warrants respectively, &c. to be examined;' and if found to be within the description of the act, to be delivered over to the regulating-officer, &c. The persons described as the objects of this statute were, 'all able bodied, idle and disorderly persons, who cannot, upon examination, prove themselves to exercise and industrially follow, some lawful trade or employment, or to have some subsistence sufficient for their support and maintenance,' and offenders of a certain description; and a remedy

* Note, In England if the process be sufficient in its frame, and issue in the ordinary course of justice from a court or person having jurisdiction in the case, no error or irregularity in the previous proceeding, no impropriety in the mode of obtaining it, will vitiate it so as to excuse the party killing the officer in the execution of it. See *Curtis's case* printed in a note to the case of *Richard Noble*, vol. 15, p. 731, and *East's Pleas of the Crown*, c. 5, s. 78, as there referred to.

3 L

is provided for any wilful and malicious abuse of the powers given by the statute. In terms of this act the magistrates of Dumfries issued a general warrant to their constables and borrow officers, to search for, and apprehend, all persons of the description above mentioned who should be found within their jurisdiction, and to bring them before them for examination. The warrant, however, though signed by three of the magistrates, was not sealed, nor was the day or time for their next meeting, and for the examination of the parties, expressed in the warrant. The execution of it was entrusted to three constables, who had orders to set off in the night time, taking with them, as their assistants, some burgh-officers, and a serjeant and twelve men. Though the warrant was general in its terms, it was issued for the express purpose of apprehending the O'Neils, who were well known to be resolute, and to have a purpose of resisting the warrant. Special directions were therefore given to the constables to apprehend their persons, and bring them before the magistrates for examination; their place of residence was not within the limits of the town, strictly so called, though within the jurisdiction of the magistrates. The party, on their arrival at the house, knocked at the door, and desired admittance in the king's name, notifying, at the same time, the object of their coming, and the warrant which they were possess of. The O'Neils refused to open the door, and, without asking a sight of the warrant, still less intimating any particular objection to it, declared it as their determined purpose, to shoot the first person who should attempt to enter. This however, did not deter the constables from doing their duty. They proceeded to force open the door, when three shots were fired from within, which severely wounded two of the soldiers; one of whom died of his wounds a short time thereafter. John and Arthur O'Neil (father and son) were brought to trial for murder, and feloniously wounding officers of the law in the execution of their duty. No objections were stated to the relevancy of the libel. Besides the circumstances already mentioned, it was clearly proved, that days before, the O'Neils had notice that a warrant was to be issued against them under the Comprehending Act, as idle and disorderly persons; that they had made preparation of resistance, by purchasing powder and lead; and expressed their determination to oppose, by every means in their power, the execution of any such warrant. One witness swore, that the father said, 'he would blow out the brains of any officer who should attempt to apprehend him.' It appeared also, that the prisoners had no proper calling, or visible means of subsistence, and were otherwise of indifferent character. Various defences in law were stated to the jury. It was in the first place maintained, that the prisoners fell not under the description of the act, being not idle and disorderly persons, having no subsistence sufficient for their support;

but persons, it was said, employed occasionally to work for their livelihood. Therefore, not being within the description of the act, the warrant was illegal, or at least its execution, when directed against them. 2dly, That the warrant having been issued under a particular statute, the requisites of the act, as to the form of the warrant, must be strictly complied with; but that in this case, the warrant was not in terms of the statute, being neither sealed by the magistrates, nor the day for the examination of the party expressed in it; which last was meant (it was said) as a humane, and of course, as an important requisite, in no shape to be dispensed with; and that in such case it mattered not whether the officer was not in *bonâ fide*, or the prisoners in the knowledge at the time of the defects of the warrant; while in law, every illegal act is an act of violence, which it is justifiable to resist. 3dly, It was said, that the warrant was irregularly executed, the party coming in the night time; that they had no right or authority to break open doors, and that the magistrates could not have given them any such, under the statute. From all which it was maintained, that the resistance was legal and justifiable, and that the prisoners were not therefore guilty of murder.

"In addressing the jury, lord-justice-clerk (M^cQueen) after stating the substance of the proof, observed, That the question was of much importance in a public point of view, involving in it the security and protection of the officers of the law on the one hand, and of the individual on the other; but that, in judging of such cases, the law of Scotland leans not with the same indulgence as the law of our neighbouring country to the plea of justification, founded on the irregularity of the warrant, but looks to the real circumstances and substance of the case: the supposed aggression on the one hand, and the temper, purpose, and intent on the other. That in this case, the defects in the warrant, supposing them greater than they were, could not justify the resistance that was made: that it was the duty of the officers to execute the warrant, any fault or omission in it not being imputable to them, but to the magistrate who issued it; and it was the duty of the prisoners to yield obedience in the mean time, and to seek their redress and their damages, as the statute had directed, if the proceedings were illegal;—at all events not to resist in the manner they did; while it would be of highly dangerous example, if every one against whom an irregular warrant was issued, was to be the judge and avenger of his wrong; and the officer, ignorant perhaps of the defect, and at the same time incompetent, in most cases, to judge of it, to be made the victim on the occasion. That such a plea is in a particular manner excluded from this case, when it is admitted that both the officers and prisoners were completely ignorant at the time of the defects of the warrant, and when at the same time, the defects were not such, as if known, and the officers even apprised of them, ought to

have deterred them from putting it in execution, they were at best doubtful, and such as neither the prisoners nor officers were the competent judges of. That the sealing is a mere English form, and applicable to English warrants; but when the act comes to have execution here, it must be given effect to, 'secundum leges et consuetudines Scotiæ,' and these require nothing more than the subscription of the magistrate. That leaving the day of examination blank, was perhaps not strictly regular, but in the circumstances of the case, it is plain that the prisoners were meant to be brought immediately, or next morning, before the magistrate; and so they must have understood, had they known of the defect. As to the warrant allowing no person to break open doors, the truth is, that all warrants under this act, imply a power to break open, being granted against disorderly and irregular persons; and so, as will be found, it has been understood in practice. Lastly, as to the defence of the prisoners not falling under the description of those being liable to be comprehended, the officers certainly were not to be accountable for this error, or resisted to the death on that account; that they had no power or right to judge of the competency of the warrant. Besides, it was no irregularity of theirs, but of the magistrates who issued it, and ample redress lay against them if the warrant was illegal. In the case of a *Med. Fugæ* warrant, obtained without

the oath of the party who applies for it; or of a warrant granted to apprehend a criminal, but without a signed information as the Act 1701* requires, would the person, against whom the warrant is issued, be entitled, on the ground of these defects, to kill the officer sent to apprehend him; or even the officer be justifiable in not executing the warrant, on the statement of its defects by the party himself? He certainly would not: the law of Scotland knows of no right in a private person, 'jus sibi dicere;' least of all to take vengeance in this form, against an innocent servant of the law. His lordship concluded, by his stating, explicitly to the jury, that in his opinion there occurred in this case, almost every thing, that, by the law of Scotland, is held to constitute murder; deliberation, malice, and a purpose to kill, without any thing which could amount to provocation or self defence. He added, however, that under all the circumstances of the case, he thought the father more culpable of the two. The jury found the father guilty, and acquitted the son. The former received sentence of death, but obtained first a reprieve and afterwards a free pardon." *Treatise on Crim. Law of Scotland*, pp. 21, *et seq.*

* Concerning this "Act against Wrongous Imprisonment," &c. see a Note to the Case of *Sommersett the negro*, A. D. 1722.

338. The Trial of LAWRENCE Earl FERRERS, for the Murder of John Johnson: Before the Right Honourable the House of Peers, in Westminster-Hall, in full Parliament, on Wednesday the 16th, Thursday the 17th, and Friday the 18th of April: 33 GEORGE II. A. D. 1760.

Wednesday, April 16, 1760.

In the Court erected in Westminster-Hall, for the Trial of Lawrence Earl Ferrers, for the Murder of John Johnson.

ABOUT eleven of the clock the Lords came from their own house into the court erected in Westminster-Hall, for the Trial of Lawrence earl Ferrers, in the manner following:

The lord high steward's gentlemen attendants, two and two.

The clerks assistant to the House of Lords, and the clerk of the parliament.

Clerk of the crown in Chancery, bearing the king's commission to the lord high steward; and the clerk of the crown in the King's-bench.

The masters in chancery, two and two.

The judges, two and two.

The peers eldest sons, two and two.

Peers minors, two and two.

York and Windsor heralds.

Four sergeants at arms with their maces, two and two.

The yeoman usher of the house.

Then the peers, two and two, beginning with the youngest baron.

Then four sergeants at arms with their maces, two and two.

The serjeant at arms attending the great seal, and purse-bearer.

Then Garter king at arms, and the gentleman usher of the black rod, carrying the white staff before the lord high steward.

Robert lord Henley, lord keeper of the great seal of Great Britain, Lord High Steward, alone; his train borne.

When the Lords were placed in their proper seats, and the Lord High Steward upon the woolpack;

The clerk of the crown in Chancery, having his majesty's Commission to the lord high steward in his hand, and the clerk of the crown in the King's-bench, standing before the clerk's table with their faces towards the state, made three reverences; the first at the table, the second in the midway, and the third near the

woolpack; then kneeled down; and the clerk of the crown in Chancery, on his knee, presented the Commission to the Lord High Steward, who delivered the same to the clerk of the crown in the King's-bench to read: then rising, they made three reverences, and returned to the table.* And then proclamation was made for silence, in this manner:

Serjeant at Arms. Oyez, oyez, oyez! Our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Lord High Steward stood up, and spoke to the peers.

Lord High Steward. His majesty's Commission is about to be read: your lordships are desired to attend to it in the usual manner; and all others are likewise to stand up, uncovered, while the Commission is reading.

All the peers uncovered themselves; and they, and all others, stood up uncovered, while the Commission was read.

"GEORGE R.

"George the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. To our right trusty and well-beloved counsellor Robert lord Henley, baron of Grainge, in our county of Southampton, keeper of our great seal of Great Britain, greeting, Know ye, That whereas Lawrence earl Ferrers, viscount Tamworth, late of the parish of Breedon, in our county of Leicester (before our justices, assigned by our letters patent under our great seal of Great Britain, to enquire more fully the truth, by the oath of good and lawful men of our said county of Leicester, and by other ways, means, and methods, by which they should and might better know (as well within liberties as without), by whom the truth of the matter may be the better known and enquired into, of all treasons, misprisions of treasons, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the money of Great Britain, and of other kingdoms or dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retensions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceits, and all other evil doings, offences, and injuries whatsoever, and also of the accessories of them, within the county of Leicester aforesaid (as well within liberties as without), by whomsoever and in what manner soever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner; and of all other articles and circumstances concerning the premises, and every or

* See Gregory King's Ceremonial, vol. 15, p. 806, of this Collection.

any of them, in any manner whatsoever; and the said treasons, and other the premises, according to the laws and customs of England, to (hear and determine,) stands indicted, by the oath of good and lawful men of our said county of Leicester, of felony and murder, by him the said Lawrence earl Ferrers viscount Tamworth done and committed: We, considering that justice is an excellent virtue, and pleasing to the Most High; and being willing that the said Lawrence earl Ferrers viscount Tamworth, of and for the felony and murder whereof he is indicted as aforesaid, before us, in our present parliament, according to the law and custom of our kingdom of Great Britain, may be heard, examined, sentenced, and adjudged; and that all other things which are necessary on this occasion may be duly exercised and executed; and for that the office of High Steward of Great Britain (whose presence, upon this occasion, is required) is now vacant (as we are informed): we, very much confiding in your fidelity, prudence, provident circumspection, and industry, have, for this cause, ordained and constituted you Steward of Great Britain, to bear, execute, and exercise (for this time) the said office, with all things due and belonging to the same office in this behalf: and therefore we command you, that you diligently set about the premises, and (for this time) do exercise, and execute with effect, all those things which belong to the office of Steward of Great Britain, and which are required in this behalf. In witness whereof, we have caused these our letters to be made patent. Witness ourself at Westminster, the sixteenth day of April, in the thirty-third year of our reign.

"By the king himself, signed with his own hand. YORKE and YORKE."

Serjeant at Arms. God save the king!

Then Garter, and the gentleman usher of the Black Rod, after three reverences, kneeling jointly presented the white staff to his grace the Lord High Steward: and then his grace, attended by Garter, Black Rod, and the Purse-Bearer (making his proper reverences towards the throne), removed from the woolpack, to an armed chair, which was placed on the uppermost step but one of the throne, as it was prepared for that purpose, and then seated himself in the chair, and delivered the staff to the gentleman usher of the Black Rod on his right hand, the Purse Bearer holding the purse on the left.

Cl. of the Cr. Serjeant at arms, make proclamation.

Serj. at Arms. Oyez, oyez, oyez! our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Clerk of the Crown, by direction of the Lord High Steward, read the Certiorari, and the Return thereof, together with the Caption of the Indictment, and the Indictment certified

thereupon, against Lawrence earl Ferrers; in *hac verba*:

The CERTIORARI and RETURN.

"George the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to our justices, assigned by our letters patent under our great seal of Great Britain, to enquire more fully the truth, by the oath of good and lawful men of our county of Leicester, and by other ways, means, and methods, by which they should and might better know (as well within liberties as without), by whom the truth of the matter may be the better known and enquired into, of all treasons, misprisions of treasons, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the money of Great Britain, and of other kingdoms or dominions whatsoever, and of all murders, felonies, manslaughter, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceits, and all other evil doings, offences, and injuries whatsoever, and also of the accessories of them, within the county aforesaid (as well within liberties as without), by whomsoever and in what manner soever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner; and of all other articles and circumstances concerning the premises, and every or any of them, in any manner whatsoever, and the said treasons, and other the premises, according to the laws and customs of England, to hear and determine, and to every of them, greeting: We, being willing, for certain reasons, that all and singular indictments and inquisitions of whatsoever felonies and murders whereof Lawrence earl Ferrers viscount Tamworth, late of the parish of Breedon, in the county of Leicester, is indicted before you (as is said), be determined before us, and not elsewhere, do command you, and every of you, that you, or one of you, do send, under your seals, or the seal of one of you, before us, in our present parliament immediately after the receipt of this our writ, all and singular the indictments and inquisitions aforesaid, with all things touching the same, by whatsoever name the said Lawrence earl Ferrers viscount Tamworth is called in the same, together with this writ, that we may further cause to be done thereon what of right, and according to the law and custom of England, we shall see fit to be done. Witness ourself at Westminster, the 18th day of March, in the 33rd year of our reign.

"YORKE and YORKE."

"To the justices assigned to enquire of all treasons, murders, &c. committed within the county of Leicester, a writ of Certiorari, to certify into the upper house of parliament the indictment found before them against

Lawrence earl Ferrers for murder, returnable immediately, before the king in parliament.

"YORKE and YORKE."

RETURN.

"By order of the Lords spiritual and temporal, in parliament assembled, by virtue of the within writ to me, and others, directed, I send to our sovereign lord the king, in this present parliament, under my seal, the indictment and inquisition within mentioned, with all things touching the same, in certain schedules hereunto annexed, as I am within commanded.

"H. BATHURST."

"*Leicestershire*. Be it remembered, That at the general session of our lord the king, of Oyer and Terminer, holden for the county of Leicester, at the castle of Leicester, in and for the same county, on Friday the fourteenth day of March, in the thirty-third year of the reign of our sovereign lord George the second, now king of Great Britain, and so forth, before Henry Bathurst, esq. one of the justices of our said lord the king, of his court of Common Bench; James Hewitt, esq. one of the sergeants at law of our said lord the king, and others their fellows, justices of our said lord the king, assigned by letters patent of our said lord the king, under his great seal of Great Britain, to them and others, and any two or more of them made, of whom our said lord the king would have the said Henry Bathurst, esq. and James Hewitt, esq. to be one, to enquire more fully the truth, by the oath of good and lawful men of the county aforesaid, and by all other ways, means, and methods, by which they should or might better know (as well within liberties as without) by whom the truth of the matter may be the better known and enquired into, of all treasons, misprisions of treasons, insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of the monies of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders, felonies, manslaughter, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceits, and all other evil doings, offences, and injuries whatsoever, and also of the accessories of them, within the county aforesaid (as well within liberties as without) by whomsoever, and in what manner soever, done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner; and of all other articles and circumstances concerning the premises, and every or any of them, in any manner whatsoever; and the said treasons, and other the premises, according to the laws and customs of England, for this time, to hear and determine, by the oath of John Grey, John Palmer, Thomas Boothby the elder, William Pochin, Nathan Wright, Charles Skrymsher

Boothby, Thomas Boothby the younger, Joseph Craddock, Edward Farnham, Rogers Rodding, Charles Morris, esqrs.; John Smalley, Richard Walker, John Willows, James Silmev, Thomas Ayre, Gabriel Newton, and Robert Hames, gentlemen; good and lawful men of the county aforesaid, then and there sworn, and charged to enquire for our said lord the king for the body of the same county.

"It is presented, that the bill of indictment hereunto annexed is a true Bill."

"BLENCOWE."

"*Leicestershire.* The jurors for our present sovereign lord the king, upon their oath, present, that the right honourable Lawrence earl Ferrers, viscount Tamworth, late of the parish of Breedon, in the county of Leicester, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 18th day of January, in the 33d year of the reign of our present sovereign lord George the 2d, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, with force and arms, at the parish of Breedon, in the county of Leicester aforesaid, in and upon one John Johnson, in the peace of God, and of our said lord the king, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that he the said Lawrence earl Ferrers, viscount Tamworth, with a certain pistol of the value of two shillings, then and there being charged with gunpowder, and a leaden bullet, which pistol he the said Lawrence earl Ferrers, viscount Tamworth, in his hand then and there had and held at, against, and upon him the said John Johnson, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off: and that he the said Lawrence earl Ferrers, viscount Tamworth, with the leaden bullet aforesaid, by force of the gunpowder aforesaid out of the said pistol, by him the said Lawrence earl Ferrers, viscount Tamworth, so as aforesaid discharged and shot off, him the said John Johnson, in and upon the left side of the said John Johnson, a little under the lowest rib of the said John Johnson, then and there feloniously, wilfully, and of his malice aforethought, did strike and wound, giving to the said John Johnson then and there, with the leaden bullet aforesaid, out of the said pistol so as aforesaid discharged and shot off, in and upon the said left side, a little under the lowest rib of the said John Johnson, one mortal wound, of the breadth of one inch and depth of four inches: of which said mortal wound the said John Johnson, at the said parish of Breedon, in the said county of Leicester, did languish, and languishing did live, until* the

19th day of the same month of January, in the 33d year aforesaid; on which said 19th day of January, about the hour of nine of the clock in the morning, he the said John Johnson, at the parish of Breedon aforesaid, in the county of Leicester aforesaid, of the mortal wound aforesaid died: and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Lawrence earl Ferrers, viscount Tamworth, the said John Johnson, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of our said lord the king, his crown and dignity."

"A true Bill.—Witnesses, Elizabeth Barge-land, Elizabeth Saxon, Elizabeth Dolman, Sarah Johnson, Thomas Kirkland, William Tomlinson.—Sworn in Court."

Lord High Steward. Is it your lordships' pleasure, that the Judges have leave to be covered?—*Lords.* Ay, ay.

Clerk of the Crown. Berjeant at Arms, make proclamation for the lieutenant of the Tower to bring his prisoner to the bar.

Serjeant at Arms. Oyez, Oyez, Oyez! Lieutenant of the Tower of London, bring forth Lawrence earl Ferrers, your prisoner, to the bar, pursuant to the order of the House of Lords.

Then Lawrence earl Ferrers was brought to the bar by the deputy governor of the Tower, having the axe carried before him by the gentleman-gaoler, who stood with it on the left hand of the prisoner, with the edge turned from him. The prisoner, when he approached the bar, made three reverences, and then fell upon his knees at the bar.

Lord High Steward. Your lordship may rise.

Then the prisoner rose up, and bowed to his grace the Lord High Steward, and to the House of Peers; which compliment was returned him by his grace, and the lords.

Then proclamation having been made again for silence, the Lord High Steward spake to the prisoner as follows:

Lord High Steward. Lawrence earl Ferrers; You are brought to this bar to receive your trial upon a charge of the murder of John Johnson; an accusation, with respect to the crime, and the persons who make it (the grand jury of the county of Leicester, the place of your lordship's residence), of the most solemn and serious nature.

Yet, my lord, you may consider it but as an accusation; for the greatest or meanest subject of this kingdom (such is the tenderness of our law) cannot be convicted capitally, but by a

the day to which it is applied, according to the context and subject matter. So in *Pugh v. Duke of Leeds*, Cowp. 714, it was held, that in the phrase "from the day of the date" the word 'from' might be construed to include or exclude the day of the date.

* The meaning of the word *until* was much litigated in the case of the King against Stevens and Agnew, Trin. 44 G. 3, 5 East 244, in which case it was decided that the word may be construed either exclusive or inclusive of

charge made by twelve good and lawful men, and a verdict found by the same number of his equals at the least.

My lord, in this period of the proceedings, while your lordship stands only as accused, I touch but gently on the offence charged upon your lordship; yet, for your own sake, it behoves me strongly to mark the nature of the judicature before which you now appear.

It is a happiness resulting from your lordship's birth and the constitution of this country, that your lordship is now to be tried by your peers in full parliament. What greater consolation can be suggested to a person in your unhappy circumstances, than to be reminded, that you are to be tried by a set of judges, whose sagacity and penetration no material circumstances in evidence can escape, and whose justice nothing can influence or pervert?

This consideration, if your lordship is conscious of innocence, must free your mind from any perturbations that the solemnity of such a trial might excite; it will render the charge, heavy as it is, unembarrassing, and leave your lordship firm and composed, to avail yourself of every mode of defence, that the most equal and humane laws admit of.

Your lordship, pursuant to the course of this judicature, hath been furnished with a copy of the indictment, and hath had your own counsel assigned; you are therefore enabled to make such defence as is most for your benefit and advantage; if your lordship shall put yourself on trial, you must be assured to meet with nothing but justice, candour, and impartiality.

Before I conclude, I am, by command of the House, to acquaint your lordship, and all other persons who have occasion to speak to the Court, during the trial, that they are to address themselves to the Lords in general, and not to any lord in particular.

Lord High Steward. Lawrence earl Ferrers, Your lordship will do well to give attention, while you are arraigned on your indictment.

Here Earl Ferrers was arraigned, in the form of the said Indictment, against him, by the Clerk of the Crown in the King's-bench.

Clerk of the Crown. How say you, Lawrence earl Ferrers, Are you guilty of the felony and murder whereof you stand indicted, or not guilty?

Earl Ferrers. Not Guilty, my lords.

Cl. of the Cr. Culprit, How will your lordship be tried?

Earl Ferrers. By God and my peers.

Cl. of the Cr. God send your lordship a good deliverance.

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. Oyez, Oyez, Oyez! All manner of persons that will give evidence, on behalf of our sovereign lord the king against Lawrence earl Ferrers, the prisoner at the bar, let them come forth, and they shall be heard;

for now he stands at the bar upon his deliverance.

Lord High Steward. My lords, the distance of this place from the bar is so great, that I must desire your lordships' leave to go down to the table for the convenience of hearing.

Lords. Ay, ay.

Then his grace removed to the woolpack, and delivered the white staff to be held by the gentleman usher of the black rod; who, during the whole trial, always received and delivered back the white staff upon his knee.

Mr. Perrott. (Afterwards a baron of the Exchequer.) May it please your lordships; this noble lord Lawrence earl Ferrers, the prisoner at the bar, stands indicted for the felonious killing and murder of one John Johnson; and the indictment sets forth, That the right honourable Lawrence earl Ferrers, viscount Tamworth, on the 18th day of January, in the 33d year of his present majesty's reign, with force and arms, at the parish of Breedon, in the county of Leicester, in and upon one John Johnson, feloniously, wilfully, and of his malice aforethought, did make an assault; and that a certain pistol then and there being charged with gunpowder and a leaden bullet, which pistol he the said Lawrence earl Ferrers then and there held in his hand, at, against, and upon him the said John Johnson, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off; and with the leaden bullet aforesaid, by force of the gunpowder aforesaid, out of the said pistol by him so discharged and shot off, the said John Johnson in and upon the left side of the said John Johnson, a little under his lowest rib, then and there feloniously, wilfully, and of his malice aforethought, did strike and wound, giving to the said John Johnson then and there with the leaden bullet aforesaid, out of the said pistol so as aforesaid discharged and shot off, in and upon the said left side a little under the lowest rib of the said John Johnson, one mortal wound, of the breadth of one inch, and depth of four inches; of which said mortal wound the said John Johnson did languish, and languishing did live, until the 19th day of the same month of January, in the 33d year aforesaid; on which day, about the hour of nine of the clock in the morning, he, the said John Johnson, of the mortal wound aforesaid, died; and so the jurors, upon their oath, do find, that the said Lawrence earl Ferrers, the said John Johnson, in manner aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of our lord the king, his crown and dignity.

To this indictment the noble lord, the prisoner at the bar, hath pleaded Not Guilty, and for his trial hath put himself upon your lordships, his peers here present.

We, who have the honour to serve the crown in this prosecution, shall call our evidence; and, if we prove the fact charged by this indictment, we doubt not but your lordships will

find him guilty, and give such judgment for the same as shall be just.

*Mr. Attorney General.** May it please your lordships, I am likewise of counsel for the crown; and it is become my duty in consequence of that, to open to your lordships the facts and circumstances of this case, out of which your lordships are to collect and find the crime that is charged in this indictment.

The noble prisoner stands here arraigned before your lordships for that odious offence, malicious and deliberate murder. There cannot be a crime in human society that deserves more to be punished, or more strictly to be enquired after; and therefore it is, that his majesty, the great executive hand of justice in this kingdom, has promoted this inquiry, whereby all men may see, that in the case of murder his majesty makes no difference between the greatest and meanest of his subjects.

The prisoner has a right, from his quality, to the privilege of being tried before this noble tribunal; if he is innocent, he has the greatest reason to be comforted, that your lordships are his judges; for that nobleness and humanity, which prompt you naturally to incline towards mercy, will strongly exert themselves in the protection of innocence. But, on the other hand, if the prisoner is really guilty of the charge, his case is truly deplorable; because your minds cannot be deceived by the false colouring of rhetoric, nor your zeal for justice perverted by any unmanly compassion.

This impartial disposition in your lordships call upon the prosecutors to observe a conduct worthy of this noble assembly; not to enlarge or aggravate any part, or advance a step beyond their instructions; but barely to state the naked facts, in order that, by that means, your lordships may be enabled the better to attend to the witnesses when they are called, to examine and cross-examine, and sift out the truth with more accuracy.

My lords, as I never thought it my duty in any case to attempt at eloquence, where a prisoner stood upon trial for his life; much less shall I think myself justified in doing it before your lordships; give me leave therefore to proceed to a narration of the facts.

My lords, the deceased person, Mr. Johnson, I find to have been employed by the Ferrers family almost during the whole course of his life: he was taken into their service in his youth, and continued in it unfortunately to the time of his death.

At the time a bill was passed by your lordships about two years ago, to separate lord Ferrers from his lady, Mr. Johnson was appointed receiver of his lordship's estates. At that time his lordship seems to have entertained a good opinion of him, because I am told he was appointed receiver at his lordship's own

* Charles Pratt, esq. (afterwards lord Camden, chief justice of C. B. and lord chancellor.)

nomination; but, very soon after he became invested with this trust, when the noble lord found there was no possible method, by any temptation whatever, to prevail on Mr. Johnson to break that trust, his lordship's mind grew to be alienated towards him, and his former friendship was converted into hatred.

The first instance of his lordship's malice, that will be produced, will be his giving him notice to quit a beneficial farm that Mr. Johnson had obtained a promise of from the earl, or his relations, before he was appointed receiver; but when it appeared that the trustees had made good the promise, and had granted him a lease, my lord was obliged to desist from that attempt.

When he found it was impossible to remove him from the farm, his resentment against Mr. Johnson increased, and he took at last a determined resolution within himself to commit the horrid fact for which he now stands arraigned.

My lords, I find several causes assigned by the prisoner for this indignation expressed against the deceased; he charged him with having colluded secretly with his adversaries, with being in the interest of those he was pleased to call his enemies, and instrumental in procuring the act of parliament: whether these charges were justly founded or not, is totally immaterial; such as they were, he had conceived them. His lordship, who best knew the malice of his own heart, has confessed that he harboured these suspicions.

Another thing he suspected was, that, in confederacy with Mr. Burslem and Mr. Curzon, he agreed to disappoint his lordship, in regard to a certain contract for coal mines. These notions, though void of truth, had so poisoned his lordship's mind, that he was determined at last to gratify his revenge by murder.

This determination being once settled and fixed in his mind, your lordships will see, with what art and deliberation it was pursued: notwithstanding these seeming causes of disgust, he dissembled all appearance of ill-will or resentment; his countenance towards the deceased for some months seemed greatly to be changed, and his behaviour was affable and good-humoured.

The poor man, deluded with these appearances, was brought to believe he was in no danger, and that he might safely trust himself alone with his lordship.

Matters being thus prepared, on Sunday, the 13th of January, the prisoner made an appointment for Mr. Johnson to come to him on the Friday following.

His lordship, though the appointment was five or six days before, remembered it perfectly; nay, he remembered the very hour he was to come, and took his measures accordingly; for your lordships will find, that in order to clear the house, Mrs. Clifford, a woman who lives with his lordship, and four children, were directed by him, at three o'clock precisely, to absent themselves; they were ordered to walk out to Mrs. Clifford's father, about two miles

from my lord's house, and not to return till five, or half an hour after five.

The two men-servants likewise, the only servants of that sex then residing with him, were contrived to be sent out of the way; so that when Mr. Johnson repaired to Stanton, my lord's house, at three o'clock, there was no person in the house, except his lordship, and three maid-servants.

Mr. Johnson, when he came to the house, rapt at the door, and was received by his lordship, and directed to wait some time in the still room; then his lordship ordered him into the parlour, where they both entered together, and the door was immediately locked on the inside.

What passed in that interval, between the time of Mr. Johnson's first going in, and the time of his being shot, can only be now known to your lordships by the noble earl's confession, which has been very ample indeed upon the present occasion.

After Mr. Johnson had been there the best part of an hour, one of the maids in the kitchen, hearing some high words in the parlour, went to the door to see if she could discover what was doing; she listened, and heard my lord, as she was at the kitchen door, say, Down upon your knees; your time is come; you must die; and presently after heard a pistol go off; upon that, she removed from the kitchen, and retired to another part of the house; for she did not care to venture into his lordship's presence.

Though it appeared, afterwards, that Mr. Johnson had then received that wound of which he died, he did not then immediately drop; he arose, and was able to walk.

Just then, my lord Ferrers, as he confessed afterwards, felt a few momentary touches of compassion: he permitted Mr. Johnson to be led up stairs to bed, till better assistance could be called; he suffered a surgeon to be sent for, nay, the very surgeon that Mr. Johnson himself had desired; and Mr. Johnson's children, by his lordship's order, were acquainted with the accident, and sent for to see him.

Mr. Johnson's daughter was the first person that came; she met the noble lord, and the first greeting she had from him was, that he had shot her father; and that he had done it on purpose, and deliberately. Mrs. Clifford, who had been apprized of this accident by the servants, came not long after; and, in an hour and an half, or two hours, Mr. Kirkland, the surgeon, who was from home when the servant was dispatched, and at a neighbouring village, hastened with the best expedition he could make, to Stanton. When he came to Stanton he met my lord in the passage.

Here your lordships will observe, that the noble lord's conduct and behaviour, from this time to the time that Mr. Johnson was removed to his own house, seemed all along calculated for his escape; and that the only anxiety he expressed was the dread of being seized, and

VOL. XIX.

brought to punishment in case Mr. Johnson should die.

Upon Mr. Kirkland's first appearance, my lord had told him, that he had shot Mr. Johnson, and that he had done it coolly; he desired he might not be seized till it was known with certainty, whether Mr. Johnson would die or not; and threatened, that if any person attempted to seize him, he would shoot them. Mr. Kirkland told him, he would take care that nobody should meddle with him.

Mr. Kirkland was then brought up to Mr. Johnson, who was upon the bed; the surgeon examined the wound, and found that the ball had penetrated a little below the ribs on the left side; he took an instrument in his hand, called a director, in order to probe the wound: here my lord interrupted him, and said, You need not be at that trouble; pass your instrument downwards; I, when I shot off the pistol, directed it that way; and Mr. Kirkland found this, upon examination, to be true; the ball had not passed through the body, but remained lodged in the cavities of the abdomen.

When my lord found that the ball was in the body, he grew uneasy; for he was apprehensive that the ball, if it remained there, might prove fatal; he asked Mr. Kirkland, if it could be extracted; Mr. Kirkland told him, from what he observed, it would be impracticable to extract the ball: but to give him better hopes he told him, that many persons had lived a long while after they had been shot, though the ball had remained within them.

Presently after this, the surgeon went down stairs to prepare a fomentation, and soon after returned: when he came back into the room, Mr. Johnson complained of the strangury, and found a considerable difficulty in making water. This alarmed his lordship again: he then asked Mr. Kirkland, What would be the consequence, if the bladder or kidneys were hurt? Mr. Kirkland having laid down his rule of conduct, wherein his prudence deserves to be commended, answered, That though the bladder should be wounded, or the kidneys hurt, there had been many cures performed upon such like wounds.

This made his lordship tolerably easy: he then began to be in better spirits, which, I am sorry to say, at that time were somewhat heightened with liquor: for, although he was cool and fresh when he did the fact, yet the moment it was done, he began to drink, and continued drinking, at times, till twelve o'clock at night: this liquor, however, only contributed to raise his spirits, without disordering his understanding; for he appeared to be complete master of himself the whole day.

After Mr. Kirkland had given him so much encouragement, they together went down to the still room; and now his lordship verily believing that Mr. Johnson would recover, he grew less cautious in avowing the deliberation with which he did the fact, and declaring all the circumstances that attended it.

And here, because I will not wrong the no-
3 M

ble lord, by adding a single letter to my brief, your lordships shall hear his confession, from thence, in his own words.

"Kirkland, says he, I believe Johnson is more frightened than hurt; my intention was to have shot him dead; but, finding that he did not fall at the first shot, I intended to have shot him again, but the pain he complained of made me forbear; there nature did take place, in opposition to the resolution I had formed. I desire you will take care of him; for it would be cruel not to give him ease, now I have spared his life.

"When you speak of this afterwards, do not say (though I desire he may be eased of his pain) that I repented of what I have done: I am not sorry for it; it was not done without consideration; I own it was premeditated; I had, some time before, charged a pistol for the purpose, being determined to kill him, for he is a villain, and deserves death; but, as he is not dead, I desire you will not suffer my being seized; for, if he dies, I will go and surrender myself to the House of Lords; I have enough to justify the action; they will not excuse me, but it will satisfy my own conscience: but be sure you don't go in the morning without letting me see you, that I may know if he is likely to recover or not; I will get up at any time; at four o'clock in the morning.

"To this very strange and horrid declaration Mr. Kirkland answered, by promising his lordship, that he would certainly give him the first intelligence touching Mr. Johnson's condition; and, as it was proper, for very prudent reasons, as well with respect to himself as Mr. Johnson, to dissemble with his lordship, he proceeded further, and told him, that he would give a favourable account of this matter. The noble lord then asked him, what he would say if he was called upon; he told him he would say, that though Johnson was shot, that he was in a fair way of recovery. His lordship asked Mr. Kirkland, if he would make oath of that? He said, Yes.

"Mr. Kirkland then went to see Mr. Johnson again, and found him better; they then went to supper, and, during the time they were at supper, his lordship mentioned several other particulars: he said, he was astonished, that the bullet should remain in his body; for, says he, I have made a trial with this pistol, and it pierced through a board an inch and a half thick; I am astonished it did not pass through his body; I took good aim, and I held the pistol in this manner; and then he shewed Mr. Kirkland the manner of his holding his pistol."

He also declared the grounds, and motives for his killing Johnson; that he had been a villain; that he was in the interest of his enemies; that he had joined with those who had injured him, and taken away his estate, by an act of parliament; that he had colluded with Mr. Curzon and Mr. Burslem, with respect to the coal contract.

Another thing he mentioned with respect to the farm; says he, I have long wanted to drive Johnson out of the farm; if he recovers, he will go back to Cheshire, where he came from. Mr. Kirkland said, No doubt but this accident would drive him home again.

After they had supped, Mrs. Clifford came into the room, and she proposed, that Mr. Johnson should be removed to the Lount, which is the name of Mr. Johnson's house, and lies about a mile from Stanton; his lordship refused to consent to that, not because he thought Mr. Johnson might be hurt by the removal, but, to use his own words, because he would have him under his own roof, to plague the villain.

When supper was over, they returned back to Mr. Johnson, who was then under the greatest uneasiness; he was restless, and the complaint of the strangury increased: then my lord was alarmed again; he enquired of the surgeon what would be the consequence, in case the guts were shot through? Mr. Kirkland gave him a favourable answer, that revived his spirits; he went out of the room, and invited Mr. Kirkland to take a bottle of port; they then drank together, and during that time, the same, or the like expressions were repeated. I will not trouble your lordships with them again; but he all along declared, he did not do it hastily, but coolly and deliberately: that his intention was to have killed him: and that the reason why he did it at that time was, because he would not sign a paper of recantation, acknowledging all the injuries he had done his lordship.

They then again returned to Mr. Johnson, after they had drank out the bottle: whether the liquor was prevalent or not, I don't know; your lordships will observe what followed: his behaviour to the poor man, though he lay there under the surgeon's hands, was totally changed, and his resentment grew outrageous; my lord again attacked him upon the same charge as before, compelled him to acknowledge before all the company (of which his daughter was one) that he was a villain; nay, he was about to drag him out of bed upon the floor, which would hardly have been prevented, if Mr. Johnson, who was tutored by a wink from Mr. Kirkland, had not said, I do confess I am a villain: my lord at last went to bed; but, before he departed, he said with great earnestness to Mr. Kirkland, May I rely upon you? Are you sure there is no danger? May I go to bed in safety? Mr. Kirkland said, Yes, your lordship may. When his lordship was gone, poor Johnson begged to be removed to his own house. Mr. Kirkland wished it as much; for, besides that he could not have that free access to his patient that was necessary, if he was to remain there, he thought himself in the utmost peril. My lord had confessed too much, and Kirkland too little; so that if Mr. Johnson had died there, no man in Mr. Kirkland's situation would have wished to have been alone with his lordship, considering the

dangerous conversation that had passed between them.

Mr. Kirkland, therefore, immediately went to the Lount, procured six or seven armed men, and came back by two o'clock in the morning. They removed Mr. Johnson, put him into a great chair, and wrapped him up in blankets, and so conveyed him home. Towards morning the poor man's symptoms grew worse, and Mr. Kirkland then went away.

Mr. Johnson lay languishing till seven or eight in the morning, and then died.

In the mean time Mr. Kirkland had procured a number of armed men to go down to Stanton, and to seize his lordship. When they came there, my lord was just out of bed; he had his garters in his hand, and was seen passing towards the stable. The horses were all saddled, and every thing got in readiness for his escape.

Mr. Springthorpe advanced towards him; and when his lordship found he was really to be attacked, he fled back to his house, and there stood a siege of four or five hours. While he was thus beset, he appeared at the garret windows, and thinking himself secure in that place, he began to parley, and asked, What they wanted with him? They told him, Mr. Johnson was dead, and that they were come to secure him. He said, he knew that was false; for Mr. Johnson was not dead: that he wished it might be true: that he would not believe it, unless Mr. Kirkland would declare it: that he would pay no regard to any body else. He did not think fit to surrender; but continued in the house, till he thought he had an opportunity of escaping through the garden. He was there discovered by one Cutler, a collier, who was a bold man, and determined to take him: he marched up to him; and though his lordship was armed with a blunderbuss, two or three pistols, and a dagger, he submitted to the collier's taking him, without making the least resistance: and the moment he was in custody, he declared he gloried in the fact; and again declared, that he intended to kill Johnson. He was then carried to Mr. Kinsey's house, and remained there till after the coroner sat upon the body.

I must mention to your lordships, that upon Mr. Hall, a clergyman's being introduced to him, he told him, he knew his duty as well as he or any other clergyman: that the fact he had committed was coolly and deliberately done. So that your lordships see his declarations were consistent and uniform, from the beginning to the end.

I shall neither aggravate nor observe.

These are the circumstances which attended this horrid murder. I have opened them faithfully from my instructions. The case is rather stronger than I have made it.

The witnesses are to acquaint your lordships, whether I have opened the case truly. If the evidence comes out as I have represented it to your lordships, then your lordships' sentence must be agreeable to law. The noble earl at the bar must be found guilty.

If he has any defence, God forbid that he should not have a fair opportunity of making it. Let him be heard with patience. The prosecutors will be as glad as your lordships to find him innocent.

The evidence is to determine; and upon that evidence we shall leave it.

Mr. Solicitor General, (the hon. Charles Yorke, esq.)

My lords, we will now proceed to call our witnesses. Call Elizabeth Burgeland. [Who came to the bar, and one of the clerks held the book to her, upon which she laid her hand.]

Cl. of the Cr. Hearken to your oath. The evidence that you shall give on behalf of our sovereign lord the king's majesty, against Lawrence earl Ferrers, the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God. [Then she kissed the book.]

Sol. Gen. My lords, This witness was in the house at the time when the fact is charged to have been committed.

L. H. S. If your lordships please, the clerk may go down to the bar, and repeat to your lordships what is said by lord Ferrers or the witnesses.

Lords. Ay, ay.

Earl Ferrers. My lords, there was something said by the gentleman, counsel for the crown, that is a little false, relating to a lease said to be given by sir William Meredith to Mr. Johnson; I did not know of that lease previous to this fact; there were other matters mentioned that are not right; I will not take up your lordships' time to answer them now, but leave that matter till I come to my defence.

Sol. Gen. My lords, whatever his lordship thinks material in his defence, he will have many opportunities to offer.

E. Burgeland examined by Mr. Sol. Gen.

You was a maid-servant in lord Ferrers's house the 11th of January last?—Yes.

Did you know one Mr. Johnson?—Yes.

Do you know any thing of Mr. Johnson's being employed by lord Ferrers? Did he use to attend him?—He sometimes attended my lord Ferrers.

Did you know any thing of his being expected to wait on lord Ferrers at any time in January last?—Yes.

What do you know of it?—I know he came to the house.

Do you know what day in January?—I don't know what day.

About what time of the day was it?—About three o'clock in the afternoon.

On what day of the week was it?—On Friday.

When Mr. Johnson came, who let him in?—I let him in.

What did he say?—He asked whether his lordship was within; I told him he was in his room.

What happened after that? Did my lord expect him?—I believe he did.

When he was let in, did you go with him?—No; he walked up to the room door, and knocked at it himself.

At the door of the room where lord Ferrers was sitting?—Yes.

Did he go in then?—No; he did not go in then.

Did lord Ferrers speak to him?—Yes; and told him to walk into the other room.

Do you know any thing of what passed between them?—I cannot say any thing about it.

You said lord Ferrers expected Mr. Johnson, how do you know he expected him?—Mrs. Clifford told me in the morning, that Mr. Johnson was to come to his lordship that day.

Did you hear, or do you know, any thing of what passed between lord Ferrers and Mr. Johnson, when Mr. Johnson went into my lord's room?—No.

Was the door locked or open, after he went into the room?—Locked.

How came you to observe that?—I heard it locked.

Where did you go after Mr. Johnson was in the room with lord Ferrers?—Into the kitchen.

Who was with you there?—The other maid-servant.

What was her name?—Elizabeth Saxon; There was another maid-servant in the kitchen when he went in.

Who was she?—Elizabeth Dolman.

After that, did you hear any thing?—I did not hear any thing myself.

Did you afterwards hear any thing of what happened? Do you know whether Mr. Johnson came out of the room?—I cannot tell any thing of it.

Did you go into the room?—I did not go into the room; I was not out of the kitchen.

Did you hear any noise?—No; I heard no noise at all.

Did you hear any pistol go off, or any noise?—I heard a pistol go off.

What did you do then?—When I heard the pistol go, I run into the yard, and the other maid-servant with me.

What happened afterwards?—We stayed in the yard a while, a few minutes, and came back to the wash-house.

Was the room door open after you heard that noise?—I did not stay till it was open.

Did you stay till lord Ferrers came?—My lord came when we were in the wash-house, and called.

What did he say?—He hooped and hallooed, Where are you all?

What did he say then?—I went out, and said, We are here, my lord; he asked me, Where we had been? I said, in the bleaching-yard.

Did he give you any order?—He ordered that we should walk down to the house.

Did he give any other order?—He sent up a maid-servant into the yard to fetch the man in.

Did he say any thing of Mr. Johnson?—Not till I got into the room.

What did he say then?—He went up to Mr. Johnson, and asked how he did.

What did Mr. Johnson say?—That he was a dying man, and desired he would send for his children.

Did any thing else pass?—That is all I know.

Who else was in the house besides the servants you have named and yourself?—There was nobody in the house but us three when Mr. Johnson came; and but two in the kitchen when it was done.

What other servants did my lord use to keep?—One man-servant, an old man; I don't know whether he was a servant.

Did any other person live with him?—Mrs. Clifford, and the four young ladies.

Were they all out at the time when this happened?—Yes; they were all out but the two maids.

Were they out by accident, or by order?—I do not know any thing of any order.

Did you give Mr. Johnson any assistance to carry him up to his room?—Yes; I took him up to bed by the arm, by his lordship's order.

By Earl Ferrers.

Was not the door locked before Mr. Johnson came?—Yes.

Has it been locked before?—It has several times, when my lord has been upon business.

Was not Mr. Johnson at my house on the Monday?—Yes, he was there on the Monday.

Did you hear any dispute or words between Mr. Johnson and me on the Monday?—No, I did not hear any at all.

Had not I packed up my trunks, intending to go to London the week following?—Yes.

On the Monday while he was there, and sent to the carriages?—Yes.

Mr. Gould. Our next witness is Elizabeth Saxon.

Elizabeth Saxon sworn.

Mr. Gould. Did you live with lord Ferrers in January last?—Saxon. Yes.

Did you know John Johnson?—Yes.

Do you remember Mr. Johnson's coming to lord Ferrers in January?—Yes.

Upon what day?—The eighteenth.

What day of the week was it?—On Friday.

Who was in the house when he came?—Nobody; only three maids and my lord.

What time of the day did he come?—About three o'clock.

What was become of the rest of my lord's family?—I don't know: Mrs. Clifford and the misses were gone out.

How long were they gone out before Mr. Johnson came?—About half an hour.

Do you know the reason of their going away?—No; my lord came into the still-house, and said they might go and fetch a walk.

How long was it before they did go upon the walk?—They went directly.

What time of day did my lord give this leave?—It was about three o'clock.

Was any thing mentioned where they were to go?—Mrs. Clifford asked him, whether

they might go to her father's? and my lord said, Yes.

Was any thing mentioned how long they might stay?—He said, they might stay till five, or half an hour after.

What men-servants belonged to the house?—There is but one boy and an old man.

Where were they?—I cannot tell.

Were they in the house?—No.

When Mr. Johnson, came in, in what room was my lord Ferrers?—In his own room.

Where did Mr. Johnson go when he came into the house?—He went up to my lord's room.

Did my lord appear?—My lord came to the door.

Did you hear any thing said by my lord to Mr. Johnson?—No.

Where did Mr. Johnson go when my lord came out?—My lord came out, and ordered him to go into the still-house.

What became of my lord then?—He went into his room.

How long did he stay there before he came out again?—I don't know: maybe a few minutes; not long; ten minutes, or such a matter.

When he came out did he speak to Mr. Johnson?—I don't know that he did: I did not hear him.

Did you see Mr. Johnson when my lord came out a second time?—No.

What became of Mr. Johnson? Did he go into any room with my lord Ferrers?—I know he went into my lord's room.

Was the door locked or not?—He locked to the door after Mr. Johnson was in.

Did you hear the door locked?—Yes, I heard it locked.

What did you hear pass in that room?—Nothing at all; I did not hear any thing.

Did you hear any expression, any words used by my lord to Mr. Johnson?—No.

Did you hear any noise?—Yes; I heard them very loud; I heard my lord say, Down on your other knee, and declare what you have acted against lord Ferrers; and then the pistol went off; and I and the other maid were frightened, and run away.

Did you hear my lord, or Mr. Johnson, say any thing more in the room, than what you have mentioned?—No.

By Earl Ferrers.

Was it not customary for Mrs. Clifford to speak to me before she went out?—She said, My lord, where must we go to?

Was it customary to speak to me?—Yes.

How came you to be at my door at that time?—I was not at my lord's door.

Lord Mansfield. Who was the other maid that was with you when you over-heard what passed in my lord's room?—Saxon. The other witness that was here.

Lord Mansfield. Had that other servant the same opportunity to hear as you had? Was

she as near the door, listening in the same way you was?—Saxon. No, she was not.

Earl Ferrers. Do you know what time Mrs. Clifford was to return?—Saxon. About five o'clock, or half an hour after five.

Earl Ferrers. Did not Mrs. Clifford very often go out about that time after dinner, about three or four o'clock?—Saxon. Yes.

By Earl Morton.

Earl Morton. You said in the first part of your evidence, that you heard my lord say to Mr. Johnson, Down on your other knee. My lord Ferrers asked you, how you came to be near the door. You said, that you was not. Where did you hear it?—Saxon. I was at the kitchen door: I was no nearer than the kitchen.

You say, that lord Ferrers locked his door?—Yes.

Was it customary for him to lock it when people were with him, or when he was alone?—I don't know.

Did you ever know lord Ferrers lock his door when Mr. Johnson was with him?—No.

Earl Ferrers. Did you never know that I locked the door when I had company with me?—Saxon. No; I don't know that his lordship did it ever since I came.

Earl Hardwicke. You have said, that lord Ferrers told Mr. Johnson to kneel on the other knee; and that you heard it, though you was no nearer than the kitchen door: What distance was there between the kitchen door and the door of the room where lord Ferrers was?—Saxon. Not a great way.

Earl Hardwicke. What distance was it?—Saxon. It might be ten or a dozen yards, maybe.

Earl Ferrers. Was there not a thick wall between that room and the kitchen, and a chimney?—Saxon. Yes.

Elizabeth Dolman sworn.

Examined by Mr. Norton.

Was you servant to lord Ferrers in January last?—Yes.

Did you know Mr. Johnson the deceased?—Yes.

Do you remember his coming there in January last?—Yes.

What day of the month was it?—The eighteenth.

What time of the day?—About three o'clock.

Who was in the house of lord Ferrers at that time?—Three maids.

Nobody else?—No.

Was not his lordship there?—Yes.

Do you know where the rest of the family was at that time?—I know nothing of that: I believe Mrs. Clifford and the children were gone out.

Do you know whether Mr. Johnson was expected at lord Ferrers's that day?—I don't know.

Was you in the house when Mr. Johnson came in?—I was in the kitchen.

Who let him in?—Elizabeth Burgeland.
 Who did he ask for?—Lord Ferrers.
 Did you or Elizabeth Burgeland shew him to lord Ferrers?—Elizabeth Burgeland.
 You was there?—I was in the kitchen.
 Did you hear any thing that passed between lord Ferrers and Mr. Johnson?—No.
 Did you hear a pistol go off?—Yes.
 At that time where were lord Ferrers and Mr. Johnson?—In my lord's room.
 How long had Mr. Johnson been in my lord's room before you heard the report of the pistol?—May be about half an hour.
 Was you there when Mr. Johnson went into the room?—I was in the kitchen.
 Did you hear the door locked?—Yes.
 How did you hear it? Was there a spring, or was the key turned?—It was turned with the key.
 Did you hear the key turned, and the door locked?—Yes.
 How soon did you see Mr. Johnson after the pistol went off?—I did not see Mr. Johnson till after he was laid upon the bed.
 Did you see lord Ferrers after Mr. Johnson was laid upon the bed?—Yes.
 Did you hear any conversation between my lord and Mr. Johnson at the time Mr. Johnson was upon the bed?—Lord Ferrers ordered me to go up and see what Mr. Johnson would have done.
 Then his lordship was not in the room at that time?—Not then; he came in after.
 What passed then? What did you hear between them?—I went up stairs, and asked Mr. Johnson how he did. He said, he was very poorly.
 Was lord Ferrers there then?—No.
 How soon did he come in?—He did not come in till after I had fetched a bed out of the garret, and laid it on the bedstead.
 Did you hear his lordship say any thing to Mr. Johnson?—Yes; his lordship told him, that he would shoot him through the head.
 Did Mr. Johnson make any reply to that?—He said, No matter how soon, my lord.
 What time of the night was this?—It might be between four and five o'clock.
 Earl Ferrers. Did not I send you for the bed, and order it to be well aired?—*Dolman*. Yes.

By Lord Ravensworth.

How long did you live with my lord Ferrers before this supposed accident?—It might be two months.
 Did Mr. Johnson ever, during the time you lived with my lord Ferrers before the 18th of January, to your knowledge, come to lord Ferrers?—Yes; I have seen him there.
 I should be glad to know, whether from your own knowledge, or from any conversation with others, you had any reason to suspect or believe that lord Ferrers bore Mr. Johnson any ill-will; or did his lordship ever make any complaint, to your knowledge, in regard to Mr. Johnson?—No; I never had.

At what time did Mr. Johnson come to lord Ferrers?—About three o'clock.
 When lord Ferrers and Mr. Johnson went into the room, did lord Ferrers appear to be in liquor?—No, not at all.
 When you was in the room, and Mr. Johnson said he was but poorly, did you imagine he was shot?—No.
 Did lord Ferrers take Mr. Johnson by the wig, before he said he would shoot him through the head?—Yes.
 Did you hear the pistol go off; and where?—I was in the yard; and I heard the pistol go off.

By Lord Mansfield.

Did you hear any part of the conversation between lord Ferrers and the deceased before the pistol went off?—I did not.
 Was you near enough to have heard it, if any such conversation had passed?—I was not.
 Had Elizabeth Saxon, from the place where she was, a better opportunity of hearing what passed?—I cannot say.
 Where was you at that time?—I was in the yard.
 Where was Elizabeth Saxon?—She was in the kitchen, I believe.
 What was the distance between the kitchen door and the room where lord Ferrers and the deceased were?—I cannot justly tell.
 Might a person that was at the kitchen door hear any conversation or words which passed between two people in that room?—Yes.
 Was it as far off as to that bench?—Yes.
 Earl Ferrers. Did you ever hear any conversation that passed in my room, at any time when I had company, and you was in the kitchen?—*Dolman*. I have heard talking.
 Could you distinguish what was said?—I never took notice.
 A Lord. Was you at the kitchen door when my lord Ferrers and Mr. Johnson were in his room?—*Dolman*. I was in the kitchen.
 Did you hear lord Ferrers tell Mr. Johnson to kneel on the other knee?—No; I heard no such thing.

Was you with the other witness at the time she says she heard these words?—I was not.
 Lord Mansfield. I desire to know of this witness, whether at the time that the pistol went off, she was not in the yard; and the maid, that heard the conversation, at the kitchen door?—*Dolman*. I was in the yard then.
 Where was you when you heard the key lock the door?—I was in the kitchen.
 Lord Ravensworth. You say you was in the room when lord Ferrers went up to Mr. Johnson, and he pulled Mr. Johnson by the wig, and said he would shoot him; how long was that from the time that you heard the pistol go off?—*Dolman*. I cannot justly say.
 What space of time was there, from the time that you saw Mr. Johnson in the room, to the time that lord Ferrers came and pulled him by the wig, and said, he would shoot him through

the head?—I cannot say, he had lain upon the bed some time.

Sarah Johnson sworn.

Examined by Mr. Perrott.

You are the daughter of John Johnson, to whom this accident happened?—Yes.

Was your father concerned in lord Ferrers's estate?—Not that I know of.

Was he his steward?—He did live with him, but not within these two years.

Did he receive any rents?—For nobody but lord Ferrers.

Did he rent any farm that was part of the estate of lord Ferrers?—Not that I know of.

Do you remember his going to lord Ferrers, at any time in January last?—On the 18th of January.

Do you know whether lord Ferrers had been with your father any short time before the 18th of January?—Lord Ferrers was at our house on the Sunday before.

Did you hear any conversation that passed between lord Ferrers and your father, on that Sunday?—I did not; I came home before he was gone.

Did you hear lord Ferrers say any thing to Mr. Johnson?—No; I was not in the room.

Did not you know before the 18th of January, that your father was to go on that day to lord Ferrers's?—I heard my father say, that he was to go to lord Ferrers's on the Friday.

Do you know upon what occasion he was to go?—No.

Upon whose appointment?—No.

Was you sent for to lord Ferrers's on the 18th of January?—Yes.

At what time?—I think it was between four and five o'clock.

Who sent for you?—I believe it was lord Ferrers.

Who was it that came for you?—A man that was at work there.

What message was brought to you?—That I must come down to the hall to lord Ferrers.

Then was any thing said about your father?—I asked, what he wanted me for? and he said, my father was taken very ill.

When you got there, did you see my lord Ferrers?—Yes.

What did he say to you?—I cannot say: I asked him how my father was; he ordered one of the maids to go up stairs, and shew me where my father was.

Was lord Ferrers in the room when you was with your father?—He followed me up directly.

In what condition did you find your father?—He was in bed; but he did not say any thing to me.

Did lord Ferrers say any thing?—When lord Ferrers came up, he said, he thought he had not shot him.

Was any thing done upon that?—Some time after that, lord Ferrers came up again; and I, or he, turned the clothes down; and he said,

he saw he had shot him; and threw something out of a bottle; I don't know what it was; he poured something upon it out of a bottle.

Who poured that out of the bottle?—Lord Ferrers.

Did he tell you how the accident happened?—He did not then say any thing about that.

Did he at any time?—He said, he did not know what he had done; he had shot him; he said, it was what he designed.

Was that the same day or afterwards?—The same day.

Did lord Ferrers say any thing about your father's family?—He said he would take care of his family, if my father died.

Was that all: was there no if?—He said he was in hopes I would not let any body come to take him; that he would take care of the family; that he would not go out of the house till my father was buried, if he should die.

Do you know of any thing more that passed between lord Ferrers and you about your father?—My lord, when Mr. Kirkland was searching the wound, shewed him which way he held the pistol when he let it off.

Did lord Ferrers say at that time it was an accident?—No; he said he designed it.

Did he give any reason for it?—I did not hear him give any reason for it.

Do you know whether your father was ever served with any notice to quit a farm?—Yes.

What farm was that?—The farm he lived in.

Whose estate was it?—Lord Ferrers's.

Who gave him that notice?—Either lord Ferrers or Mr. Clifford; Mr. Clifford gave it me; they were both together.

Is that the paper? [Paper produced.] Yes.

Paper read.

"I do hereby give you notice to quit your farm at Lady-day next ensuing, or six months after the date hereof, November the 7th, 1758, agreeable to your lease granted to me,

"RICHARD CLIFFORD."

Was lord Ferrers by when that was given to you?—Yes.

Did you hear any thing said about that farm?—No.

Whose hand-writing is that?—(Shewing her the body of the paper) This is lord Ferrers's, I believe.

Did you ever see lord Ferrers write?—No.

When you was up in the room with Mr. Johnson, do you remember any body attempting to pull the clothes off?—Lord Ferrers attempted to pull them off.

What time was that?—I cannot say; about ten or eleven o'clock.

Do you know of any occasion that was given for my lord's attempting to pull the clothes off your father?—I cannot say what was the reason of it.

What had passed before that?—I cannot tell: lord Ferrers seemed to be very angry before; but I cannot tell what about.

Did my lord Ferrers pull off the clothes?—He did not pull them off.

How did that happen?—I caught hold of them.

Do you remember any thing that lord Ferrers said at the time that he attempted to pull off the clothes?—He said he knew him to be a villain, and that he had acted things against him, that were not right.

Did your father say any thing to you about lord Ferrers's having shot him?—I don't remember he did.

Did not your father tell you, that lord Ferrers had shot him; and that he believed he should die?—I heard him say, he believed he should die; but I did not hear him say, that lord Ferrers had shot him. I do not remember it. My lord said, he knew the pistol to be a good one, he had shot through a board with it.

Was any body by when lord Ferrers said that he had shot him, and that it was what he designed?—Mr. Kirkland was by.

Earl Ferrers. Do you think that I was sober when I came into the room where your father was?—*Johnson*. At the time I came in, I think his lordship was.

Mr. Perrott. At the time of this confession?—*Johnson*. I cannot tell: I think he was not quite sober when he said that.

Lord Talbot. I believe the confusion of this unhappy witness has occasioned an apparent, though not an intentional, variation in her evidence; therefore I desire she may be asked again about the farm.

Mr. Perrott. Did you know of your father's renting a farm of lord Ferrers?—*Johnson*. He rented no farm but what he had of lord Ferrers.

Mr. Perrott. And did he rent one of him?—*Johnson*. Yes.

Mr. Perrott. You was asked at first about the lease; he might have the farm and not the lease.—*Johnson*. He had a lease; but I believe he had it but the last year.

Lord Ravensworth. I agree with the noble lord, that there is a particular tenderness in the situation of this witness; but imagine your lordships are desirous of knowing as many particulars as may be relating to this unhappy affair; therefore I desire this witness may be asked, whether she, at any time, near the time of the decease of her father, did hear her father express any degree of uneasiness, or apprehension, from his being to wait upon lord Ferrers?—*Johnson*. No, I never heard him say, that he was afraid of going to lord Ferrers's.

Att. Gen. My lords, we will now call Mr. Curzon to prove the body of the notice that has been read, to be all of lord Ferrers's handwriting.

Earl Ferrers. I do not deny it. I hope the witnesses may be detained by your lordships, in case I should think proper to call them again.

Att. Gen. My lord, we will take care that they shall be forthcoming.

Thomas Kirkland sworn.

Examined by Mr. Attorney General.

What is your profession, or occupation?—A surgeon.

Where do you chiefly practise?—At Ashby de la Zouch.

How far is that from lord Ferrers's house at Stanton?—Two computed miles.

Do you know the noble earl at the bar?—Yes.

How long have you known him?—I have known him many years. I have been employed for his lordship about nine years.

Did you know Mr. Johnson the deceased?—Yes.

How long did you know him?—I have known him a great many years. I have been intimately acquainted with him ten or eleven.

Had he any employ under my lord Ferrers, or any part of his family?—I believe so.

What was his employ?—Steward.

Did you, in the month of January last, see Mr. Johnson or my lord Ferrers?—I saw them together.

At what time in that month in particular?—The 18th of January.

What day of the week?—On Friday.

Upon what occasion did you see the one or the other?—I saw Mr. Johnson to take care of a wound he had received in his left side.

Who sent for you?—They told me that lord Ferrers had sent for me.

Who was sent for you? What was his name?—I have since found that his name is Henry Wales.

At what time did you receive that message?—About five o'clock in the afternoon.

Where was you at that time?—At Calcorton.

How far is that from Stanton?—A mile and a half, or a mile.

Did you go directly to Stanton?—I went first to the Lount.

What place was that?—The place where Mr. Johnson lived.

How far is that from Stanton?—I think half a mile, or it may be a little more.

Did you hear any thing there?—I first heard at the Lount, that Mr. Johnson was shot; the boy that came for me, told me that he was sent to me from my lord.

Did you, when you came to the Lount, and had had this intelligence, proceed to Stanton?—Yes.

When you came there, who did you see?—I met one of the servant girls in the close next to the yard.

What was the girl's name?—I cannot tell; it was dark.

Did any thing pass there?—She said my lord had been charging guns and pistols.

What happened next?—I heard my lord calling out in the yard, Who is there? I immediately spoke to his lordship; he ordered me to come along. I went to him; he told me, he had shot Johnson, and desired I would go and take care of him. As we went along,

his lordship desired I would not suffer him to be seized, because Johnson was not dead; and if any body offered to seize him, he would shoot them.

What answer did you make to that?—I told his lordship, that nobody should meddle with him. I then went up stairs; and upon seeing Mr. Johnson, and that he had lost no blood, I bled him.

Did Mr. Johnson make any complaint?—He complained of a violent pain in his bowels.

Did he at that time say that he had received any wound, and where was it?—I looked, and found the wound below the lowest rib, on his left side.

How large was that wound?—I put my little finger into it. I then took a director to search the wound. My lord told me, Mr. Kirkland, you must pass your instrument slanting downwards, I held the pistol in this manner when I shot him. After that my lord asked me, whether I could find the ball? I said No, it was lodged in the abdomen; and after this he again asked me, if I could not extract it? I told his lordship, I believed it would be better to remain where it was (indeed I looked upon it impracticable to extract it.) My lord asked me then, what would be the consequence of the ball's lying in the abdomen? I told him, that balls often lay there many years, without giving any disturbance: with this my lord seemed satisfied, and said, he knew they would.

Was there any surprize expressed by any body at the ball's being lodged, or any thing said?—I cannot say there was.

Was any thing said concerning the goodness of the pistol?—My lord asked me, if the ball had not gone through? I told him No. He said, he wondered it had not; for this pistol had carried a ball through a board, and broke the bricks, or wall, I don't know which.

Was Mr. Johnson by, and did he hear what passed?—Yes, he did.

Did this provoke him to utter any thing?—He did. My lord went out of the room at that time, and Mr. Johnson said, What a villain this is!

Did you order any thing to be prepared for the dressing of the wound?—I dressed the wound; it had already been dressed. There was a dressing upon it. I ordered a fomentation, and what other things I thought proper. I then went down stairs. My lord told me, he thought Johnson was more frightened than hurt.

Did you both go down stairs?—No, we did not.

You said it had been dressed before, what was that dressing?—I believe, though I am not certain, it was arquebusade.

Was there any plaister found upon it?—To the best of my remembrance there was not.

Was there a rag upon it?—I believe there was; a rag that had been dipt in arquebusade. After my lord's telling me, that Johnson was more frightened than hurt, he said, he intended to have shot him dead, and that, seeing he did not fall at first, he intended to shoot him again;

VOL. XIX.

but the pain he complained of made him forbear. Says he, There nature did take place, in opposition to the resolution I had formed. And says he, It is cruel not to give him ease, now I have spared his life; therefore I desire you would do all you can for him. One thing I omitted to mention, while I was up stairs. My lord desired I would take all the care imaginable of Mr. Johnson; that he would send one of his servants for any thing I wanted.—I forgot to relate to your lordships, that my lord was in liquor when I saw him. He desired, when I spoke of this affair, that I would not say, though he desired me to ease him of his pain, that he repented of what he had done. He was not sorry for it; for he owned it was premeditated; that he intended to shoot him, for he said he was a villain, and deserved death. But, says he, as he is not dead, I desire you will not suffer my being seized; for, if he dies, I will go and surrender myself to the House of Lords: I have enough to justify the action: perhaps they may not excuse me, but it will satisfy my own conscience.

Did he say any thing about his going away, or not going away, the next morning?—He told me thus: Kirkland, be sure you don't go away in the morning before I have seen you. I will get up at four o'clock, or at any time that you call. I told his lordship I would let him know before I went.

What particular complaint did Mr. Johnson labour under when you went?—A pain in his bowels.

What other complaints had he?—A strangury. A difficulty of making water.

What did my lord Ferrers say upon that?—He asked me: "Kirkland, don't you think that the bladder or kidneys are wounded?" And what would be the consequence? I set it in such a light as to make him believe that they might, and no bad consequence ensue.

Was that, or was it not, your rule, upon which you represented things in this light?—I, immediately from the time of my seeing Mr. Johnson, thought he would be dead; but I thought it prudent to deceive my lord for our safety.

Was my lord satisfied with this flattering account that you gave?—Yes, he seemed satisfied.

Were any orders given to get things in readiness? any orders for the horses?—I don't know any thing but what the servants told me.

Did any discourse pass between you relating to their seizure of my lord's person?—My lord did desire that I would take care he was not seized, and I promised him I would.

Did you tell him how you meant to represent it?—My lord asked me, what I should say upon the occasion, if I was called upon? I told his lordship that I should say, that, though Mr. Johnson was shot, yet there was a great probability of his recovering; and that I thought there was no necessity of seizing his lordship. His lordship then asked me, if I would make oath of that before a justice of the peace, if I was called upon? I said, Yes.

3 N

Where was this? and about what part of the night did the last conversation pass?—It was in the parlour.

What time was it? Was it an hour before supper?—I think this was before supper; but it was repeated before and after supper.

Did my lord, in this discourse, say any thing relating to Mr. Johnson?—He told me, that Mr. Johnson had long been a villain to him. He said, he began his villainy in 1753; that he assisted in procuring the act of parliament; that he was in the interest of his enemies; that, on Mr. Johnson's first coming there in the afternoon, he ordered him to settle an account. He then told him, Johnson, you have been a villain to me; if you don't sign a paper, confessing all your villainy, I'll shoot you. My lord told me Johnson would not sign one. Therefore, says he, I bid him kneel down on his knees to ask my pardon. I said, Johnson, if you have any thing to say, speak quickly. Then, says he, I fired at him. I know he did not think I would have shot him; but I was determined to do it. I was quite cool. I took aim; for I always aim with a pistol in this manner.

Did any thing pass in reference to the farm?—My lord told me he had long wanted to drive Johnson out of his farm; and that he imagined, after he recovered, he would go into Cheshire, from whence he came, and give him no more disturbance. He said he had long intended to shoot him: that the chief reason he did it at this time was, an affair between Mr. Curzon, Mr. Burslem, and his lordship. But the greatest part of this discourse was at the time that my lord was full of liquor.

Was he so full of liquor as to be deprived of his understanding?—I think not; he seemed to understand very well what he did.

Was he in liquor when you first saw him?—Yes; not much.

Did he continue drinking during the time you saw him?—He was drinking porter; they said it was porter.

Did you go to Mr. Johnson again?—Yes; after supper I went up stairs to Mr. Johnson; nothing material passed; but my lord enquired what I thought of Mr. Johnson; and upon my setting things in the light I thought I should, my lord seemed very well satisfied.

Was any thing said about the bowels or guts?—My lord asked, if the bowels were wounded, what would be the consequence? I said, some had had wounds in their bowels and recovered.

There was an expression used, that the bullet was lodged in the abdomen; was that your's or my lord's expression?—It was my expression.

Did you and my lord sit together in the evening?—Yes.

Was any wine brought?—Yes; Mrs. Clifford brought a bottle of wine, and then his lordship again repeated, that he had shot Johnson, and that he intended it.

Was there any thing passed between you relative to my lord's circumstances?—A little

before he went to bed, before I went to Mr. Johnson the last time, my lord said, Kirkland, I know you can set this affair in such a light, that I shall not be seized if you will; I owe you a bill, you may have some of your money now, and the rest when you want it; I told his lordship I did not want money, I should be glad to receive it when it was most convenient to him.

Did you afterwards see my lord and Mr. Johnson together?—Yes.

What passed?—My lord went up to the bed-side, and spoke it temperately; Johnson, you know you have been a villain to me; Mr. Johnson made no answer, but desired my lord to let him alone at that time: my lord kept calling of him villain; his passion rose, and he began to pull the bed-clothes, and said, Have you not been a villain? Mr. Johnson said, My lord, I may have been wrong as well as others: upon this, my lord run up in a violent passion to the bed-side, I thought he would have struck him; but upon Mr. Johnson's declaring he might have been a villain to his lordship, my lord went to the fire-side.

How came Mr. Johnson to make that answer?—I winked at him, and he made the answer.

Was Miss Johnson in the room?—Yes; my lord went to her, after he had abused her father, and said, Though he has been a villain to me, I promise you before Kirkland, who I desire to be a witness, that I will take care of your family, if you do not prosecute.

Did my lord go out of the room?—Yes; he went down stairs; he sent for me, and told me, he was afraid he had made Miss Johnson uneasy; he desired I would tell her, he would be her friend: we came up stairs together; his lordship asked at the top of the stairs, whether I thought Mr. Johnson would recover: I replied, Yes; he said, then I may go to bed in safety; he went to bed directly.

What passed after?—The first thing I did I went to Mr. Johnson, who desired, for God's sake, that I would remove him; while we were talking, I heard my lord open the door, and call up his pointer: Mr. Johnson was a good deal alarmed at it, fearing my lord should come again; but my lord shut the door; then he again intreated me to remove him.

Was any proposal made to remove him before that?—Yes; Mrs. Clifford came down before that into the still-room, and said, Cannot Johnson be removed? My lord replied, No, he shall not be removed, till he be either better or dead: and some time after that he said, he was glad he had him in the house, that he could plague the rascal; or some such words.

Why did you propose to remove him?—I thought it prudent for many reasons to remove him; I imagined, Mr. Johnson would die; and if my lord came and found him dying, his resentment would rise against me; besides, Mr. Johnson was in a good deal of apprehension of being again shot; I really apprehended he might die through fear, for he was a man

of a very weak constitution; upon this I went to the Lount and got a parcel of fellows, and placed Mr. Johnson in an easy chair, and carried him upon poles to the Lount, where he got without being much fatigued.

Did you apprehend that the moving would be prejudicial to him, considering the condition he was in?—It is impossible to say it might not; but there was much more danger in leaving him at Stanton; and he expressed satisfaction on my removing him: when he came there, he desired he might be removed from one room where he was, into another; for he said, my lord might come and shoot him there, the window was facing the bed; I told him, he might make himself easy, I would place a centry at each door.

At what time was Mr. Johnson removed?—I believe about two o'clock in the morning; I am not quite certain of the hour.

How long did he live after that?—He lived, as I was informed, till about nine; I did not leave him till seven o'clock.

In what condition was he when you left him?—Weak and low, and cold in the extremities.

What was your judgment about him?—That he would be dead; he thought so himself.

What happened after he was dead?—Nothing more than my examining the body.

What did you do upon that?—I examined it the next day when the coroner's inquest was taken.

Did you give an account of the wound?—The ball had passed just under the lowest rib, on the left side, through one of the guts, and through a bone we call the 'os inominatum,' and lodged in the bone called the 'os sacrum.'

Do you apprehend that Mr. Johnson died of that wound?—I do; I am clear in it.

Was you there when the earl was seized?—I was not; I went to ask advice what was to be done.

By Earl Ferrers.

You said that when I asked you to extract the ball, that it was lodged in the abdomen, and that I wondered at it.—That question was asked before I told your lordship it was lodged; I remember the question was asked.

When I told you I had shot it through a deal, was it not mentioned with surprize?—The surprize seemed to be, that it had not also gone through the man.

At the time that we were talking this over a bottle of wine, did you talk with me as a friend; or did you intend to betray me?—I do own, my lord, that I intended to deceive you; and I thought it absolutely necessary.

Did you intend to give this in evidence?—I knew I should be called upon on this occasion.

Did you not take advantage of my being in liquor?—No, I could not, my lord; what you said was quite voluntary.

Did I say I had come to a resolution to do it deliberately?—I do not remember.

Did you never hear me say, that I did not intend to kill him?—Your lordship did.

A Lord. Did you, at any time, hear Mr. Johnson say, that lord Ferrers had shot him?

—Kirkland. As soon as Mr. Johnson had got home, I said to him, Was my lord in liquor when he shot you? He was, when I first saw him. Mr. Johnson said, No, he was not: I imagined he got what liquor he had afterwards. I did not think he would have shot me. I thought he only wanted me to sign a paper. I asked him, Was you down on your knee when my lord shot you? He said, I think when my lord shot me I was rising; though I cannot be sure whether I was or not, being hurried.

By Mr. Att. Gen.

At the time of this relation of Mr. Johnson's, was any other person present?—No, there was none; we were by ourselves in the room.

Did you hear my lord say to Miss Johnson, that he would take care of them?—Yes, I heard my lord say so to Miss Johnson.

He said to you, I owe you a bill?—My lord said, You can set this matter right: if you do, I owe you a bill; you may have some money now, and the rest when you want it.

Did you ever hear Mr. Johnson express any apprehension of my lord Ferrers?—Mr. Johnson, in conversation at different times, has said to me, he did not think my lord Ferrers would do him any harm.

Lord Talbot. My lords, this witness has told you, that in one of his conversations with lord Ferrers his lordship declared, that he did not intend to kill Mr. Johnson; and also that lord Ferrers shewed him the position in which he held the pistol, when his lordship thought the instrument went wrong, as Mr. Kirkland was probing the wound; I would ask, whether the conversation was previous or subsequent to the probing the wound?—Kirkland. He told me, before I entered the director into the wound, You must pass it in that manner. The other conversation was subsequent to this.

Lord Talbot. Do you believe that his lordship's shewing the position of the pistol, in order to acquaint you with the direction of the ball, was with an intention to facilitate your operation?—Kirkland. I believe it was.

By Mr. Attorney General.

Did he appear in liquor?—He was in liquor at first; but it got more upon him.

As that unhappy fury rose, the more liquor he had, the more he seemed to persist in the action?—Yes.

But when he was calmer, in his better senses, he said, he did not wish to kill him?—No; he said at first, that he intended to kill him.

A Lord. When he told you the direction of the ball, did he not mean that tenderly, to assist the unfortunate man?—Kirkland. I took it, that he was directing me to enquire into the nature of the wound.

Could he direct you with any other view than to assist?—I remember when I told my lord the ball could not be extracted, he said, I do not intend to direct you; pursue your own method, and do the best you can for him.

You mentioned that he sent to you?—Yes.

By Lord Mansfield.

You have said, that, from the first to the last, lord Ferrers told you, that he designed to kill the deceased; now, in answer to a question lately asked, you say, he said, he did not intend to kill him; upon what occasion did he say that?—I think we sat by the fire in the still room, but I am not quite certain, and his lordship said, that he did not intend to shoot him dead; I intended only to make him smart, and shoot him into the hip, or side.

Could such a wound as this be given to a man without a certain hazard of his life?—It was certain death to such a constitution as Mr. Johnson's.

How long after this time was it, that he told you that you could set that matter right?—He mentioned it at the very beginning, and several times after, till the end of the evening.

Did your fear of lord Ferrers arise from his being in liquor?—I should not have been afraid of lord Ferrers if he had not been in liquor; I thought, if he had found Mr. Johnson had died, that, as I had deceived him, I should have had his resentment.

Did you see lord Ferrers in the morning?—No. I did not.

Mr. Springthorpe sworn.

Mr. Gould. My lords, we call this witness to give an account of the manner of seizing lord Ferrers, and what passed upon that occasion.

Examined by Mr. Gould.

Was you present at the time of taking lord Ferrers?—I was.

What day was it?—On Saturday morning.

What time in the morning?—I believe it was between ten and eleven o'clock.

Had you a multitude of people with you?—The first part of the time I had not; but before he was taken there were a great many.

Was you armed?—I had a pistol I took from Mr. Burslem's.

Where did you go first?—I went to see Mr. Johnson; he was my friend, and I found he was dead. Mr. Burslem desired I would go and help to take lord Ferrers: I condescended to do it. When I came to the hall yard, my lord in a few minutes came; he seemed to be going to the stable, with his stockings down, and his garters in his hands; his lordship seeing me demanded to know what I wanted. I presented my pistol to his lordship, and I said it was he I wanted, and I would have him; he put his hand, whether he was going to put his garters into his pocket, or to pull out a pistol, I cannot say; but he suddenly run into the house. I never saw more of him for two hours; in about two hours he came to the garret win-

dow; I went under the window; he called; I asked him what he wanted; he said, How is Johnson? I said he was dead; he said, You are a lying scoundrel, God damn you. I told him he was dead; he said, I will not believe it till Kirkland tells me so. I said he was dead; he said, Then disperse the people, and I will go and surrender: let the people in, and let them have some victuals and drink. I told him I did not come for victuals, but for him, and I would have him. He went away from the window swearing he would not be taken. Two hours after that there was a report that he was upon the bowling-green; I was at this part of the house: I run there, and, by the time I got there, I saw two colliers had bold of his lordship. I said, I would take care nobody should hurt him. I took from a man that had hold of him, a pistol and a powder-horn; I shot the pistol off, and it made a great impression against the stones. I heard my lord say, he had shot a villain and a scoundrel, and, clapping his hand upon his bosom, he said, I glory in his death. That is all I know of the matter.

Francis Kinsley sworn.

Examined by Mr. Norton.

You keep a public-house at Ashby de la Zouch?—Yes.

Was lord Ferrers brought to your house when he was apprehended?—Yes.

Did you hear him say any thing about killing of Johnson?—I heard very little of it.

Do you remember one Mr. Hall, a clergyman, coming to your house at that time?—Yes.

Did he desire to be admitted to lord Ferrers?—Yes.

Did you hear what passed between Mr. Hall and my lord Ferrers?—A great many words passed.

What passed?—I heard Mr. Hall intimate to his lordship, as a clergyman, that his lordship seemed to be pretty much in liquor at that time, and desired he would not make use of those expressions. He told Mr. Hall he was extremely obliged to him for his good advice; he apprehended what it was; however, he told Mr. Hall that he knew his duty, perhaps, as well as a justice of peace.

Was Mr. Hall a justice of peace?—Yes. I did not hear much more said between Mr. Hall and my lord Ferrers. Mr. Hall stayed with his lordship some time in the same room; then he came down stairs, and I never saw him afterwards.

Did he say any thing about killing of Mr. Johnson?—He asked, a great many times, if I had heard that Johnson was dead; I told him a good many times, that I heard he was dead: he said, I will not be convinced till I hear it from the coroner.

Did he say any thing else?—His lordship behaved very well with me, and decently, from the Saturday to the Monday at ten o'clock.

Att. Gen. My lords, we rest it here for the crown.

L. H. S. My lord Ferrers, the counsel for the crown have done; now is the time for your lordship to make your defence; and if you have any witnesses to examine, now is your time to call them.

Earl Ferrers. My lords, there have been a great variety of circumstances that have appeared through the course of this evidence. I really do not recollect any thing that happened since the time relative to the affair; and I should hope your lordships would give me a farther day to make my defence.

L. H. S. Your lordship hath had a great deal of time, and you have had counsel assigned you, and orders for summoning your witnesses. It is now the time to proceed to your defence.

Earl Ferrers. I hope your lordships will be so good as to give me till to-morrow, as there are some circumstances that I could wish to consult my counsel about.

Lord Mansfield. My lords, as your lordships cannot debate here upon the application that has been made by the noble lord at the bar, to adjourn the trial till to-morrow, I could wish he would open to your lordships the nature of his defence, or some reason why he is not prepared to go on now; otherwise, when your lordships adjourn, you will have nothing to debate upon, but barely whether there shall be this delay because it is asked; and it may be a dangerous precedent to establish, that a trial shall be adjourned, as of course, if desired, just when the evidence in support of the prosecution is closed. If he should give your lordships a reason for it, then it will be in your lordships' discretion, whether that reason is sufficient to induce your lordships to adjourn till to-morrow. I think he should open the nature of his defence, and state some ground for the delay he asks.

Elizabeth Burgeland called in again: Examined by one of the Peers.

Do you know of any particular quantity of strong liquor, of any kind, that lord Ferrers had drank that day?—No. I cannot tell any thing of it: he drank some brandy in his tea, in the morning.

Who is the person that kept the key of the strong liquor?—Mrs. Clifford.

Do you know of any that he had that day?—I cannot tell any thing about it.

Was it usual for my lord to drink brandy in his tea?—He did not drink tea every morning; but, when he drank tea, I believe he did put brandy in it.

Was Mrs. Clifford returned to the hall before the surgeon, Mr. Kirkland?—Yes.

How long?—I cannot justly say; it may be near, or near upon two hours.

Had you, or any person, carried any strong liquor to my lord before Mr. Kirkland came?—I cannot tell any thing about it.

At what time did lord Ferrers dine that day?—At two o'clock.

When you saw lord Ferrers, after the fact,

was he drunk, or sober?—I did not observe he was much in liquor then; but, soon after, he was quite fuddled.

The first time you saw him after the pistol went off, how was he then?—I did not observe that he was much in liquor at the time when it was done.

Did you see him any part of that day, before you heard the pistol go off, or before Mr. Kirkland came to the house, appear intoxicated with liquor?—I saw him at dinner; I never saw him after till it was done.

How was he at dinner?—My lord was sober at dinner.

Earl Ferrers. My lords, by the kind of defence recommended to me, it will be impossible to go on at present; there are several witnesses to be examined, and really, my lords, I am quite unprepared.

Earl of Hardwicke. I believe it is expected by your lordships, that the noble lord at the bar should now open to you the nature of his defence.

L. H. S. My lord Ferrers, it is required that you should open the nature of your defence; my lords will be able to judge, from that, whether it will be proper to give your lordship time to make your defence, agreeable to your request.

Earl Ferrers. My lords, I can hardly express myself, the very circumstance shocks me so much; but I am informed, from several circumstances, of an indisposition of mind.

Then the Lord High Steward returned back to the chair.

Lord Ravensworth. My lords, I move your lordships to adjourn to the chamber of parliament.

L. H. S. Is it your lordships' pleasure to adjourn to the chamber of parliament?—*Lords.* Ay, ay.

L. H. S. This house is adjourned to the chamber of parliament.

The Lords, and others, returned to the chamber of parliament, in the same order they came down; and, after some time, the House was adjourned again into Westminster Hall, and the Peers being there seated, and the Lord High Steward in his chair, and the House resumed, the Serjeant at Arms made proclamation for silence, as usual.

L. H. S. My lord Ferrers, you are to proceed to your defence.

Earl Ferrers. My lords, the kind of defence I mentioned to your lordships before, I really don't know how myself to enter upon; it is what my family have considered for me, and they have engaged all the evidence that are to be examined upon this unhappy occasion, who I really have not seen; I do not well know what they have to say: I should, therefore, hope your lordships will give me all the assistance that is possible in their examination.

My lords, I believe that what I have al-

ready mentioned to your lordships, as the ground of this defence, has been a family complaint; and I have heard that my own family have, of late, endeavoured to prove me such. The defence I mean is occasional insanity of mind; and I am convinced, from recollecting within myself, that, at the time of this action, I could not know what I was about. I say, my lords, upon reflecting within myself, I am convinced, that, at that time, I could not know what I was about.

It has been too plainly proved, that, at the time this accident happened, I was very sober, that I was not disordered with liquor: your lordships will observe, from the evidence both of Mr. Kirkland and Miss Johnson, that it plainly appeared that this man never suspected there was any malice, or that I had any.

Mr. John Bennetfold sworn.

Examined by Earl Ferrers.

How long have you known me?--Above these twenty years.

Was you ever employed by me in any shape?--Yes.

In what shape?--In receiving his lordship's rents, when they were sent him out of the country.

Did you know any of the family besides me?--Yes.

Do you remember my uncle, or any other of the family?--Yes, the late lord Ferrers, Henry.

What disorder had he?--Lunacy.

How many years before he died?--Several years before he died, at Kensington Gore.

Did you know lady Barbara Shirley?--No.

Did you never hear that she was disordered?--Yes, I have.

Please to observe what you know of my conduct, as to the state of my mind, without having any particular questions asked you?--His lordship has always behaved in a very strange manner, very flighty, very much like a man out of his mind, more particularly so within these two years past, such as being in liquor, and swearing and cursing, and the like, and talking to himself, very much like a man disordered in his senses; and then he has behaved himself as well as any other gentleman at times.

Do you know of any particular time, or of any particular action?--Nothing in particular, more than the particular circumstances of my lady, and expressing great hardships, and dissatisfaction with the act of parliament.

Have you observed irrational behaviour when I have not been in liquor?--Yes, I have.

Was it frequent or seldom?--It was often.

Can you recollect any particular irrational behaviour in me when I have not been in liquor?--I cannot say that I can recollect any particular passage.

Did you ever see me walking about the room, talking to myself; making motions with my head, and talking to myself?--Yes, a great many times.

Did you think that I was disturbed in my mind?--Yes.

By Mr. Attorney General.

My lords, I should be glad to know what is this witness's trade and occupation?--I am now clerk of St. James's parish; I was a peruke-maker by trade.

Was you acquainted with my lord Ferrers in the country or in town?--In town.

Was you admitted to my lord's friendship or familiarity?--To both.

In conversation at any time, have you observed my lord to give you irrational or insensible answers?--I cannot say he has given me any insensible answers.

I should be glad to know whether you have any reason to believe, from his behaviour, that he did not understand enough to distinguish right from wrong?--That is a question I am in some doubt of answering.

I have asked as to your opinion; if you will recollect what discourse has passed between you, you will be able to give an answer; now, from your discourse and conversation, do you think or believe he was in that state of mind as not to know right from wrong at any time?--That is a question I cannot answer to.

You will be pleased to recollect, that you told me, when I asked you, that my lord never gave you an irrational answer; why cannot you give your opinion as to his sanity?--My lord's behaviour appeared in general in such manner as I have mentioned.

Att. Gen. My lords, this witness did not mention any particular act, only talking to himself, and motions with his head; I am questioning him upon those kind of acts that proceed from words or speeches: did you ever, from his words or speeches, conceive that he was not himself?--*Bennetfold.* No further than by being displeased, often talking to himself, like a man that was out of his mind.

Did my lord manage his affairs by himself?--He managed them himself; he gave me directions.

Were those directions reasonable and achievable?--Sometimes they were, though thought unreasonable and insensible by the persons he wrote to.

Can you recollect any instances, and the persons that thought them so?--I cannot recollect any circumstance relating to family matters; his mother, when I have carried such messages, has thought him to be in a wrong mind, in writing to her in the manner he did.

Did Mrs. Shirley ever treat him as an insane person, or talk of sending for a physician to him?--Not that I know of.

Did any other person think my lord so insane as to want that?--I cannot recollect any person in particular.

Was it easy to impose upon his lordship in his affairs, or difficult?--It was not easy to impose upon his lordship that I know of.

As you have known him so long, and have been admitted to his familiarity, I wish you

would recollect one single irrational expression that you have ever heard him make use of.—I cannot recollect any in particular.

You say that he seemed displeased with his lady, and with the act of parliament; please to recollect, whether, upon that occasion, his behaviour was such as betrayed his insanity, or any thing that was irrational?—My lord expressed a good deal of dissatisfaction at the act of parliament.

What was the dissatisfaction? and was it general as well as particular?—In relation to the estate's being taken away, and receivers being put upon it.

Do you apprehend that that sort of expression denoted insanity or sanity?—That I cannot take upon me to determine.

Please to recollect yourself, and give me an answer to the question: you said that he expressed a dissatisfaction, because his estate was taken from him, and a receiver put upon it; I desire to know whether those expressions bespeak a man in his senses or out of his senses?—I cannot say whether that denoted him to be in his senses or out of his senses.

Are those expressions the expressions of a fool, or of a man of understanding upon the subject?—I should think, of a man of understanding.

You have not been able to answer as to any particular speeches that denoted him to be insane; now do you remember any act of his, of any kind, that denoted a disordered mind?—I cannot say I can; I was not so often with him, though I have known him long.

Then I desire to know, whether lord Ferrers, from the conversation you had with him, appeared to be rather of better parts than an ordinary kind of man?—Yes, to be sure.

Mr. Thomas Goostrey sworn.

Examined by Earl Ferrers.

How long have you known lord Ferrers?—About ten years.

How long have you been concerned for him?—About that time.

Have you seen any instances of any thing like insanity in me?—I think I have.

Please to mention the instances.—I have been called upon very unexpectedly; I should have recollected myself, if I had had any apprehension of being called upon.

Then mention the instances.—I know nothing within this twelve months past: lord Ferrers always appeared to me to be of a very remarkable disposition; and though lord Ferrers was extremely sensible, and thoroughly acquainted with his affairs, yet I have frequently had directions from him to do things that in my opinion were either fruitless, or opposite to his interest, and upon those occasions I have always found it in vain to endeavour to dissuade his lordship from it; and as I always found that lord Ferrers was extremely sensible, and thorough master of his affairs, I have never been capable of accounting for his behaviour,

otherwise than by apprehending that he has been at times out of his mind.

Do you remember any instance where it appeared to be out of my mind, and what?—I remember that all of a sudden he took it into his head that he should be capable of impeaching a family settlement that he had long acquiesced under, and by which he was only tenant for life of his estate; and though he had advised with many lawyers upon the occasion, and they were all of opinion that it was impossible he could succeed, yet he persisted in his resolution of bringing a suit to destroy that settlement; and upon those occasions I have always found lord Ferrers extremely strange; and when he has touched upon that subject, his conversation has been very wild, and inconsistent with what I have looked upon a man of sense and understanding to be; and I remember one instance, which was, when lord Ferrers returned from my lord Westmoreland's, my lord Ferrers followed me upon that occasion into the city, and he came into the room where I was with a great deal of company. I perceived, by his appearance, that something disturbed him, and therefore hastily came up to him, and got him out of the room. When I came up to him, I asked him what was the matter; and did at first apprehend he had been in liquor, but I soon perceived that he was perfectly sober. He then told me a strange inconsistent story of his having been down at my lord Westmoreland's, and of his having been ill treated by sir Thomas Stapleton, and the intent of his coming to me was, to draw an advertisement to be inserted in all the papers, tending to challenge sir Thomas Stapleton, and to post him for a coward if he did not give him satisfaction. I was extremely uneasy; and with difficulty did dissuade him from it, upon a promise to wait upon him the next day; but then looking upon him to be out of his senses; I did not call upon him the next day. From thence I declined being concerned for him, as looking upon him to be a person out of his senses: that is all; I have never seen his lordship from that time to this, except when I had the honour to wait upon his lordship in the Tower.

Did you know Mr. Johnson?—Very well.

Was I in friendship with Mr. Johnson?—I have often seen lord Ferrers and Mr. Johnson together, and have likewise had occasion to talk of Mr. Johnson with my lord: I always observed that his lordship had the greatest regard and esteem for Mr. Johnson; and I have, in the course of my business that I have done for lord Ferrers, always found that Mr. Johnson was very exact and regular in his accounts.

Did you ever hear me at any time find fault with Mr. Johnson, or express any dissatisfaction at him?—Never, but always the reverse.

Do you know if Mr. Johnson would have consented to have been receiver under the act of parliament, without consulting me?—I heard Mr. Johnson declare, that when it was proposed to him to be receiver, that he refused

to be so, without first consulting his lordship; and afterwards I saw Mr. Johnson; and he told me that it was at his lordship's particular request that he consented to be a receiver.

Sol. Gen. My lords, I must beg leave to ask this witness a question or two.—Mr. Goostrey gave your lordships as a reason for his opinion that lord Ferrers was insane, that his lordship would very frequently send directions in the course of his affairs, which Mr. Goostrey thought fruitless, or opposite to his interest; in particular, he mentioned an instance relative to his impeaching or setting aside a family settlement; now, I should be glad to ask Mr. Goostrey, Whether he thinks that the manner of lord Ferrers's receiving his advice to dissuade him from endeavouring to set aside that settlement, proceeded from a tenaciousness of his opinion, or from the insanity of his mind.

Goostrey. To say that it might be owing to insanity of mind, might be going too far; but it was from his remarkable disposition, his obstinate and improper behaviour, his remarkable tenaciousness of his opinion, which was not consistent with the good sense I have known him master of. If I may explain what I said before, I should rather think it tended to insanity than any thing else, as it was so inconsistent with the good sense and understanding that I have always met with from his lordship.

By Mr. Solicitor General.

Was it from any particular circumstance which passed between you and lord Ferrers, that you thought the manner of receiving your advice was owing to a tendency in lord Ferrers to insanity?—My reason is, that his lordship had been advised by many lawyers, that, by his long acquiescence under that settlement, and the many acts he had done confirming it, that there was no possibility of succeeding in it.

Mr. Goostrey, you have had a great deal of business, and been employed by many clients, as well as lord Ferrers; have not you, in the course of your experience and transactions, met with several clients of a temper to proceed against the advice of counsel and friends?—I never did in my small experience meet with any person that did so, that was possessed of the good sense and understanding that I have at other times found in my lord Ferrers.

Have you never met with persons unsuspected of lunacy, who acted in the manner lord Ferrers did upon that occasion?—I do not know I ever had any other client that was under such circumstances; I do not know that I ever met with any client that would commence a suit after counsel advised the contrary.

How did the suit end?—It never proceeded so far as to have an answer; for, in the mean time, the unhappy dispute between lord and lady Ferrers broke out, and that diverted his thoughts from it.

You mentioned an instance of attending lord Ferrers, with regard to the ill treatment he had received from sir Thomas Stapleton; upon that

occasion do you think that my lord's insisting to have a challenge inserted in the papers, by way of advertisement, proceeded from insanity, or from mere violence of temper?—I did then think it insanity; he being perfectly sober, I could impute it to nothing else, and from thenceforth I declined being concerned for him.

Might it not be from violence of temper?—It was many hours after the accident happened that he came to me.

Did you ever observe any thing frantic in my lord's behaviour?—Many times.

Upon what occasion?—Upon occasion of his going from the business we have been talking upon, I have often found him in conversation lose himself entirely.

Did he lose himself from passion, or for want of understanding?—He had nothing to ruffle his temper but that particular thing; it was from his talking to himself; I made it a rule never to contradict him; and, during the ten years I was concerned for him, I never had a word with him.

You endeavoured to dissuade him from this suit which he was going to prosecute as to the settlement; how did he reason upon the occasion?—Quite wild and inconsistent, and, upon this occasion, in my opinion, shewed want of reason.

Do you recollect what he said, and how he argued? Mention the particulars.—He treated it as if he had been imposed upon, and drawn in improperly to do it.

Do you think that such a way of arguing shewed his insanity and want of sense?—I thought it did, because it appeared to me to be inconsistent with the facts.

Might it not arise from a difference in opinion between you and him?—I should think not, because I always looked upon his lordship to be a much more sensible man.

How long have you known him?—I said ten years; but I believe it may be eleven.

Do you know of any instance in which his friends or family ever entertained the same opinion of him as you do?—Never, as to taking out a commission of lunacy.

As from the conversation you had with him you think he was insane, did not you represent it to the family?—Never; his family knew it as well as I.

As you was of that opinion, did you advise a commission of lunacy?—Never.

In the time of your being concerned for him in his affairs, did you prepare any deed, conveyance, or lease for him?—In some things I have.

Did you ever prepare any mortgage upon his estate?—Never that I remember.

Did you ever attend the execution of any such deeds?—I was concerned in suffering a recovery, and cutting off the entails in the settlement.

In case of a client's being insane, would you have suffered such acts to be done?—There was no such thing happened in my time; I never knew of any ~~etc~~ that my lord did to his

prejudice in the execution of any deed in my time.

I ask you, if you had been desired to be a party, or present at the execution of any such deed, whether you would have suffered it under such circumstances?—Most certainly I should not.

Was you ever a witness to the execution of any deed by lord Ferrers?—I have.

Did you ever transact any mortgage for him?—I do not recollect.

Did you never get any loan of money for him?—Never. If the gentlemen will find it out I will not disown it.

Has my lord lately raised a considerable sum of money upon his estate?—No, I never negotiated any such, nor was I privy to it.

Was you employed to procure any money?—Never to my memory.

Did you never converse with his lordship upon the subject?—Never.

Did you, or did you not, in your conscience and opinion, upon the whole matter, think my lord Ferrers insane, or a proper object to be under the care of a physician, or of the court of Chancery?—I am in great doubt whether my lord was so insane as that a commission of lunacy could be taken out; I should think a commission of lunacy could not be taken out against him.

Why? because he was not insane?—I look upon it that he was insane only at particular times, and in particular instances.

If he was insane only at times, would he not have been a proper object of a commission of lunacy?—I cannot say at the times I have seen. If a jury had been to enquire touching his sanity, I am sure they would have found him a lunatic.

Mention the times of which you speak.—I meant that particular time when his lordship came to me in the city, as I have mentioned. My lord Ferrers did propose to dispose of his Northamptonshire estate. I do recollect there was once a negotiation of a loan of 10,000*l.* from sir Thomas Clarges. I was no otherwise concerned in it, than only to see that the deed which lord Ferrers executed was a proper one. Mr. Howell of Lincoln's-inn was the person concerned.

You recollect the negotiation of a loan, and your being advised with?—I do recollect I was advised with, and I believe my lord was then in Leicestershire.

What advice did you give?—The money to be borrowed by my lord was not to be put into his pocket, but to pay off another mortgage.

What advice did you give?—I do not recollect any particular advice; I remember there was a draught of a deed; I believe it was laid before me.

Did you, or did you not, advise the execution of it?—I neither advised one way nor the other; I was no otherwise concerned than to see that the draught was proper.

You say my lord asked your advice; did you give him your opinion with respect to the

VOL. XIX.

propriety of the deed?—I dare say if my lord asked it, I did; I don't remember he did; it is most likely he did.

Lord Hillsborough. Why did you make it a rule never to contradict my lord Ferrers?—Goostrey. Because if I had contradicted him, I should have led his lordship into a strange wild way of reasoning, that I had often experienced by his reasoning with himself only.

Earl Ferrers. Was you ever concerned for any of the family but me?—Goostrey. For lady Anna Eleonora Shirley I was concerned.

Earl Ferrers. Do you know of any thing else?—Goostrey. Not that I recollect.

By Lord Ravensworth.

Do you know lord Ferrers's mother, or any of his relations?—I know them all.

Do you mean that you know them as one that has transacted business with them, and that you can speak your opinion touching them?—Yes; I have had business with them frequently.

Did you at any time, or at different times, speak to lord Ferrers's mother, or any of his relations, to give them your opinion of the management of lord Ferrers?—I never did; I should have thought it very unnecessary, because I was thoroughly satisfied that the family knew it as well as myself.

My lords, I have attended to Mr. Goostrey's evidence, and am desirous of getting every thing from him that I can; and therefore desire he will tell your lordships, whether, during the time he did business for lord Ferrers, he ever signified to any of his lordship's family his own sentiments touching his lordship?—If I had been concerned for the family, I should not have hesitated a moment to have done it. I believe Mr. Shirley in particular knew that the reason I declined being longer concerned in lord Ferrers's affairs, was from an apprehension that he was not in his senses.

You declined being concerned for him upon his behaviour about the settlement?—No, upon his returning from lord Westmoreland's.

Should you have thought that alone sufficient, if, previous to that, you had not seen marks that induced you to have a suspicion of his sanity, and to take the resolution you did?—I don't know whether, if that had been the only instance in which I had found my lord behave in that odd manner, I should then have given up his affairs; but he had several times before acted so inconsistent, as to induce me to think it was out of my power to be of any service to him.

How long is it since he was at lord Westmoreland's?—About a year and a half.

You say that you have known him between ten and eleven years; during the whole time was you concerned in his affairs?—There was something or other moving in his affairs all the while; it was with the greatest difficulty that I kept him within the bounds I did.

Do you mean that from the first time of your being concerned in his affairs, you looked

upon him in that light, or only in that instance?—Soon after I was concerned in his affairs, I wished I had not engaged; but as I had got into them, it was difficult to recede, and for that purpose I went on.

In your opinion, and from your best recollection, did you observe these symptoms in lord Ferrers the whole time you attended him, the major part of the time, or more particularly at the latter part?—Most certainly his lordship was greatly affected with the separation of lady Ferrers; and at that time I observed it.

Do you think it proceeded from liquor?—I very seldom saw him in liquor.

At the times you recollect, was he sober?—Perfectly sober, at the times I speak of.

Earl of Morton. Did you ever see him in such a condition, that he was incapable of judging between a moral and an immoral act?—*Goostrey*. I cannot say I ever did.

Then the Lord High Steward returned back to his chair.

Lord Privy Seal. My lords, I move your lordships to adjourn to the Chamber of Parliament.

Lord High Steward. Is it your lordships' pleasure to adjourn to the Chamber of Parliament?—*Lords*. Ay, ay.

Lord High Steward. This House is adjourned to the Chamber of Parliament.

The Lords, and others, returned to the Chamber of Parliament, in the same order they came down; and, after some time, the House being there resumed, resolved to proceed further in the Trial of Lawrence earl Ferrers, in Westminster-hall, to-morrow, at ten of the clock in the morning; and ordered that the said Lawrence earl Ferrers should be remanded prisoner to his majesty's Tower of London, there to be kept in safe custody; and that he be brought again to the bar of this House in Westminster-hall, to-morrow at ten of the clock in the morning.

THE SECOND DAY.

Thursday, April 17, 1760.

The Lords, and others, came from the Chamber of Parliament into Westminster-hall, in the same order as on Wednesday last; and the peers were there seated, and the Lord High Steward in his chair.

Lord High Steward. My lords, the House is resumed. Is it your lordships' pleasure, that the Judges may be covered?—*Lords*. Ay, ay.

Then the Serjeant at Arms made proclamation for silence, as usual, and afterwards the following proclamation.

Serj. at Arms. Oyez, Oyez, Oyez! Lieutenant of the Tower, bring forth your prisoner, Lawrence earl Ferrers, to the bar, pursuant to the order of the House of Lords.

Trial of Earl Ferrers,

[932]

The deputy-governor of the Tower brought the prisoner to the bar in the like form as before; and then he knelt down.

L. H. S. Your lordship may rise.

L. H. S. Earl Ferrers, your lordship will proceed in your defence.

Thomas Husley sworn.

Examined by Earl Ferrers.

Did you know the late earl Ferrers?—I did. How long did you know him?—About fourteen years.

What was the matter with him?—He was a lunatic.

Was he under confinement?—He was under confinement.

Was he a lunatic all that time?—He had intervals.

Was he not recovered of his understanding sometimes, so as to return to his seat in parliament?—Not in that time that I was with his lordship.

Was he a lunatic home to the time of his death?—He was.

Did you know lady Barbara Shirley?—I did not.

Or lady Betty Shirley?—I did know lady Betty Shirley.

Is she living?—She is dead.

How long has she been dead?—To the best of my knowledge about seventeen or eighteen years.

Had she any disorders that you know of?—As I have been told by her servants, she frequently appeared to be very much disordered.

Att. Gen. My lords, I should be sorry to stop the course of the noble earl's evidence, but this is hearsay.

By Earl Ferrers (continued.)

Did you know any other of the family that were disordered in their senses?—Nothing more than by hearsay.

How long have you known the present earl Ferrers?—But a very few years.

What relation was the late earl Ferrers to the present lord?—His uncle.

Att. Gen. My lords, we will not trouble your lordships to cross-examine this witness.

Mrs. Wilhelmina Deborah Cotes sworn.

Examined by Earl Ferrers.

Did you know lady Barbara Shirley?—Perfectly well.

What relation was she to the present earl Ferrers?—His aunt.

How long did you know lady Barbara before her death?—She is now living.

Was she afflicted with any, and what disorder?—Lunacy.

Is she confined as a lunatic at this time?—She was always looked upon as a lunatic, and proper care has been taken of her.

Do you know any other of the family that has been afflicted with lunacy?—Only by hearsay.

The Hon. and Rev. Mr. Walter Shirley sworn.

Examined by Earl Ferrers.

What relation are you to me?—Brother.

Do you know any, and which, of the family, that have been afflicted with lunacy; if you do, please to mention their names?—I believe the prisoner at the bar has that misfortune.

What is your reason for such belief?—I have many reasons for it. The first is, that I have seen him several times talking to himself, clenching his fists, grinning, and having several gestures of a madman, without any seeming cause leading thereto. I have likewise very frequently known him extremely suspicious of plots and contrivances against him from his own family; and, when he was desired to give some account what the plots were that he meant, he could not make any direct answer.—Another reason I have for thinking him so is, his falling into violent passion, without any adequate cause.

Do you believe that, at some times, I have been hurried into violent fits, so as not to know the distinction between a moral and immoral act?—I believe, at those times when my lord has been transported by this disease of lunacy, that he has not been able to distinguish properly between moral good and evil.

Has any other of the family, besides myself, been afflicted with lunacy?—I have heard—
(*siopt.*)

Please to inform their lordships, whether, at the time I have been transported with such violent fits, they have been the effects of drink, and whether they have happened when I was sober?—Frequently when my lord has been sober, much more so when he has been a little inflamed with liquor.

Do you know of any intention in the family to take out a commission of lunacy against me?—I heard it talked of.

How long ago?—I think I can recollect it was at the time of his lordship's committing the outrage at lord Westmoreland's house that it was proposed to be done; but afterwards they were afraid to go through with it; and the reason given was, lest, if the court of judicature should not be thoroughly satisfied of my lord's lunacy upon inspection, that the damage would be very great to those that should attempt it.

Why was the family afraid that I should appear in the courts of judicature to be in my senses?—Because my lord had frequently such long intervals of reason, that, we imagined, if he, on the inspection, appeared reasonable, the court would not grant the commission against him.

What damage do you mean that the family was apprehensive of, in case the court should refuse a commission?—We apprehended my lord would sue us for *scandalum magnatum*.

Was the family apprehensive of any other kind of damage?—I know of none.

Att. Gen. My lords, I did not intend to have

troubled this gentleman; but from what he has said, your lordships will permit me to ask him two or three questions; I shall do it very tenderly, and with as much propriety as I can.—In giving his account of the noble lord's state of mind, as far as I could collect it, he said, that he had more reasons than one why he deemed him to be insane.

By Mr. Attorney General.

Mr. Shirley, you said that the first ground was, that his lordship would, at times, talk to himself, grin, and use certain gestures, proper only to madmen—Now, as to this first mark of insanity, was this frequently the case with his lordship?—Very frequently.

Did he, at those times, speak loud, or use any intelligible language to himself?—He did not.

Did he, at such times, offer to commit any mischief, or betray any marks of disorder, while in that situation?—I do not recollect any.

Then, as far as I can understand you, at those times, his behaviour in those intervals was perfectly innocent.—Yes.

At such times have you ever entered into discourse with him?—No, I do not remember.

Did you never ask him a single question when you have seen him walking backwards and forwards in the way you mention?—I don't remember I have.

Did you never hear him speak at such times to other persons?—Not whilst he continued in those attitudes.

I don't ask you whether he conversed the time that he was mute, but within a quarter or half an hour?—I am not certain.

Your next ground for supposing him to be insane was, That he was accustomed to be transported into passions without any adequate cause, were those the words?—Without any seeming cause.

Was not 'adequate' the expression you used?—Yes.

I should be glad to know whether you deem every man that is transported with anger, without an adequate cause, to be a madman?—I deemed it as a sign of madness in him; but there were other causes.

I ask you a general question, and I do not expect a particular answer. Whether you deem a person that is transported with fury without reason, to be a madman?—I think a person may be transported to fury without an adequate cause, that is no madman.

Then please to recollect some particular instance of this frantic passion, and state it.—I really cannot command my memory so far. I have not seen my lord these two years, till the time of this unhappy confinement.

Then I am to understand you, that you cannot recollect one particular instance; Am I, or not?—I cannot recollect any at this time.

Then as to the suspicion of plots without any foundation; will you please to enumerate any of those?—He never himself would give any particular account of what he suspected,

only that he did suspect that the family was in some combination against him; and when I have asked him, What it was that he meant? he would never give me a direct answer to that question.

Does that kind of behaviour, as you describe it, denote a man out of his senses?—I thought so. I was so fully possessed of that opinion, that I declared to other people long ago, that I thought him a madman.

Please to inform their lordships, whether the unfortunate earl lived well or ill with his family?—Indeed, he did not live in friendship with his family.

Were there not disputes on both sides?—Yes, there were; his younger brothers and sisters were under the unhappy constraint of suing for their fortunes.

Then please to inform their lordships, whether, in truth, there was not a combination in the family against him? I do not mean a criminal one.—I am very certain that was not what my lord alluded to.

If you are certain of that, you can inform their lordships what it was that he alluded to?—I will give a reason why I am certain it was not that; because it appeared to be some secret combination: that was a thing publicly known.

How did you collect that the combination was secret?—By my lord's manner of expressing himself.

Can you recollect the phrase or the words he used?—I cannot.

In another part of your examination you was asked, whether the earl could distinguish between good and evil? You said he could not distinguish them properly. Was he at that time less able to distinguish properly between good and evil than any other man that is transported into a violent passion?—I never saw any man so transported.

Did he express himself in insensible words, so as that you could discover the state of his mind; and that it was that of a madman, and not a man in passion?—I considered it as madness.

Can you recollect any expression, in any fit of passion that my lord was in, that might not as well have come from the mouth of any other passionate man?—Indeed I cannot.

You recollect an old adage, 'Ira furor brevis est'; do you believe that his was such madness as is there poetically described?—I believe that it really proceeded from madness.

Have you ever seen him so transported upon any other occasion than that of anger? Have you seen any appearance of that kind when he was cool and calm?—I have seen him break into passions without any seeming cause.

You said you could not remember any instance, when the question was asked you; can you now?—I remember once being at a hunting seat at Quarendon in Leicestershire, as I chose to avoid the bottle, I went up stairs to the ladies; lady Ferrers, at that time, lived with him; and, without any previous quarrel,

my lord came up stairs into the room; and, after standing for some time with his back to the fire, he broke out into the grossest abuse of me, insulting me, and swearing at me; and I cannot to this day or hour conceive any reason for it.

Had you never any dispute or quarrel with your brother?—Not at that time.

Might not you have had some quarrel a few days before?—No.

Are you confident of that?—I am confident.

Had he no suspicion at that time of your interesting yourself with respect to my lady Ferrers?—There was then no quarrel existing.

Had there never been a quarrel between my lord and my lady?—I think not; it was soon after his marriage.

Richard Phillips sworn.

Examined by Earl Ferrers.

How long have you known me?—About eighteen years.

Are you a tenant, or what relation do you stand in to me?—I am a tenant to your lordship.

Did you ever see me mad?—Your lordship asked me one day, whether I ever saw you mad? I said, I hoped not.

How long ago is that?—It may be nine or ten years.

Upon what occasion was it that I asked you that question; and what did I say further?—Your lordship said that you was a madman, but could not help it; and when it was off you, you was sorry for it.

Did I at any time lament the misfortune of my family, in respect of madness?—Your lordship told me that it was in your family.

At the time that you speak of, ten or eleven years ago, was I upon a visit at any place that might make it necessary for me to caution people against my own madness, that they might not be affronted at my behaviour?—Your lordship came then to live in the house where I live. I thought you spoke those words in a way to caution me, that I should not be surprized, in case you had such fits.

Did you hear Johnson the deceased say that he thought me mad?—I have.

When was it?—Some time ago.

Att. Gen. My lords, that is not evidence, to speak of what he heard Mr. Johnson say.

Earl Ferrers. I thought as the evidence of declarations of the deceased was admitted against me, it would have been admitted for me.

Att. Gen. My lords, though the declarations of the deceased, whilst a dying man, and after the stroke is given, are to be admitted as legal evidence,* yet a deposition of what he or any other person said before the accident, is clearly

* See Leach's Hawkins's Pleas of the Crown, b. 8, c. 46, s. 26. As to dying declarations, see in this Collection the case of Ranson and Tranter, vol. 16, p. 1.

hearsay evidence, upon the same foundation with all other hearsay evidence; and, with submission to your lordships, ought not to be admitted.

Att. Gen. The question is objected to by me; if my noble lord or his counsel insist upon it, the next step is to hear his counsel upon the objection; then we are to answer it, and they are to reply; and then it is for your lordships' judgment.

Earl Ferrers. I waive the question.

Gold Clarges, esq. sworn.

Examined by Earl Ferrers.

How long have you known me?—From the time of your birth.

Did you look upon me to be afflicted with any and what distemper?—Indeed I have looked upon your lordship as a lunatic for many years.

Has that distemper increased of late years, and how long?—I think it has.

How long?—For these two years or more, ever since the unhappy difference between my lady and my lord.

Have you seen me in violent fits of lunacy?—I cannot say I have; and the reason that I have seen few extravagant actions of his lordship was this, as I looked upon him to be disordered in his mind, I avoided being in company, or having any conversation with him as much as possible.

Have you particularly remarked that I am of a very jealous or suspicious nature?—That I have often.

Has it been remarkably so in me more than any other people?—Much more so.

Did you know any of my relations being so afflicted?—I remember Henry earl Ferrers was.

Had he a commission taken out against him?—He had.

Was he after that restored to his senses for any time, so as to return to parliament?—He was; he returned to parliament about a year and a half, I believe, or thereabouts.

What relation was he to me?—Uncle.

Was his return to parliament after he had been confined for lunacy?—Yes.

Had he, after that year and a half's being in parliament, any relapse?—Yes.

What became of him then?—Another commission was taken out, and he was confined to the time of his death.

His being in parliament a year and a half was after the first commission issued against him?—Yes.

Do you know of any other of the family being afflicted with that distemper?—I have heard, but do not know it.

By Lord Ravensworth.

Have you avoided being in company with lord Ferrers, or having any thing to do with him, for some time past?—I did, as much as I could.

Please to inform their lordships, whether you, at any time previous to that, lived in any degree of constant correspondence and intimacy with lord Ferrers?—Not much since he arrived to manhood.

Whether previous to his arrival at manhood, did you see a great deal of lord Ferrers?—A great deal, almost from his cradle; for I being a relation of his family, was constantly with his father and with him in the country, and most part of my time I spent with them.

Whether in that time, previous to his manhood, did you observe any thing in lord Ferrers from his behaviour, or any of his deportment, that was particularly remarkable?—I have.

You have known him during his infancy and before his manhood: did you observe any thing remarkable constitutionally (if I may call it so), and singular in his behaviour, during the time you knew him?—I have seen great oddities in him beyond what I have seen in any other man.

What age was this present unfortunate earl at the time of the death of his father?—I believe about twenty-two or twenty-three.

You say you was intimate with his father: had you at any time any conversation with the father of the present earl, relative to that which appeared to you to be singular in his son?—I cannot say I ever had.

Please to recollect as far as possible, any symptoms, be they of what kind soever, that made you think lord Ferrers so very singular in his nature?—I cannot specify any particular thing.

You say that you have several times seen that in my lord, which made you think my lord to be very singular?—Yes.

Do you recollect any thing?—It is a great while ago; I cannot particularly specify any thing.

By the Earl of Morton.

This witness has told your lordships, that he has known the noble lord at the bar from his cradle; I desire he may be asked, if he ever observed any defect of understanding in the noble lord at the bar?—Not to my knowledge; not whilst he was with me.

Upon no occasion when you saw him?—No, I cannot say I have.

Did you ever perceive the noble lord at the bar so far deprived of his senses, as not to know that robbery or murder was an offence against the law of God and man?—No, to be sure, my lords; I cannot say that I ever did.

Peter Williams sworn.

Examined by Earl Ferrers.

How long have you known me?—I have known your lordship these 16 or 17 years.

Do you know of any distemper that I am afflicted with?—Of late I have.

What distemper is that?—I have often observed your lordship, when I have been in

your company, to be spitting in the glass, and biting your lips, and stamping about the room, which induced me to believe your lordship was not in your right senses; and further to convince me it was so, there was a mare that your lordship sent to me on the 17th January 1749, and remained with me to the first of April following: one day, being Sunday, your lordship came to my house, about four or five in the afternoon, with two servants; your lordship armed with a tuck stuck upon a stick, the two servants with guns and other offensive weapons: upon entering into the yard, your lordship jumped off the horse, and bid one of your servants, you called Tom, knock the padlock off the stable door. He did so. My wife hearing a noise in the yard, she came to know the reason; and without any ceremony your lordship felled her to the ground with your fist: upon my seeing this, I went into the yard, and asked your lordship what you meant by this behaviour?—

Earl Ferrers. My lords, I desire to stop this witness; I only meant to ask him a general question.

Earl Ferrers. Have you observed, that that which you call a distemper in me has increased lately?—*Williams.* Yes, in my opinion I think it did: when your lordship came to me, you, without any further ceremony ——— [stopped by lord Ferrers.]

Lord Ravensworth. My lords, in justice to myself and to your lordships, I hope that the witness may go on, though the prisoner desires he may be stopped.

Lord Mansfield. If any of your lordships have any questions to ask the witness, you will do it: the prisoner will ask such as he thinks proper.

By *Earl Ferrers*, (continued).

Do you know of any design in the family to take out a commission of lunacy against me?—I cannot say I do.

Did you ever tell me that the family wanted to prove me mad?—I don't remember I did.

Did you yourself consider me as a madman?—I considered your lordship so at this juncture, and many times before.

What time did you mean by this juncture?—I mean the juncture of his lordship's coming on horseback with guns and other offensive weapons to take away the mare.

What time was that?—Sunday the 1st of April 1759; I mistook when I said 1749.

Was it the general reputation of the country that I was mad?—It was; I have heard several people say, Where is the mad lord that used to be at your house?

How long before this accident, in regard to Mr. Johnson, was it, that my lord came to your house armed in this manner?—I believe it was about a twelvemonth.

You said it was 1749 before?—I meant 1759.

Elizabeth Williams sworn.

Examined by *Earl Ferrers*.

How long have you known lord Ferrers?—A great many years.

Do you know of any distemper that lord Ferrers is afflicted with, and what is it?—He never appeared like any other gentleman.

Wherein did he differ from other people in general?—He always was a-musing and talking to himself. He spit in the looking-glass, tore the pictures, swearing he would break my bureau open, and would break all the glasses in my house, and would throttle me if I would not let him do it.

Had he any particular reason for this conduct?—None that I ever saw, but like a delirious man.

Did you keep a public-house?—Yes.

How near did you live to my lord?—My lord was at my house, and boarded with me.

Are you the wife of the last witness?—Yes.

Where did lord Ferrers live, at the time he behaved in that odd manner you speak of?—He had lodgings at Muswell-Hill.

How far did you live from him?—Two miles, to the best of my knowledge; he frequently used to come; I have made him coffee and sent up a dish, he always drank it out of the spout, which surprised me, that I thought him delirious.

How long ago is that?—I believe it is about twelve months ago, to the best of my knowledge.

Have you often seen lord Ferrers behave in that manner?—I never saw him behave like any other gentleman in my life.

Was the coffee hot when he drank it out of the spout?—Hot. He always went about the town like a madman, throttled me, and threw me down in the yard, one day when he took the horse away.

Did you think lord Ferrers a madman?—I know he was by all appearance.

Was he generally thought so by other people?—By all the whole town.

A Lord. When he threatened to break open your bureau, and to use you ill if you did not let him do it, was he in liquor?—*El. Williams.* Sober as I am now.

A Lord. Did you ever, upon any occasion when he committed these outrages, observe that he had been drinking?—*El. Williams.* Never; he never drank in a morning but a little tea or coffee, or some broth.

By *Earl Ferrers*.

Have you ever seen me commit any other acts of outrage besides those you have mentioned?—A great many more that are worse.

Name them.—Swearing, cursing and damning us; and wishing us all at hell, and himself at hell; and threatened to break the glasses; and talked to himself for hours together in bed.

Was he drunk or sober at those times?—Very rarely; but he seemed more to be disturbed in his mind.

Mention the circumstance about my coming for the mare.—My lord came for the mare, it was at church-time, and brought his servants, and a hammer in his hand, and guns, with a tuck in his hand, and broke the stable door open by violence of arms, and knocked me down with his arm, and run the tuck into my husband, fetched the blood, I was obliged to have a surgeon to attend him; and took the mare away by force of arms; and if any body came to hinder him, he said he would blow their brains out. He always had pistols nobody knew of. I never saw any gentleman that came to my house before, that had those things about them. I used to like to take them out of the bed-chamber, but was afraid to touch them, for fear of what he should do to me himself, by seeing his mind so disturbed.

Were those outrages committed when he was drunk or sober?—Sober for the general; and when he took the mare away, as sober as he is now.

Earl of *Hardwicke*. Inform their lordships, whether, before my lord came in this manner to get the mare out of the stable, he had before sent any servant to demand the mare, and had been refused?—*Williams*. Yes, he had, the boy was gone to church. We always kept it under lock, because there was more of his lordship's horses; and nobody was to go into the stable but his lordship's ostler.

The Hon. Mr. *Robert Shirley* sworn.

Examined by Earl *Ferrers*.

What relation are you to me?—Brother.

When was the last time that you and I had any conversation together?—Almost four years ago, between three and four years.

At that time in what light did you look upon me?—Rather turned in your head.

Was there any disorder in the family? and what was that?—Lord Henry *Ferrers* had madness.

Do you know lady *Barbara Shirley*?—I do not.

Do you know, of your own knowledge, any other besides earl Henry that was a lunatic?—No.

Have you any reason to believe that I have been afflicted with the like disorder?—I have.

Please to name your reasons.—My reasons are, that when I lived at *Burton-upon-Trent*, your lordship came to my house with concealed pistols in your pockets; pockets that were made on purpose for that use I apprehend; and that you likewise had a snick-or-snee knife, as it is called; and I apprehended myself and all the family in great danger at that time; and I was obliged to shut the doors against you; upon that I wrote to my brother, captain *Washington Shirley*, that I apprehended you to be a lunatic, and would join with him in taking out a commission against you.

Have you any other reason to believe me a lunatic than my carrying pistols?—Yes.

Name all your reasons.—Your lordship has frequently asked my opinion in relation to your

affairs, which I have told you to the best of my capacity; but you was always so unsteady and jealous of me and your friends, when we were endeavouring to serve you, that you would never venture to trust us in any thing in which we could be of service to you. I have likewise seen you in several strange postures, walking about with great confusion of mind, and was often very absent for a considerable time; when I have been asking you a question, I could hardly get an answer from you.

Was it usual for me to go armed?—I believe for four years past, or very near, you have hardly ever gone without concealed pistols about you.

Did I use to go armed formerly when you knew me?—I never knew that his lordship went armed, till he came to my house at *Burton-upon-Trent*, which was the last time I saw him.

Do you know any thing more?—I have further to say, that my father made a settlement in 1741, which you subjected yourself to, and acquiesced under for near twenty years; and then preferred a bill, in order to set that settlement aside; and, contrary to the opinion of your solicitor and counsel, you still would insist upon doing it, and obliged me to put in an answer for myself and my son.

Do you know of my being subject to fits of violent rage?—I cannot say but I have.

Did you ever see me so outrageous as not to know the difference between good and evil?—I really cannot particularize any thing, 'tis so long ago; but upon occasions I have seen you extremely passionate and warm; and so much so, that I believe you did not know what you did sometimes.

Do you think that these violent passions you speak of, arose from constitutional defects?—I really believe so.

If you have any thing more to offer, mention it yourself; I have no more questions to ask you.—I have nothing more to offer.

Lord *Cadogan*. How long was it before this accident, that you wrote to captain *Washington Shirley* about taking out a commission of lunacy against my lord?—*Shirley*. It is upwards of two years ago since I wrote to him.

Doctor *John Monroe* sworn.

Examined by Earl *Ferrers*.

Did you know the late earl *Ferrers*?—I did.

Did you know him in any and what distemper?—I attended him as a physician when he was under the unhappy influence of lunacy.

Have you heard all the evidence that has been given in this cause, on the charge against earl *Ferrers*, on both sides?—I have.

You are desired to mention what are the usual symptoms of lunacy.—Uncommon fury, not caused by liquor, but very frequently raised by it; many others there are which tend to violence against other persons or against themselves: I do not know a stronger, a more constant, or a more unerring symptom of lunacy than jealousy, or suspicion without

cause or grounds: there are many others too long to enumerate.

Has the carrying of arms been generally a circumstance of lunacy?—I have known it to be so, but not generally.

Please to inform their lordships whether any, and which of the circumstances which have been proved by the witnesses are symptoms of lunacy—

Att. Gen. My lords, if the noble lord means to insist upon that question, I object to it.

L. H. S. Lord Ferrers, do you desire your counsel to be heard upon that?—*Earl Ferrers.* I do.

Earl of Hardwicke. My lords, this question is too general, tending to ask the doctor's opinion upon the result of the evidence, and is very rightly objected to by the counsel for the crown: if the noble lord at the bar will divide the question, and ask whether this or that particular fact is a symptom of lunacy, I dare say they will not object to it.

Att. Gen. My lords, I shall not.

Earl Ferrers. My lords, I submit to have it go on in the way recommended by lord Hardwicke.

Earl Ferrers. Please to inform their lordships, whether quarrelling with friends without cause is a symptom of lunacy?—*Monroe.* Very frequently one.

Whether being naturally suspicious is a symptom of lunacy?—Yes, it is without cause a constant one.

Whether going armed where there is no danger is a symptom of lunacy?—That must be according to the circumstances.

Whether going generally armed where there is no apparent danger is a symptom of lunacy?—I should think it was.

Whether spitting in the looking-glass, clenching the fist, and making mouths, is a symptom of lunacy?—I have frequently seen such in lunatic persons.

Whether walking in the room, talking to himself, and making odd gestures, are symptoms of lunacy?—Very common ones.

Is quarrelling without cause a symptom of lunacy?—It is a very frequent attendant upon such unhappy complaints, and they are generally malicious.

Whether drinking coffee hot out of the spout of the pot is a symptom of lunacy?—I should think it one in the present case; it is not a general one.

Whether lunatics, when they are angered with or without cause, know what they are doing?—Sometimes, as well as I do now.

Is it common to have such a disorder in families in the blood?—Unfortunately too common.

Whether lunatics in their intervals are conscious of their being lunatics?—They are conscious of it; many, both in and out of their intervals; very few that are not.

Whether lunatics are apt to be seized with fits of rage on a sudden?—Very often.

Without any apparent cause?—Without any apparent cause.

Is there any other way of discovering whether a man is lunatic or not, but by the irregularity of his behaviour or his pulse?—By the irregularity of his behaviour; I know of no other method; the pulse discovers nothing in general.

A Lord. Please to inform their lordships, whether a person under an immediate visitation from God of madness, has not commonly a fever?—*Monroe.* Seldom or never, unless it may be at the first attack of the distemper, or in some very violent fit.

Roger Griffith sworn.

Examined by *Earl Ferrers.*

How long have you known me?—About twelve months.

Did you know me when I lived at Muswell Hill?—Yes, very well.

When was that?—It was about twelve months ago.

At that time was I generally reputed a madman, or a man in his senses?—Generally reputed a lunatic; some said, cracked in his head.

Earl Ferrers. My lords, I desire leave to call Mr. Goostrey, to ask him a question I forgot yesterday.

Mr. Goostrey sworn again.

Earl Ferrers. Have you observed me remarkably jealous and suspicious, and for what?

Goostrey. Very remarkably so all the while I had the honour to be concerned for him, and much more than any other person. In the course of time that I was concerned for his lordship, he has been at different times—

L. H. S. You are not to go into a detail.

Earl Ferrers. My lords, I have done with my evidence; but it is impossible for me to sum up, and what I have to offer to your lordships I have reduced into writing, and desire the Clerk may read it.

L. H. S. Is it of your lordship's own writing?

Earl Ferrers. My lords, the attorney got it copied.

Clerk reads:

My lords; It is my misfortune to be accused of a crime of the most horrid nature. My defence is, in general, that I am Not Guilty: the fact of Homicide is proved against me by witnesses, who, for aught I can say to the contrary, speak truly.

But if I know myself at this time, I can truly affirm, I was ever incapable of it, knowingly: if I have done and said what has been alleged, I must have been deprived of my senses.

I have been driven to the miserable necessity of proving my own want of understanding; and am told, the law will not allow me the assistance of counsel in this case, in which, of all others, I should think it most wanted.

The more I stand in need of assistance, the greater reason I have to hope for it from your lordships.

Witnesses have been called to prove my in-

sanity—to prove an unhappy disorder of mind, and which I am grieved to be under the necessity of exposing.

If they have not directly proved me so insane as not to know the difference between a moral and an immoral action, they have at least proved that I was liable to be driven and hurried into that unhappy condition upon very slight occasions.

Your lordships will consider whether my passion, rage, madness (or whatever it may be called) was the effect of a weak or distempered mind, or whether it arose from my own wickedness, or inattention to my duty.

If I could have controuled my rage, I am answerable for the consequences of it. But if I could not, and if it was the mere effect of a distempered brain, I am not answerable for the consequences.

My lords, I mention these things as hints—I need not, indeed I cannot, enlarge upon this subject: your lordships will consider all circumstances, and I am sure you will do me justice.

If it be but a matter of doubt, your lordships will run the hazard of doing me injustice, if you find me guilty.

My lords, If my insanity had been of my own seeking, as the sudden effect of drunkenness, I should be without excuse. But it is proved, by the witnesses for the crown, that I was not in liquor.

Mr. Kirkland, who drank and conversed with me, in order to betray me, (Mr. Attorney may commend his caution, but not his honesty) represents me as the most irrational of all madmen, at the time of my doing a deed which I reflect upon with the utmost abhorrence.

The Counsel for the Crown will put your lordships in mind of every circumstance against me; I must require of your lordships' justice, to recollect every circumstance on the other side.

My life is in your hands, and I have every thing to hope, as my conscience does not condemn me of the crime I stand accused of; for I had no preconceived malice; and was hurried into the perpetration of this fatal deed by the fury of a disordered imagination.

To think of this, my lords, is an affliction, which can be aggravated only by the necessity of making it my defence.

May God Almighty direct your judgments, and correct my own!

Earl Ferrers. My lords, I will mention one circumstance, which I did speak of yesterday; it was said, that I knew of a lease Johnson had, but it has never been proved; therefore, I imagine, that what I asserted, that I did not know of it, must be admitted as truth.

L. H. S. Earl Ferrers, Hath your lordship any thing further to offer?

Earl Ferrers. No.

Sol. Gen. My lords, it is now my duty, to lay before your lordships some observations
VOL. XIX.

upon the evidence offered both for the king and the prisoner, in reply to the defence made against the charge.

The fact of killing Mr. Johnson (the person named in the indictment,) is admitted as well as proved. The noble lord at the bar only denies the consequence; that the fact is murder. For, he tells your lordships, that, upon considering all the circumstances, he is satisfied, that he was incapable, knowingly, of doing what he did; and therefore insists upon an incapacity and insanity of mind in his defence.

My lords, it is certainly true, that the fact is not murder without malice; so natural justice says; so the law says, on which the indictment is framed: and malice must depend, in every case, upon the will and understanding of the party. If the defence is founded in truth; as the noble prisoner at the bar has seen the anxiety of your lordships to give it all due weight, through the whole course of his trial; so now, in the conclusion, he will receive from you, as his judges, the full benefit of that defence in his acquittal. If it is not founded in truth, I am persuaded, that no other consideration, respecting the rank and quality of the noble prisoner, and his relation to your lordships, will turn your attention from the evidence, nor make the least impression upon the firmness of your justice.

Before I observe upon the evidence, I will presume, with your lordships' indulgence, to state to you the legal notion of that defence, which has been urged and attempted in proof.

My lords, the law of England, which is wisely adapted to punish crimes with severity, for the protection of mankind, and for the honour of government, provides, at the same time, with the greatest equity, for the imbecility and imperfections of human nature. Therefore, my lord chief justice Hale (the weight and authority of whose writings are known to your lordships and to the whole kingdom) explains the law upon this subject, at large, with his usual clearness and accuracy. It is in his first volume of the History of the Pleas of the Crown, (fol. 30,) where he traces all the distinctions, which the nature of this question admits, as it concerns the trial of criminals for capital offences. I will collect the substance of what he says, and submit it to your lordships, as founded not only in law and practice, but in the most unerring rules of reason and justice.

My lords, he begins with observing, that "There is, 1st, a partial insanity of mind, and there is, 2dly, a total insanity. 1st, partial insanity is, either in respect to things, when they, who are competent as to some matters, are not so as to others; or else it is partial in respect to the degree. This is the condition of many, especially of melancholy persons. As to such, a partial insanity will not excuse them; for (he says) that persons who are felons of themselves, and other felons, are under a degree of it, when they offend." It is difficult to draw

the line, which divides perfect from partial insanity; and he refers it to the discretion of the judge and jury, who must duly weigh and consider the whole; "lest on one side, there be a kind of inhumanity towards the defects of human nature; or, on the other side, too much indulgence given to great crimes." Then, my lords, he speaks of the general rule, which he would choose to lay down, as the best measure of his own judgment; and it is, "that a person, who has ordinarily as great a share of understanding, as a child of fourteen years of age, is such a person, as may be guilty of treason or felony. 2dly, as to total insanity or alienation of mind, which is perfect madness, this (lord Hale agrees) will plainly excuse from the guilt of felony and treason."

But he distinguishes under the head of total insanity, between "that species, which is fixed and permanent; and lunacy, which comes by periods or fits."

Of this latter kind he expresses himself thus: "Crimes committed by lunatics, in such their distempers, are under the same judgment, as those committed by men partially insane. The person, who is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission. But such persons, as have their lucid intervals, have usually, in those intervals at least, a competent use of reason; and crimes committed by them are of the same nature, and punishable in the same manner, as if they had no such defect."

My lords, afterwards, he treats of that insanity which arises from drunkenness, and lays it down, that "by the law of England, such a person shall have no privilege from this voluntary contracted madness, but shall have the same judgment, as if he were in his right senses" (unless it be occasioned by medicine unskilfully administered, or poison accidentally taken.) Indeed, if by such practices an habitual, fixed frenzy be caused, it puts the man in the like condition, with respect to crimes, as if that frenzy were at first involuntarily contracted.

My lords, the result of the whole reasoning of this wise judge and great lawyer (so far as it is immediately relative to the present purpose) stands thus. If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it, when the offence was committed, it will acquit the prisoner: but if there be only a partial degree of insanity, mixed with a partial degree of reason; not a full and complete use of reason, but (as lord Hale carefully and emphatically expresses himself) a competent use of it, sufficient to have restrained those passions, which produced the crime;* if there be thought and

* See also upon this subject the case of *Edward Arnold*, vol. 16, p. 693, and particularly lord Erskine's most sagacious and profound disquisition into the subject in the case of *Hadfield*, A. D. 1800, in this Collection, therein referred to.

design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the fact of the offence proved, the judgment of the law must take place.

My lords, the question therefore must be asked; is the noble prisoner at the bar to be acquitted from the guilt of murder, on account of insanity? It is not pretended to be a constant general insanity. Was he under the power of it, at the time of the offence committed? Could he, did he, at that time, distinguish between good and evil?

The same evidence, which establishes the fact, proves, at the same time, the capacity and intention of the noble prisoner. Did he weigh the motives? Did he proceed with deliberation? Did he know the consequences?

My lords, he weighed the motives. The two witnesses, who speak most strongly and materially to this part of the cause, as well as to every other, are, Sarah Johnson the daughter of the deceased, and Mr. Kirkland the surgeon.

The circumstances proved by their evidence shew, that the malice conceived, on this unfortunate occasion, was steady, cool, and premeditated. Mr. Johnson had acted, for many years, as steward to collect the rents of such lands as lord Ferrers had in possession; and he was himself tenant of one of the farms. At the time of passing the act of parliament, two years ago, relative to the noble lord's estate and affairs, Mr. Johnson stood so well in his opinion and favour as to be recommended by his lordship to be receiver, for the various trusts and purposes in the act. Something passed on that occasion, which disgusted the noble lord, and made him jealous, that Johnson had taken part against him. From that moment, he entertained resentment and hatred in his heart. More lately still, he took offence against Johnson, as to a contract for the sale of coals upon part of the estate, in which his lordship thought (as he seems to be knowing and attentive in his private business) that there had been some collusion, to impose upon him.

My lords, the first instance of his resentment appeared to you from the evidence of Sarah Johnson, the daughter: that, in the November preceding the killing of her father, lord Ferrers, accompanied by Mr. Clifford, delivered a paper to Johnson, the body of which was voluntarily admitted by my lord to be of his own hand-writing. It was a notice to Johnson to quit the farm which he rented, and Clifford was the intended successor. This step proceeded from resentment, and it was so explained afterwards by himself to Kirkland, when he said, that he had long wanted to drive Johnson out of the farm, and make him return to Cheshire, from whence he came. My lords, it is very plain, that the noble lord took his resolution—

Earl Ferrers. Mr. Solicitor, you mistake; the notice was given a twelvemonth ago last November; it was not given in the last November.

Sol. Gen. My lords, I am extremely obliged

to the noble lord at the bar, for setting me right in the least circumstance; and hope that he will always do it, whenever I mistake. I mean to be as exact as I am able. My lords, the view with which I mention the notice to turn Johnson out of the farm, is this: lord Ferrers, in order to shew the improbability of his conceiving malice against Johnson, has relied upon it, that he was always known to entertain the greatest regard and friendship for that unfortunate man. My lords, I admit the friendship and kindness down to the time of passing the act of parliament: and I said, that his lordship had recommended Johnson to be receiver. But soon after the passing of that act, he certainly changed his opinion. It is sufficient, therefore, that the notice to quit the farm (which was the first strong mark of his resentment proved in evidence) was given subsequent to the proceedings of the legislature. Whether the notice was given last November, or in the year preceding, the observation, as applied to this purpose, remains in its full force.

My lords, I was saying, that, it was plain, his lordship gradually wrought himself up to a resolution of destroying Mr. Johnson. The daughter, Sarah Johnson, proves, that his lordship declared, in her hearing, when she went to Stanton, in the evening of the 18th of January, to see her dying father, that he designed it. He declared to Kirkland, that since the year 1753, Johnson had been a villain; that he had done things not right; that his lordship fully intended to shoot Johnson dead, as a villain who deserved death; and that it was premeditated. He complained farther to Kirkland, that Johnson had colluded with his enemies to obtain the act of parliament; but added, that the chief reason, which had just then provoked him, was, the contract with Mr. Curzon, in relation to the profits of his coals. He upbraided Johnson that evening, upon his death-bed, in like terms of reproach. And though the witness said, that his lordship might then be raised with liquor in some degree, yet he did not lose his understanding; and the manner in which he spoke, was temperate.

My lords, can there be a clearer proof, that the noble prisoner weighed the motives of this action? Neither these, nor any other motives, will justify it; but the evidence shews, that his conduct was not absurd, but rational and consistent. The same crime has been committed in all ages, upon grounds as slight, by men who never thought of setting up the defence of lunacy. Motives like those suggested, might easily and naturally work upon one, the course of whose life (as explained by the witnesses) betrays so many marks of ungoverned passion; though the same motives would not have inflamed tempers, less susceptible of violence than his own.

My lords, he proceeded with equal deliberation to commit the fact. The attention, thought, and care, with which he acted, are remarkable.

It appears, that he had appointed a particular day for Mr. Johnson to wait upon him.

Friday the 18th of January was fixed by the order of lord Ferrers; and the appointment was made some days beforehand. Elizabeth Burgeland has told your lordships, that Mr. Johnson was expected at Stanton in the forenoon of that very day. Sarah Johnson tells your lordships, that she heard her father declare, on the Sunday preceding, that he was to attend lord Ferrers on Friday. Kirkland proves, that the noble prisoner himself said to the witness at Stanton, that upon Johnson's coming into the room, they had a conversation together, after the door was locked, by way of warm and violent expostulation on the part of my lord; and that he tendered a paper to be signed by Johnson, acknowledging his villainy. Elizabeth Saxon overheard part of what was said. That paper must have been the result of thought and consideration, probably prepared before Johnson came. Your lordships observed with some emotion, the account given of the impatience with which confessions of villainy were expected, and almost extorted afterwards, from the dying man.

My lords, when the wound was given, the noble lord at the bar told Mr. Kirkland, that he was cool at the time he did it: that he took aim; but not having killed Johnson, he intended to shoot again: that, however, nature got the better of resolution, when he observed the pain under which Johnson languished. It is proved, that in the evening, whilst Kirkland and lord Ferrers sat together in the still-room, his lordship declared, that he did not intend to shoot Johnson dead, but only to make him smart in the hip and side. This was taken notice of by the noble prisoner, as a variation in Kirkland's account of the intention with which Johnson was shot, inconsistent with what the witness had said before. But the variation probably arose from my lord's own manner of discoursing during that evening. The observation, therefore, cannot affect the credit of the witness; and the intention declared, of killing or wounding, will not vary the construction of law upon the fact committed. Your lordships heard too, what lord Ferrers said in the hearing of Sarah Johnson; that he had tried the pistol through a deal board, and knew it to be good. He said the same thing to Kirkland, expressing some surprize (as the witness understood it), that the ball did not go through Johnson.

All these circumstances shew the deliberation with which the noble prisoner proceeded.

My lords, let me now ask, when the motives had been weighed, and the fact deliberately committed, Did he know the consequences?

His first thought was, instantly to send for the assistance of a surgeon, and to enquire, whether Johnson would live or die. The daughter came early in the afternoon. He said to her, that he was afraid of being prosecuted; adding, that if she would not prosecute him, he would maintain her, and her family. Does not this circumstance prove, that he readily understood the consequences? that he knew himself bound to answer to the law for his offence?

When Kirkland came, his lordship tempted him with fair promises, to prevent the neighbours from seizing him. He told Kirkland, that a large bill was owing to him; and my lord said, that he would pay part of it then, and the rest in a reasonable time. In talking over the circumstances (which he recollected clearly and calmly), he added, that he could justify himself, though, upon his surrender to your lordships, he was doubtful whether his justification would be approved. From what consciousness in his own mind did that doubt arise? He expressed his fears during the whole evening, that he should be seized. He was quieted in this respect, only by the conversation of Kirkland, and the manner of his behaviour. Upon Kirkland's coming to Stanton, my lord enquired much into the probability of Johnson's dying. In the first visit which my lord and the surgeon made to Johnson that evening, his lordship gave material instructions; asked sensible and pertinent questions, particularly as to the place of the wound, and the effect of the ball lying in the abdomen. The witness thought that Mr. Johnson would die, from the very moment of his first visit; but he told your lordships, that he judged it right to deceive lord Ferrers. The noble prisoner was pleased to say, that the caution of the witness might be commended, but not his honesty. My lords, the caution proceeded from honesty: he was unwilling that his lordship should escape. This was due to civil government, to justice, and humanity. To prevent lord Ferrers from taking alarm, and attempting to escape, Kirkland flattered him with hopes of Johnson's recovery, during the whole evening; and his lordship was told, that if the people should endeavour to seize him, the witness would persuade them, that there was no occasion for it. About eleven o'clock at night, Mr. Kirkland went up again to Johnson: he still continued to amuse lord Ferrers with hopes of Johnson's recovery; and, at taking leave, when Kirkland gave him assurances on that subject, my lord said, then he might go to bed in safety; and retired to his own chamber. What do all these circumstances speak, but a correct knowledge of the fact, and apprehension of all its consequences, either as they concerned Johnson, or himself? When he was seized, did he shew marks of insanity? He resisted, for some time; but appeared, in every respect, in the judgment of the witnesses, to be of sound mind. Afterwards, when he was led into Kinsey's house, his behaviour was decent; and he made answer to a worthy clergyman in the commission of the peace, who visited and admonished him, that he knew his duty as well as any justice of the peace.

This is the substance of the evidence, which has been offered for the king; and it not only proves the fact, but proves it to be murder.

My lords, what is the evidence produced by the noble lord to weaken the force of it? In the first place, there is none which applies to

the time of committing the fact. His sobriety is admitted, and drunkenness would not excuse; and even supposing it had appeared to your lordships, that the noble prisoner was sometimes, by fits and starts, under a degree of lunacy or temporary insanity; yet if he was of sound mind at that hour, he is a person within all the rules and distinctions which lord Hale explains. But, my lords, in the next place, I must observe, that no general evidence has been offered, which proves his lunacy or insanity at any time; for his own witnesses fail in their endeavours to shew it. This appears from their manner of expressing themselves in their original examination; but still more in the answers, which they gave to the questions asked upon the cross-examination.

The two first witnesses called were, Mr. Bennetfold, and Mr. Goostrey. They describe the insanity of the noble lord at the bar to consist of flights. They say, that he would swear; would talk to himself; that he would use strange gestures; that he had friends, and suspected them; that he was of a positive temper, and difficult to be dissuaded from any opinion or resolution which he had once formed. But Mr. Bennetfold, upon the cross-examination, admitted, that he never knew of any act of wildness done by his lordship, nor of any physician sent for, to take care of him in that respect. He said, upon the whole, that he thought lord Ferrers had better parts and understanding than ordinary men. Mr. Goostrey told your lordships, upon the cross-examination, that he had done business several years for lord Ferrers; that he had advised and prepared deeds for his lordship to execute; that he had assisted in suffering a recovery to bar the entail of the estate; and admitted his sense and capacity in general, but inferred insanity from positiveness of temper and opinion. However, in answer to a question proposed by one of your lordships, he said, that he thought lord Ferrers capable of distinguishing between moral and immoral actions.

Several other witnesses have been called to-day. I will first mention Mr. Charges. He describes similar circumstances with Mr. Bennetfold and Mr. Goostrey, from which he collects the insanity of the noble prisoner. He said, that he had observed great oddities in my lord, during his minority, but no defect of understanding. He could not specify particular instances; and added, that his lordship was jealous and suspicious: but the witness never saw him in such a situation, as not to be capable of distinguishing between good and evil, and not to know, that murder was a great crime.

My lords, this account of the state of the noble prisoner's mind is consistent, not only with a considerable degree of understanding, but with the highest degree of it. If the law were to receive such excuses, it would put a sword into the hand of every savage and licentious man, to disturb private life, and public order.

My lords, there was another witness of a different and a much lower sort than those whom I have named; I mean Elizabeth Williams. She was the only person who said, that the noble earl was always mad. When she came to explain the instances from which she drew that conclusion, the principal one insisted upon was ridiculous; the anger which he shewed against a servant, who had neglected to take care of a favourite mare, intrusted to his management. This was a vivacity so natural, that if it be deemed a symptom of madness, few are free from it; and I doubt the inference will go far in cases of common life.

The two next witnesses, whom I will mention, are the brothers of the noble earl. My lords, I own I felt for them. It gave me pain to see them, in a cause which touches a brother's life, brought to the bar as witnesses, to mitigate the consequences of one misfortune, by endeavouring to prove another of the most tender and affecting nature; and if they had spoke stronger to matters of conjecture, opinion, and belief, for my part, I could easily have excused them.

My lords, they both spoke with caution, and as men of honour; but one of them was the only witness of weight, who expressed a belief, that, at particular times, the noble lord might not be able to distinguish between moral good and evil. I did not observe, that he spoke of any instance within his own recollection. The circumstances, from which these gentlemen inferred insanity, were for the most part of the same kind with those which came from the mouths of the other witnesses. They did not carry the marks of it in the least degree beyond that evidence. And Mr. Walter Shirley admitted, that the noble lord at the bar had long intervals of reason. I endeavour to repeat the expression, and I think it was so. Mr. Robert Shirley told your lordships, that he had not seen the noble prisoner for four years past; that the last time of seeing lord Ferrers was, at Burton upon Trent. He mentioned the carrying of pistols, and a large case-knife, at that time. I understood him to say, that the noble lord generally did so; the witness had seen it only once; but from that circumstance he argued insanity. Your lordships will judge, whether this practice might not be owing to jealousy and violence of temper, as well as to lunacy and madness. The witness added, that he had written formerly to his brother captain Washington Shirley, about taking out a commission of lunnacy against lord Ferrers; but I could not find, that any measures were taken in consequence of that opinion given by the witness, nor did he himself ever take any steps towards it, nor any branch of his family.

The last witness called, on behalf of the noble prisoner, was Doctor Monro. He was brought here to describe, what symptoms he considers as marks of lunacy or insanity. He said, that there were many; and on being asked particularly, as to the several symptoms suggested in this cause, Doctor Monro was led

to speak principally of three marks of lunacy. The first was common fury, not caused by liquor, but raised by it. Surely this circumstance will not infer insanity. The next was, jealousy and suspicion, with causeless quarrelling. Do not many, who are not lunatics, suspect or quarrel without cause, and become dangerous to their neighbours? The third was, carrying arms; which (he said) though less usual, might be a mark of lunacy. And it is equally true, that such behaviour may prove, in many cases, a bad heart and a vicious mind, as well as lunacy. My lords, the general observation, which occurs upon Doctor Monro's evidence, is this; that he did not describe any of these things, as absolute marks of lunacy, so as to denote every man a lunatic, who was subject to them. Indeed he could not have said it, consistently with common sense and experience.

This was the import of the evidence for the noble prisoner. No witnesses were offered, on the part of the king, in reply to that evidence. And, my lords, the reason why they were not offered was, because the counsel who attend your lordships for the king, chuse to submit it to your opinions, whether the evidence produced for the prisoner does not tend to strengthen, rather than weaken, that proof of capacity, which arises out of all the circumstances urged, in support of the charge? From those circumstances, I have already shewn, that the noble prisoner was conscious of what he did, at the time of the offence committed; that he weighed the motives; that he acted with deliberation; that he knew the consequences.

I will only take notice of one thing more. Your lordships have attended with great patience, and the most impartial regard to justice, to all the evidence, and every observation, which has been laid before you. You have seen the noble prisoner, for two days at your bar (though labouring under the weight of this charge), cross-examining the witnesses for the king, and examining his own in a manner so pertinent, as cannot be imputed merely to the hints and advice of those agents and counsel, with which you have indulged him. I am persuaded, from the appearance and conduct of the noble prisoner, that if the fact itself would have admitted doubts, and probable arguments, to repel the force of any one material circumstance, your lordships would have heard him press those arguments, with sense and sagacity.

But, my lords, the truth is, that the fact tried this day stands without alleviation. There is not a colour for the defence, unless it arises from the enormity of the crime, aggravated by the manner of committing it; an old, faithful servant of himself and his family, murdered in cold blood, whilst he was performing, by express orders, an act of dutiful attendance upon his master; murdered in the most deliberate and wilful manner, destructive of all confidence in human society. My lords, in some sense, every crime proceeds from in-

sanity. All cruelty, all brutality, all revenge, all injustice, is insanity. There were philosophers, in ancient times, who held this opinion, as a strict maxim of their sect; and, my lords, the opinion is right in philosophy, but dangerous in judicature. It may have a useful and a noble influence, to regulate the conduct of men; to controul their impotent passions; to teach them, that virtue is the perfection of reason, as reason itself is the perfection of human nature; but not to extenuate crimes, nor to excuse those punishments, which the law adjudges to be their due.

My lords, the necessity of his majesty's justice; the necessity of public example, called for this prosecution; and the effect of the whole evidence is submitted to the weight and wisdom of your judgment.

Then the Lord High Steward returned back to his chair.

Lord High Steward. Lieutenant of the Tower, take my lord Ferrers from the bar. (Which was done accordingly.)

Lord Privy Seal. My lords, I move your lordships to adjourn to the Chamber of Parliament.—*Lords.* Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

The Lords, and others, returned to the Chamber of Parliament, in the same order they came down: and, after some time, the House was adjourned again into Westminster-hall; and the Peers being there seated, and the Lord High Steward in his chair, and the House resumed, the Serjeant at Arms made proclamation for silence as usual.

L. H. S. Your lordships have heard the evidence, and every thing that has been alleged on both sides; and the solemnity of your proceedings requires, that your lordships' opinions on the question, of guilty or not guilty, should be delivered severally, in the absence of the prisoner, beginning with the junior baron; and that the prisoner should afterwards be acquainted with the result of those opinions by me. Is it your lordships' pleasure to proceed now to give your opinions on the question of Guilty, or Not Guilty?—*Lords.* Ay, ay.

Then the Lord High Steward stood up uncovered; and, beginning with the youngest peer, said,

George lord Lyttelton; What says your lordship? Is Lawrence earl Ferrers Guilty of the felony and murder whereof he stands indicted, or Not Guilty?

Whereupon George lord Lyttelton standing up in his place, uncovered, and laying his right hand upon his breast, answered,

Guilty, upon my honour.

In the like manner, the several lords after-mentioned, being all that were present, answered as followeth:

Lords.—Harwich, Mansfield, Walpole, Hyde, Vere, Ponsonby, Archer, Feversham,

Ravensworth, Anson, Fortescue, Bruce, Sandys, Edgcumbe, Chedworth, Montford, Talbot, Mouson, King, Ducie, Cadogan, Onslow, Bathurst, Masham, Middleton, Boyle, Delamere, Berkeley of Stratton, Ward, Byron, Clifton, St. John of Bletsoe, Willoughby of Parham, Wentworth, Willoughby of Broke, Delawarr, Audley, Abergavenny;—Guilty upon my honour.

Viscounts.—Folkestone, Falmouth, Bolingbroke and St. John, Weymouth, Say and Sele;—Guilty upon my honour.

Earls.—Ilchester, Fauconberg, Hardwicke, Cornwallis, Guilford, Hertford, Harcourt, Egremont, Northumberland, Powis, Buckinghamshire, Gower, Brooke, Portsmouth, Harrington, Effingham, Ashburnham, Waldegrave, Pomfret, Macclesfield, Stanhope, Cowper, Sussex, Halifax, Aylesford, Tankerville, Dartmouth, Strafford, Oxford and Mortimer, Hyndford, Marchmont, Aberdeen, Breadalbane, Loudoun, Moray, Morton, Cholmondeley, Coventry, Albemarle, Rochford, Scarborough, Plymouth, Holderness, Litchfield, Shaftesbury, Cardigan, Essex, Sandwich, Thanet, Winchelsea and Nottingham, Peterborough and Monmouth, Westmorland, Northampton, Lincoln, Pembroke and Montgomery;—Guilty, upon my honour.

Marquis of Rockingham. Guilty, upon my honour.

Dukes.—Bridgewater, Chandos, Manchester, Newcastle, Kingston, Ancaster and Kesteven, (great chamberlain), Argyll, Marlborough, Leeds, Bolton, Grafton, Richmond, Cleveland and Southampton, Devonshire (lord chamberlain), Rutland, (lord steward) Guilty, upon my honour.

Earl Temple, (lord privy seal,) Guilty, upon my honour.

Then the Lord High Steward, standing uncovered at the chair, laying his hand upon his breast, said;

L. H. S. My lords, I am of opinion, that Lawrence earl Ferrers is guilty of the felony and murder whereof he stands indicted, upon my honour.

L. H. S. Your lordships have unanimously found, that Lawrence earl Ferrers is Guilty of the felony and murder whereof he stands indicted: is it your lordships' pleasure that he should be called in and acquainted therewith?

Lords. Ay, ay.

Proclamation was then made for the lieutenant of the Tower to bring the prisoner to the bar, which was done in the same order as before; and afterwards proclamation was made for silence, as usual.

L. H. S. Lawrence earl Ferrers, the Lords have considered of the charge of felony and murder which has been brought against you; they have likewise considered the evidence, and every thing which your lordship has alleged in your defence; and, upon the whole matter, their lordships have unanimously found, that

you are Guilty of the felony and murder whereof you stand indicted.

L. H. S. Lieutenant of the Tower, take the prisoner from the bar.

Ld. Pr. Seal. My lords, I move your lordships to adjourn to the Chamber of Parliament.

L. H. S. Is it your lordships' pleasure to adjourn to the Chamber of Parliament?—

Lords. Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

Then the Lords returned, in the order before mentioned, to the Chamber of Parliament; and, the House being there resumed, resolved to proceed further, in order to the giving Judgment against the said earl Ferrers, to-morrow; and that the said earl be brought to the bar of the House in Westminster-Hall, for that purpose, to-morrow, at eleven of the clock in the forenoon.

THE THIRD DAY.

Friday, April 18th.

The Lords, and others, came from the Chamber of Parliament into Westminster-Hall, in the same order as on Wednesday last; and the peers were there seated, and the Lord High Steward in his chair.

L. H. S. My lords, the House is resumed. Is it your lordships' pleasure that the Judges may be covered?—*Lords.* Ay, ay.

Then the Serjeant at Arms made proclamation for silence, as usual; and afterwards the following proclamation.

Serj. at Arms. Oyez, Oyez, Oyez! Lieutenant of the Tower, bring forth your prisoner, Lawrence earl Ferrers, to the bar, pursuant to the order of the House of Lords.

The deputy governor of the Tower brought the prisoner to the bar in the like form as before; and then he kneeled down.

L. H. S. Your lordship may rise.

The Serjeant at Arms made proclamation for silence as usual.

L. H. S. Lawrence earl Ferrers, when you was last at this bar, I acquainted your lordship, That, upon your trial, my lords your peers had unanimously found you Guilty of the felony and murder whereof you stand indicted: what has your lordship to say, why judgment of death should not pass upon you according to law?

Earl Ferrers. I desire that the Clerk may repeat what I say.—[Which he did].

My lords, I must acknowledge myself infinitely obliged for the fair and candid Trial your lordships have indulged me with.

I am extremely sorry that I have troubled your lordships with a defence that I was always much averse to, and has given me the greatest uneasiness; but was prevailed on by my family to attempt it, as it was what they themselves

were persuaded of the truth of; and had proposed to prove me under the unhappy circumstances that have been ineffectually represented to your lordships.

This defence has put me off from what I proposed, and what perhaps might have taken off the malignity of the accusation; but, as there has been no proof made to your lordships, can only be deemed at this time my own assertion: but that I must leave to your lordships.

My lords, I have been informed of this intention of the family before; and your lordships, I hope, will be so good to consider, the agony of mind a man must be under, when his liberty and property are both attacked: my lords, under these unhappy circumstances, though the plea I have attempted was not sufficient to acquit me to your lordships, according to the laws of this country; yet I hope your lordships will think, that malice, represented by the counsel for the crown, could not subsist; as I was so unhappy as to have no person present at the time of the fatal accident, it was impossible for me to shew your lordships, that I was not at that instant possessed of my reason.

As the circumstances of my case are fresh in your lordships' memories, I hope your lordships will, in compassion to my infirmities, be kind enough to recommend me to his majesty's clemency.

My lords, as I am uncertain whether my unhappy case is within the late act of parliament, if your lordships should be of opinion that it is, I humbly hope the power of respiting the execution will be extended in my favour, that I may have an opportunity of preparing myself for the great event, and that my friends may be permitted to have access to me.

If any thing I have offered should be thought improper, I hope your lordships will impute it to the great distress I am under at this juncture.

L. H. S. Has your lordship any thing else to offer?—*Earl Ferrers.* No.

L. H. S. Make proclamation for silence whilst judgment is giving.

Serjeant at Arms. Oyez, Oyez, Oyez! Our sovereign lord the king doth strictly charge and command all manner of persons to keep silence, whilst judgment is giving, upon pain of imprisonment.

Lord High Steward. Lawrence earl Ferrers; His majesty, from his royal and equal regard to justice, and his steady attention to our constitution, (which hath endeared him in a wonderful manner to the universal duty and affection of his subjects) hath commanded this inquiry to be made, upon the blood of a very ordinary subject, against your lordship, a peer of this realm: your lordship hath been arraigned; hath pleaded, and put yourself on your peers; and they (whose judicature is founded and subsists in wisdom, honour, and justice) have unanimously found your lordship guilty of the felony and murder charged in the indictment.

It is usual, my lord, for courts of justice, before they pronounce the dreadful sentence ordained by the law, to open to the prisoner the nature of the crime of which he is convicted; not in order to aggravate or afflict, but to awaken the mind to a due attention to, and consideration of, the unhappy situation into which he hath brought himself.

My lord, the crime of which your lordship is found guilty, murder, is incapable of aggravation; and it is impossible, but that, during your lordship's long confinement, you must have reflected upon it, represented to your mind in its deepest shades, and with all its train of diabolical and detestable consequences.

As your lordship hath received no benefit, so you can derive no consolation from that refuge you seemed almost ashamed to take, under a pretended insanity; since it hath appeared to us all, from your cross-examination of the king's witnesses, that you recollected the minutest circumstances of facts and conversations, to which you and the witnesses only could be privy, with the exactness of a memory more than ordinarily sound; it is therefore as unnecessary as it would be painful to me, to dwell longer on a subject so black and dreadful.

It is with much more satisfaction, that I can remind your lordship, that though, from the present tribunal, before which you now stand, you can receive nothing but strict and equal justice; yet you are soon to appear before an Almighty Judge, whose unfathomable wisdom is able, by means incomprehensible to our narrow capacities, to reconcile justice with mercy; but your lordship's education must have informed you, and you are now to remember, such beneficence is only to be obtained by deep contrition, sound, unfeigned, and substantial repentance.

Confined strictly, as your lordship must be, for the very short remainder of your life, according to the provision of the late act; yet, from the wisdom of the legislature, which, to prevent as much as possible this heinous and horrid offence of murder, hath added infamy to death; you will be still, if you please, intitled to converse and communicate with the ablest divines of the Protestant church, to whose pious care and consolation, in fervent prayer and devotion, I most cordially recommend your lordship.

Nothing remains for me, but to pronounce the dreadful sentence of the law; and the judgment of the law is, and this high court doth award,

'That you, Lawrence earl Ferrers, return to the prison of the Tower, from whence you came; from thence you must be led to the place of execution, on Monday next, being the 21st day of this instant April; and when you come there, you must be hanged by the neck till you are dead, and your body must be dissected and anatomized.

'And God Almighty be merciful to your soul!'

L. H. S. Lieutenant of the Tower, Take the prisoner from the bar.

Which being done, proclamation was made for silence, as usual.

L. H. S. My lords, this Trial being at an end, nothing remains to be done here, but to determine the Commission.—*Lords.* Ay, ay.

L. H. S. Let proclamation be made for dissolving the Commission of High Steward.

Serjeant at Arms. Oyez, Oyez, Oyez! Our sovereign lord the king does strictly charge and command all manner of persons here present, and that have here attended, to depart hence in the peace of God, and of our said sovereign lord the king; for his grace my Lord High Steward of Great Britain intends now to dissolve his Commission.

Then the white staff being delivered to the Lord High Steward, by the gentleman usher of the Black Rod, upon his knee, his grace stood up uncovered; and holding the staff in both his hands, broke it in two, and declared the Commission to be dissolved; and then leaving the chair, came down to the woolpack, and said, Is it your lordships' pleasure to adjourn to the Chamber of Parliament?—*Lords.* Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

Then the Lords, and others, returned in the same order they came down.

And the prisoner was carried back to the Tower of London.

The following is FOSTER'S REPORT of LORD FERRERS'S CASE, which having been inserted in the preceding Edition is here retained.

THE House of Peers unanimously found earl Ferrers guilty of the felony and murder whereof he stood indicted; and the Earl being brought to the bar, the High Steward acquainted him therewith; and the House immediately adjourned to the Chamber of Parliament. And having put the following Questions to the Judges, adjourned to the next day:

First. 'Whether a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same, according to the provisions of the act of parliament of the 25th year of his majesty's reign, intituled, An Act for better preventing the horrid crime of murder?'

Second. 'Supposing a peer so indicted and convicted ought by law to receive such judgment as aforesaid, and the day appointed by

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 44, § 18, and c. 51, § 11.

'the judgment for execution should lapse
'before such execution done, whether a new
'time may be appointed for the execution, and
'by whom?'

On the 18th, the House then sitting in the Chamber of parliament, the Lord Chief Baron, in the absence of the Chief Justice of the Common Pleas, delivered in writing the Opinion of the Judges, which they had agreed on, and reduced into form that morning.

His lordship added many weighty reasons in support of the opinion, which he urged with great strength and propriety, and delivered with a becoming dignity.

To the First Question.

'We are all of opinion, that a peer indicted
'of felony and murder, and tried and convicted
'thereof before the lords in parliament, ought
'to receive judgment for the same according
'to the provisions of the act of parliament
'of the 25th year of his majesty's reign, in-
'titled, An Act for better preventing the hor-
'rid crime of murder.'

To the Second Question.

'Supposing the day appointed by the judg-
'ment for execution should lapse before such
'execution done (which however the law will
'not presume); we are all of opinion that a
'new time may be appointed for the execution,
'either by the High Court of Parliament be-
'fore which such peer should be attainted, or
'by the Court of King's-bench, the parliament
'not then sitting; the record of the attainder
'being properly removed into that court.'

The reasons the Judges went upon, in their Answer to the first Question, are, I presume, too obvious to be mentioned at large. And the House resolved and ordered, that judgment shall be pronounced in Westminster-hall pursuant to the late act.

The reasons upon which the Judges founded their answer to the second, relating to the further proceedings of the House after the High Steward's Commission dissolved, which is usually done upon pronouncing judgment, may possibly require some further discussion. I will therefore, before I conclude, mention those which weighed with me, and I believe with many others of the judges.

The House, before they adjourned to the Court-room in Westminster-hall for pronouncing judgment, resolved and ordered, that execution be respited to the 5th day of May following. Upon which day execution was done at Tyburn pursuant to the judgment, and the body delivered at Surgeons-hall to be dissected and anatomized.

The Writ to the Sheriffs for Execution, see in the Account of his Execution.

REASONS, &c.

Every proceeding in the House of Peers, acting in its judicial capacity, whether upon
VOL. XIX.

writ of error, impeachment, or indictment removed thither by Certiorari, is in judgment of law a proceeding before the king in parliament. And therefore the House, in all those cases, may not improperly be stiled, The Court of our Lord the King in Parliament.

This Court is founded upon immemorial usage, upon the law and custom of parliament, and is part of the original system of our constitution.*

* Mr. Barrington, in his observations on Magna Charta, having noticed the agreement of the 29th chapter with a Norman charter nearly contemporaneous, proceeds, "I should therefore conceive that the trial *per pares*, in the 29th chapter of Magna Charta, was meant chiefly to relate to the trial of the barons by their peers, though it hath fortunately for the liberties of this country been expounded to extend to the trial of all persons by a jury. It seems very extraordinary, that we have not, after this 29th article of Magna Charta, more frequent accounts in the early part of the English history of peers being tried, either by their peers or a jury. The earl of Gloucester was executed in the time of Edward the 2d without any such regular trial; [Brady, vol. 3, p. 160.] as were also the lords Hastings and Ryvers in the reign of Richard the 3d. [Collier's Eccle. Hist. vol. 1, p. 687]." And in a note he adds, "Notwithstanding this 29th article of Magna Charta was chiefly intended to prevent the undue influence of the crown in the trial of a peer, it turned out afterwards to be the great cause of their oppression, as before the statute of William the 3d, which directs *all the lords* to be summoned, a peer of England was the only subject of this country who had not a fair and indifferent trial; it seems to be a very extraordinary construction of this statute, which is rather insinuated, than contended for by Mr. Justice Foster, in his Treatise on Treason, that the spiritual lords need not be summoned under the words *all*, who have a right *to sit, and vote* in parliament, which I apprehend to have meant only the making it unnecessary to summon peers who were minors, or professed Papists." In observing upon the "*Statutum de finibus levatis*," 27 Ed. 1, Mr. Barrington accounts for the canon prohibiting ecclesiastics to determine in cases of blood by a conjecture, "That the office of a criminal judge was anciently considered as partaking of the nature of an executioner, and therefore deemed an office of blood, which was supposed rather to detract from that reverence and good will which the canons of the church endeavoured to procure and establish to the body of clergy."

The 15th Edw. 3, stat. 1, chap. 2, reciting that before that time the peers of the land have been arrested and imprisoned, &c. and some put to death without judgment of their peers, enacts, that no peer of the land shall be brought in judgment to lose his temporalities, &c. nor to be arrested, &c. but by

It is open for all the purposes of judicature during the continuance of the parliament: it openeth at the beginning, and shutteth at the end of every session; just as the court of King's-bench, which is likewise in judgment of law held before the king himself, openeth and shutteth with the term.

The authority of this Court, or, if I may use the expression, its constant activity for the ends of public justice, independent of any special powers derived from the crown, is not doubted in the case of writs of error from those courts of law whence error lieth in parliament, and of impeachments for misdemeanors.

It was formerly doubted, whether in the case of an impeachment for treason, and in the case of an indictment against a peer for any capital crime removed into parliament by Certiorari, whether in these cases the Court can proceed to trial and judgment without an High Steward appointed by special commission from the crown.

This doubt seemeth to have arisen from the not distinguishing between a proceeding in the court of the High Steward, and that before the

award of the said peers in the parliament, and if *per case* any peer will of his agreement elsewhere, answer or be judged but in the parliament, the same shall not turn in prejudice of the other peers, nor of himself, in any other case, except he be sheriff or fermor, &c.

The statute 20th Hen. 6, chap. 9, recites a doubt, whether a peeress was to be entitled to the privilege of the peerage, under the words in the 29th chapter of Magna Charta, "*legale iudicium parium suorum*," declares, That such ladies so indicted, or hereafter to be indicted of any treason or felony by them done, or hereafter to be done, whether they be married or sole, that they thereof shall be brought to answer, and put to answer, and judged before such judges and peers of the realm as peers of the realm should be.

And Mr. Barrington remarks, as something extraordinary, that no peeress had been tried for a capital offence, which must have settled the doubt; he adds, "It seems rather extraordinary, that the peerage (who, like other bodies of men, are generally very tenacious of their privileges) should not have at this time insisted upon being tried for a misdemeanor by their peers, and not by a common jury, as the prejudices of such a jury are more likely to operate in a misdemeanor than in a capital offence. Surely the words, '*Nullus liber homo capitur, aut imprisonetur, aut aliquo alio modo destruat, nisi per legale iudicium parium suorum*,' seem to have been anxiously inserted to include every kind of criminal prosecution. It is indeed not only a provision in favour of the subject, by one of the chapters of Magna Charta, but seems to have been likewise the law of every part of Europe, where the feudal policy had been introduced." In support of which last assertion he refers to Thaumasières and Beaumanoir.

king in parliament. The name, stile, and title of office, is the same in both cases; but the office, the powers and pre-eminences annexed to it, differ very widely; and so doth the constitution of the courts where the offices are executed. The identity of the name may have confounded our ideas, as equivocal words often do if the nature of things is not attended to; but the nature of the offices properly stated, will, I hope, remove every doubt on these points.

In the court of the High Steward, he alone is judge in all points of law and practice;* the peers triers are merely judges of fact, and are summoned by virtue of a precept from the High Steward to appear before him on the day appointed by him for the trial, '*Ut rei veritas melius sciri poterit*.'

The High Steward's Commission, after reciting that an indictment hath been found against the peer by the grand jury of the proper county, empowereth him to send for the indictment, to convene the prisoner before him at such day and place as he shall appoint; then and there to hear and determine the matter of such indictment; to cause the peers triers, '*tot et tales per quos rei veritas melius sciri poterit*,' at the same day and place to appear before him: '*veritate queinde comperta*,' to proceed to judgment according to the law and custom of England, and thereupon to award execution.†

By this it is plain, that the sole right of judicature is, in cases of this kind, vested in the High Steward; that it resideth solely in his person; and consequently without this commission, which is but in nature of a commission of Oyer and Terminer, no one step can be taken in order to a trial. And that when his commission is dissolved, which he declareth by breaking his staff, the Court no longer existeth.

But in a trial of a peer in full parliament, or, to speak with legal precision, before the king in parliament, for a capital offence, whether upon impeachment or indictment, the case is quite otherwise. Every peer present at the trial, and every temporal peer hath a right to be present in every part of the proceeding, voteth upon every question of law and fact; and the question is carried by the major vote; the High Steward himself voting merely as a peer; and member of that court, in common

* See the Case of lord Delamere, vol. 11, p. 509.

† See lord Clarendon's Commission as High Steward, and the writs and precepts preparatory to the trial in lord Morley's Case in this Collection.

‡ Mr. Barrington (Obs. on 34 Ed. 3) is of opinion that lord Coke was mistaken when he asserted that the High Steward at the trial of a peer must necessarily be a lord of parliament; and he says, "I have looked into the authorities from the Year Books, cited in proof of this position, which by no means warrant what he asserts, at least in the extent he hath advanced it. As for the case in 1 Hen. 4, there

with the rest of the peers, and in no other right.

It hath indeed been usual, and very expedient it is in point of order and regularity, and for the solemnity of the proceeding, to appoint an officer for presiding during the time of the trial and until judgment, and to give him the stile and title of Steward of England. But this maketh no sort of alteration in the constitution of the court. It is the same court founded in immemorial usage, in the law and custom of parliament, whether such appointment be made or not.

It acteth in its judicial capacity in every order made touching the time and place of the trial, the postponing the trial from time to time upon petition, according to the nature and circumstances of the case, the allowance or non-allowance of counsel to the prisoner, and other matters relative to the trial;* and all this before an High Steward hath been appointed. And so little was it apprehended, in some cases which I shall mention presently, that the existence of the Court depended on the appointment of an High Steward, that the Court itself directed in what manner and by what form of words he should be appointed. It hath likewise received and recorded the prisoner's confession, which amounteth to a conviction, before the appointment of an High Steward, and hath allowed to prisoners the benefit of acts of general pardon where they appeared intitled to it, as well without the appointment of an High Steward, as after his commission dissolved.

And when, in the case of Impeachments, the Commons have sometimes, at conferences between the Houses, attempted to interpose in matters preparatory to the trial, the general answer hath been, "This is a point of Judicature upon which the Lords will not confer, they impose silence upon themselves," or to that effect. I need not here cite instances; every man who hath consulted the Journals of either House hath met with many of them.

I will now cite a few cases applicable, in my opinion, to the present question. And I shall confine myself to such as have happened since the Restoration. Because in questions of this

is not a word in it which proves the necessity of this great officer's being a lord of parliament; and as for the second authority, viz. 13 Hen. 8, the words used in the Year Book are these: 'Nota quand un seigneur de parlement serra arrain de treason, ou felony, le roy per ses lettres patentes fera un grand et sage seigneur d'estre le grand seueschal d'Angleterre;' which certainly imports nothing further than that he shall be a man of consequence." And he notices the distinction between 'seigneur,' and 'seigneur de parlement.' For more concerning the trial of peers, see lord Coke's 3d Inst. pp. 49 *et seq.*; 3d Inst. pp. 27 *et seq.*; and lord Bacon's Works, vol. 3, p. 498, 4to edit. of 1798.

* See the orders previous to the trial in the Cases of lord Kilmarnoch, lord Lovat, and many other modern cases.

kind, modern cases, settled with deliberation, and upon view of former precedents, give more light and satisfaction, than the deepest search into antiquity can afford. And also because the prerogatives of the crown, the privileges of parliament, and the rights of the subjects in general, appear to me to have been more studied and better understood at, and for some years before that period, than in former ages.

In the case of the earl of Danby and the Popish lords then under impeachments, (Lords' Journal) the Lords on the 6th of May, 1679, appointed time and place for hearing the earl of Danby by his counsel upon the validity of his plea of pardon, and for the trials of the other lords; and voted an address to his majesty, praying that he would be pleased to appoint an High Steward for those purposes.

These votes were on the next day communicated to the Commons by message in the usual manner.

On the 8th, at a conference between the Houses upon the subject matter of that message, the Commons express themselves to the following effect: "They cannot apprehend what should induce your lordships to address his majesty for an High Steward for determining the validity of the pardon which hath been pleaded by the earl of Danby, as also for the trial of the other five lords, because they conceive the constituting an High Steward is not necessary, but that judgment may be given in parliament upon impeachment without an High Steward." And concluded with a proposition, that for avoiding any interruption or delay, a committee of both Houses might be nominated to consider of the most proper ways and methods of proceeding.

This proposition the House of Peers, after a long debate, rejected.—Dissentientibus, Finch* chancellor, and many other lords.

However, on the 11th, the Commons' proposition of the 8th was upon a second debate agreed to, and the lord chancellor, lord president, and ten other lords were named of the committee, to meet and confer with a committee of the Commons.

The next day the Lord President reported, that the committees of both Houses met that morning, and made an entrance into the business referred to them. That the Commons desired to see the commissions that are prepared for an High Steward at these trials, and also the commissions in the lord Pembroke's,† and the lord Morley's‡ Cases.

That to this the lords' committees said, "The High Steward is but speaker *pro tempore*, and giveth his vote as well as the other lords. This changeth not the nature of the Court. And the lords declared they have power enough to proceed to trial, though the king should not name an High Steward.§

* Afterwards earl of Nottingham.

† See his Case, vol. 6, p. 1309.

‡ See his Case, vol. 6, p. 769.

§ In the Commons' Journal of the 15th of

"That this seemed to be a satisfaction to the Commons, provided it was entered in the Lords' Journal, which are records."

Accordingly on the same day, "It is declared and ordered by the Lords spiritual and temporal in parliament assembled, that the office of an High Steward upon trials of peers upon impeachments, is not necessary to the House of Peers; but that the Lords may proceed in such trials if an High Steward be not appointed according to their humble desire."*

On the 13th the Lord President reported, that the committees of both Houses had met that morning, and discoursed in the first place on the matter of a Lord High Steward, and had perused former commissions for the office of High Steward. And then putting the House in mind of the order and resolution of the preceding day, proposed from the committees, that a new commission might issue, so as the words in the commission may be thus changed, viz. instead of, "Ac pro eo quod officium Seneschalli Angliæ (cujus presentia in hac parte requiritur) ut accepimus jam vacat," may be inserted, "Ac pro eo quod proceres et magnates in parlamento nostro assemblati nobis humiliter supplicaverunt ut Seneschallum Angliæ pro hac vice constituere dignaremur;" to which the House agreed.†

It must be admitted, that precedents drawn from times of ferment and jealousy, as these were, lose much of their weight; since passion and party-prejudice generally mingle in the contest. Yet let it be remembered, that these are resolutions in which both Houses concurred, and in which the rights of both were thought to be very nearly concerned; the Commons' right of impeaching with effect, and the whole judicature of the Lords in capital cases. For if the appointment of an High Steward was admitted to be of absolute necessity, (however necessary it may be for the re-

May it standeth thus: Their lordships further declared to the committee, that a Lord High Steward was made *hac vice* only. That notwithstanding the making of a Lord High Steward the Court remained the same, and was not thereby altered, but still remained the court of peers in parliament. That the Lord High Steward was but as a speaker or chairman, for the more orderly proceeding at the trials.

* This Resolution my Lord Chief Baron referred to and cited in his argument upon the second Question proposed to the Judges, which is before stated.

† This amendment arose from an exception taken to the commission by the committee for the Commons, which as it then stood did in their opinion imply that the constituting a Lord High Steward was necessary. Whereupon it was agreed by the whole committee of Lords and Commons, that the commission should be recalled, and a new commission according to the said amendment issue, to bear date after the order and resolution of the 12th. Commons' Journal of the 15th of May. Foster.

gularity and solemnity of the proceeding during the trial and until judgment, which I do not dispute) every impeachment may, for a reason too obvious to be mentioned, be rendered ineffectual; and the judicature of the Lords, in all capital cases, nugatory.

It was from a jealousy of this kind, not at that juncture altogether groundless, and to guard against every thing from whence the necessity of an High Steward in the case of an impeachment might be inferred, that the Commons proposed, and the Lords readily agreed to the amendment in the Steward's commission, which I have already stated. And it hath, I confess, great weight with me, that this amendment, which was at the same time directed in the cases of the five Popish lords when commissions should pass for their trials, hath taken place in every commission upon impeachments for treason since that time.*

And I cannot help remarking, that in the case of lord Lovat, when neither the heat of the times, nor the jealousy of parties had any share in the proceeding, the House ordered, "That the commission for appointing a Lord High Steward shall be in the like form as that for the trial of the lord viscount Stafford, as entered in the Journal of this House on the 30th of November, 1680, except that the same shall be in the English language."†

I will make a short observation on this matter.

The order in the 13th of May, 1679, for varying the form of the commission, was, as appeareth by the Journal, plainly made in consequence of the resolution of the 12th, and was founded on it; and consequently the constant, unvarying practice with regard to the new form, goeth in my opinion a great way towards shewing that in the sense of all succeeding times that resolution was not the result of faction or a blameable jealousy, but was founded in sound reason and true policy.

It may be objected, that the resolution of the 12th of May, 1679, goeth no further than to a proceeding upon impeachment.

The letter of the resolution, it is admitted, goeth no further, but this is easily accounted for. A proceeding by impeachment was the subject matter of the conference, and the Commons had no pretence to interpose in any other. But what say the Lords? "The High Steward is but as a speaker or chairman *pro tempore*, for the more orderly proceeding at the trials; the appointment of him doth not alter the nature of the Court, which still remaineth the Court of the Peers in Parliament." From these premises they draw the conclusion I have mentioned. Are not these premises equally true

* See the commissions in the cases of the earl of Oxford, vol. 15, p. 1045, earl of Derwentwater and others, vol. 15, p. 761, lord Winton, vol. 15, p. 805, and lord Lovat, vol. 18, p. 530.

† See the Proceedings printed by order of the House of Lords. (Feb. 4, 1746.)

in the case of a proceeding upon indictment? They undoubtedly are.

It must likewise be admitted, that in the proceeding upon indictment, the High Steward's commission hath never varied from the antient form in such cases; the words objected to by the Commons, "*Ac pro eo quod officium Seneschalli Angliæ (cujus præsentia in hac parte requiritur) ut accepimus jam vacat.*" are still retained. But this proveth no more than that the great seal having no authority to vary in point of form, hath from time to time very prudently followed antient precedents.

I have already stated the substance of the commission in a proceeding in the Court of the High Steward. I will now state the substance of that in a proceeding in the Court of the Peers in Parliament. And shall make use of that in the case of the earl of Kilmarnock and others, as being the latest, and in point of form agreeing with the former precedents.

The commission, after reciting that William earl of Kilmarnock, &c. stands indicted before commissioners of gaol-delivery in the county of Surry, for high treason, in levying war against the king; and that the king intendeth, that the said William earl of Kilmarnock, &c. shall be heard, examined, sentenced, and adjudged before himself in this present parliament touching the said treason; and for that the office of Steward of Great-Britain (whose presence is required upon this occasion) is now vacant as we are informed, appointeth the then lord chancellor Steward of Great-Britain, to bear, execute, and exercise (for this time) the said office, with all things due and belonging to the same office in that behalf.

What therefore are the things due and belonging to the office in a case of this kind? Not, as in the Court of the High Steward, a right of judicature. For the commission itself supposeth that right to reside in a court then subsisting before the king and parliament. The parties are to be there heard, sentenced, and adjudged. What share in the proceeding doth the High-Steward then take? By the practice and usage of the court of the peers in parliament, he giveth his vote as a member thereof with the rest of the peers; but for the sake of regularity and order he presideth during the trial, and until judgment, as chairman or speaker *pro tempore*. In that respect therefore it may be properly enough said, that his presence is required during the trial and until judgment, and in no other. Herein I see no difference between the case of an impeachment and of an indictment.

I say, during the time of the trial and until judgment, because the court hath, as I observed before, from time to time, done various acts plainly judicial before the appointment of an High Steward, and where no High Steward hath ever been appointed, and even after the commission dissolved.

I will to this purpose cite a few cases.

I begin with the latest, because they are the latest, and were ruled with great deliberation,

and for the most part upon a view of former precedents.

In the case of the earl of Kilmarnock and others, the Lords, on the 24th of June, 1746, ordered that a writ or writs of *Certiorari* be issued for removing the indictments before the House. And on the 26th the writ, which is made returnable before the king in parliament, with the return and indictments, was received and read. On the next day upon the report of the lords committees, that they had been attended by the two chief justices and chief baron, and had heard them touching the construction of the act of the 7th and 8th of king William "for regulating trials in cases of high treason and misprision of treason," the House, upon reading the report, came to several resolutions founded for the most part on the construction of that act. What that construction was, appeareth from the Lord High-Steward's address to the prisoners just before their arraignment. Having mentioned that act as one happy consequence of the Revolution, he addeth, "However injuriously that Revolution hath been traduced, whatever attempts have been made to subvert this happy establishment founded on it, your lordships will now have the benefit of that law in its full extent."

I need not after this mention any other judicial acts done by the House in this case before the appointment of the High Steward, many there are. For the putting a construction upon an act relative to the conduct of the court, and the right of the subject at the trial and in the proceedings preparatory to it; and this in a case entirely new, and upon a point, to say no more in this place, not extremely clear; was undoubtedly an exercise of authority proper only for a court having full cognizance of the cause.

I will not minutely enumerate the several orders made preparatory to the trial of lord Lovat, and in the several cases I shall have occasion to mention, touching the time and place of the trial, the allowance or non-allowance of counsel, and other matters of the like kind, all plainly judicial, because the like orders occur in all the cases where a journal of the preparatory steps hath been published by order of the peers. With regard to lord Lovat's case, I think the order directing the form of the High Steward's commission which I have already taken notice of, is not very consistent with the idea of a court whose powers can be supposed to depend at any point of time upon the existence or dissolution of that commission.

In the case of the earl of Derwentwater and the other lords impeached at the same time, the House received and recorded the confession of those of them who pleaded guilty long before the teste of the High Steward's commission; which issued merely for the solemnity of giving judgment against them upon their conviction.

This appeareth by the commission itself (See the proceedings in vol. 75, p. 765). It re- citeth, that the earl of Derwentwater and

others 'coram nobis in presenti parlamento' had been impeached by the Commons for high treason, and had 'coram nobis in presenti parlamento' pleaded guilty to that impeachment; and that the king, intending that the said earl of Derwentwater and others, 'de et pro conditione unde ipsi ut praefertur impetit' accusat' et convict' existunt coram nobis in presenti parlamento secundum legem et consuetudinem hujus regni nostri Magnae Britanniae, audientur, sententientur, et adjudicentur,' constituteth the then lord chancellor High Steward (*hac vice*) to do and execute all things which to the office of High Steward in that behalf do belong.

The receiving and recording the confession of the prisoners, which amounted to a conviction, so that nothing remained but proceeding to judgment, was certainly an exercise of judicial authority, which no assembly, how great soever, not having full cognizance of the cause, could exercise.

In the case of lord Salisbury, [see vol. 12, p. 1233] who had been impeached by the Commons for high-treason, the Lords upon his Petition allowed him the benefit of the act of general pardon passed in the second year of William and Mary, so far as to discharge him from his imprisonment, upon a construction they put upon that act, no High Steward ever having been appointed in that case.

On the 2d of October, 1690, upon reading the earl's Petition, setting forth that he had been a prisoner for a year and nine months in the Tower, notwithstanding the late act of free and general pardon, and praying to be discharged; the Lords ordered the Judges to attend on the Monday following to give their opinions, whether the said earl be pardoned by the act. On the 6th, the Judges delivered their opinions. That if his offence was committed before the 13th of February, 1688, and not in Ireland, or beyond the seas, he is pardoned. Whereupon it was ordered, that he be admitted to bail; and the next day he and his sureties entered into a recognizance of bail, himself in 10,000*l.* and two sureties in 5,000*l.* each; and on the 30th he and his sureties were, after a long debate, discharged from their recognizance.

It will not be material to enquire, whether the House did right in discharging the earl without giving the Commons an opportunity of being heard. Since in fact, they claimed and exercised a right of judicature without an High Steward, which is the only use I make of this case.

They did the same in the case of the earl of Carnwath, the lords Widdrington and Nairn, long after the High Steward's commission dissolved.

These lords had judgment passed on them at the same time that judgment was given against the lords Derwentwater, Nithsdale, and Kenmure, [vol. 15, p. 762 of this Collection,] and judgment being given, the High Steward immediately broke his staff, and declared the

commission dissolved. They continued prisoners in the Tower under repleves till the passing the act of general pardon in the 3d of king George the First.

On the 21st of November, 1717, the House being informed that these lords had severally entered into recognizances before one of the judges of the court of King's-bench for their appearance in the House this session of parliament, and that the lords Carnwath and Widdrington were attending accordingly, and that the lord Nairn was ill at Bath, and could not then attend, the lords Carnwath and Widdrington were called in; and severally at the bar prayed that their appearance might be recorded, and likewise prayed the benefit of the act (3 Geo. 1, c. 19,) for his majesty's general and free pardon.

Whereupon the House ordered that their appearance be recorded; and that they attend again to-morrow in order to plead the pardon. And the recognizance of the lord Nairn was respite till that day fortnight.

On the morrow the lords Carnwath and Widdrington then attending, were called in; and the lord chancellor acquainted them severally that it appeared by the records of the House, that they severally stood attainted of high-treason, and asked them severally what they had to say why they should not be remanded to the Tower of London.

Thereupon they severally upon their knees prayed the benefit of the act, and that they might have their lives and liberty pursuant thereunto.

And the Attorney-General, who then attended for that purpose, declaring that he had no objection on his majesty's behalf to what was prayed, conceiving that those lords, not having made any escape since their conviction, were intitled to the benefit of the act, (see sect. 45, of the 3d Geo. 1.) the House after reading the clause in the act relating to that matter, agreed that they should be allowed the benefit of the pardon as to their lives and liberties, and discharged their recognizances; and gave them leave to depart without further day given for their appearance.

On the 6th of December following, the like proceedings were had, and the like orders made in the case of lord Nairn.

I observe that the lord chancellor did not ask these lords, what they had to say, why execution should not be awarded. There was, it is probable, some little delicacy as to that point. But since the allowance of the benefit of the act as to life and liberty, which was all that was prayed, was an effectual bar to any future imprisonment on that account, and also to execution, and might have been pleaded as such in any court whatsoever; the whole proceeding must be admitted to have been in a court having complete jurisdiction in the case, notwithstanding the High Steward's commission had been long dissolved. Which is all the use I intended to make of this case.

I will not recapitulate: the cases I have

cited, and the conclusions drawn from them, are brought into a very narrow compass. I will only add, that it would sound extremely harsh to say, that a court of criminal jurisdiction founded in immemorial usage, and held in judgment of law before the king himself, can in any event whatever be under an utter incapacity of proceeding to trial and judgment either of condemnation or acquittal, the ultimate objects of every criminal proceeding, without certain supplemental powers derived from the crown.

These cases, with the observations I have made on them, I hope, sufficiently warrant the Opinion of the Judges upon that part of the second Question in the case of the late earl Ferrers, which I have already mentioned. And also what was advanced by the lord chief baron in his argument on that question, "That though the office of High Steward should happen to determine before execution done according to the judgment, yet the court of the peers in parliament, where that judgment was given, would subsist for all the purposes of justice during the sitting of the parliament." And consequently that in the case supposed by the question, that Court might appoint a new day for the execution.*

AN ACCOUNT OF THE EXECUTION OF THE LATE
LAURENCE EARL FERRERS, VISCOUNT TAM-
WORTH, AND OF HIS LORDSHIP'S BEHAVIOUR,
FROM THE TIME OF HIS BEING DELIVERED
INTO THE CUSTODY OF THE SHERIFFS OF
LONDON AND MIDDLESEX, UNTIL THE TIME
OF HIS EXECUTION. (BY THE AUTHORITY
OF THE SHERIFFS.)

On Friday the second day of May 1766, the Sheriffs of London and Middlesex received the following Writ under the Great Seal of Great Britain, for the Execution of Laurence Earl Ferrers, viscount Tamworth, on the Monday following :

"George the second, by the grace of God, of Great-Britain, France and Ireland, king, defender of the faith, and so forth, to the Sheriffs of London and Sheriff of Middlesex, greeting. Whereas Laurence earl Ferrers, viscount Tamworth, hath been indicted of felony and murder by him done and committed ; which said indictment hath been certified before us in our present parliament, and the said Laurence earl Ferrers, viscount Tam-

* "Should the day appointed by the judgment for the execution lapse before such execution done, a new time may be appointed (in the case of a peer) either by the High Court of Parliament, before which such peer shall have been attainted, or by B. R., the parliament not then sitting ; the record of attainder being properly removed into B. R." East's Pleas of the Crown, c. 5, s. 136.

worth, hath been thereupon arraigned, and upon such arraignment hath pleaded Not Guilty : and the said Laurence earl Ferrers, viscount Tamworth, hath before us in our said parliament been tried, and in due form of law convicted thereof : and whereas judgment hath been given in our said parliament, That the said Laurence earl Ferrers, viscount Tamworth, shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remains to be done : we require, and by these presents strictly command you, that upon Monday the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Laurence earl Ferrers, viscount Tamworth, without the gate of our Tower of London, (to you then and there to be delivered, as by another writ to the lieutenant of our Tower of London, or to his deputy directed, we have commanded) into your custody you then and there receive ; and him in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn, and that you do cause execution be done upon the said Laurence earl Ferrers, viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit at your peril. Witness ourself at Westminster the second day of May, in the thirty-third year of our reign.

"YORKE and YORKE."

Upon the receipt of this Writ, the Sheriffs immediately issued their orders for making all the necessary preparations for the execution, and for the performance of it in a manner suitable to his lordship's rank.

When the foregoing precept was delivered to the Sheriffs, they had notice of the following Writ being sent to the lieutenant of the Tower of London or his deputy, for the delivery of his lordship into their custody :

"George the second, by the grace of God of Great-Britain, France and Ireland, king, defender of the faith, and so forth, To the Lieutenant of our Tower of London or his deputy, greeting. Whereas Laurence earl Ferrers, viscount Tamworth, hath been indicted of felony and murder by him done and committed, which said indictment hath been certified before us in our present parliament ; and the said Laurence earl Ferrers, viscount Tamworth, hath been thereupon arraigned, and upon such arraignment hath pleaded Not Guilty ; and thereupon the said Laurence earl Ferrers, viscount Tamworth, hath before us in our said parliament been tried, and in due form of law convicted thereof, and for the same is adjudged to suffer death, the execution of which judgment yet remains to be done ; we require, and by these presents strictly command you, That upon Monday the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Laurence earl Ferrers, vis-

count Tamworth, unto the usual place without the gate of the said Tower you bring, and him to the Sheriffs of London and Middlesex then and there deliver; which said sheriffs, by another writ to them directed, we have commanded then and there to receive the said Laurence earl Ferrers, viscount Tamworth, that execution of the aforesaid judgment may be done in manner and form as to the said Sheriffs of London and Middlesex we by our said other Writ have commanded; and this you are by no means to omit at your peril. Witness ourself at Westminster the second day of May, in the thirty-third year of our reign.

"YORKE and YORKE."

In obedience to these commands, the Sheriffs, on Monday the 5th day of May, being attended by their under-sheriffs, and other proper officers, went to the outward gate of the Tower of London, and at nine o'clock in the morning sent notice to the Lieutenant that they were there, ready to receive the body of Laurence earl Ferrers, viscount Tamworth, pursuant to the king's writ in that behalf.

His lordship being informed of it, sent a message to the sheriffs, requesting their permission that he might go in his own landau, which was waiting for him within the Tower, instead of the mourning-coach which had been provided by his friends; which request being granted, his lordship, attended by the reverend Mr. Humphries, the chaplain of the Tower, entered into his landau, drawn by six horses, and was conducted in it, by the officers of the Tower, to the outward gate, and there delivered into the custody of the sheriffs, upon their giving the following receipt:

"*Tower-Hill, 5th May, 1760.*

"Received then of Charles Rainsford, esq. deputy-lieutenant of the Tower of London, the body of the within-named Laurence earl Ferrers, viscount Tamworth, delivered to us in obedience of the king's writ, of which the within is a true copy.—GEO. ERRINGTON, PAUL VAILLANT, Sheriffs of London and Sheriff of Middlesex."

Mr. Sheriff Vaillant accompanied his lordship in the landau from the Tower gate to the place of execution; and, upon his entrance into it, addressing himself to his lordship, he told him, That it gave him the highest concern to wait upon him upon so melancholy an occasion, but that he would do every thing in his power to render his situation as easy as possible; and hoped that, whatever he did, his lordship would impute to the necessary discharge of his duty.—To which his lordship answered, Sir, I am very much obliged to you, I take it very kindly that you are pleased to accompany me.—His lordship being dressed in a suit of light clothes, embroidered with silver, said, You may, perhaps, Sir, think it strange to see me in this dress, but I have my particular reasons for it.

The civil and military powers attended the sheriffs from thence to the place of execution, and the procession was as follows:

First, a very large body of the constables for the county of Middlesex (the greatest probably that had ever been assembled together upon any occasion), preceded by one of the high-constables.

Then a party of horse-grenadiers, and a party of foot;

Then Mr. Sheriff Errington in his chariot, accompanied therein by his under-sheriff Mr. Jackson;

Then followed the landau, escorted by two other parties of horse-grenadiers and foot;

Then Mr. Sheriff Vaillant's chariot, in which was his under-sheriff Mr. Nicola;

Then a mourning-coach and six;

And, lastly, a hearse and six, which was provided for the conveyance of his lordship's corpse from the place of execution to Surgeons-hall.

The procession was conducted with the utmost solemnity; but moved so very slow, that it did not reach the place of execution till a quarter before twelve, so that his lordship was two hours and three quarters in the landau; during the whole of which time he appeared to be perfectly easy and composed, and his decent deportment seemed greatly to affect the minds of all that beheld him; inasmuch that although his lordship thus passed through many hundred thousand spectators, yet so respectful was the behaviour of all towards him, that not the least affront or indignity was offered to him by any one; but, on the contrary, many persons saluted him with their prayers for his salvation.

His lordship asked the sheriff, If he had ever seen so great a concourse of people before? and upon his answering that he had not; I suppose, said his lordship, it is, because they never saw a lord hanged before. He said, that he had wrote to the king, to beg that he might suffer where his ancestor the earl of Essex had suffered; and that he was in the greater hopes of obtaining that favour, as he had the honour of quartering part of the same arms, and of being allied to his majesty, and that he thought it was hard that he must die at the place appointed for the execution of common felons. But whatever his lordship's thoughts were upon that account, those considerations will for ever throw an additional lustre on his majesty's impartiality and justice.

Mr. Humphries the chaplain, who, it seems, had not attended his lordship till this morning, took occasion to observe, that the world would naturally be very inquisitive concerning the religion his lordship professed; and asked him, If he chose to say any thing upon that subject? To which his lordship answered, That he did not think himself at all accountable to the world for his sentiments on religion; but that he had always believed in, and adored one God, the maker of all things; that whatever his notions were, he had never propagated

them, or endeavoured to gain any persons over to his persuasion; that all countries and nations had a form of religion by which the people were governed, and that whoever disturbed them in it, he looked upon him as an enemy to society; but that, if he himself was wrong in his way of thinking, he was very sorry for it. That he very much blamed my lord Bolingbroke, for permitting his sentiments on religion to be published to the world. That the many sects and disputes which happen about religion, have almost turned morality out of doors. That he could never believe what some sectaries teach, that faith alone will save mankind; so that if a man, just before he dies, should say only, I believe, that that alone will save him; "Shew me thy faith."—Here his lordship stopped; but by which quotation he plainly meant, according to the holy writer, (St. James, chap. ii. v. 18.) whose words they are, that faith without works is a dead faith.

Concerning the unfortunate and much-to-be lamented Mr. Johnson, whose death occasioned the trouble of this day, his lordship declared, That he was under particular circumstances; that he had met with so many crosses and vexations he scarce knew what he did; and most solemnly protested, that he had not the least malice towards him.

The slowness of the procession made this journey appear so very tedious to his lordship, that he often expressed his desire of being got to the end of it, saying, that the apparatus of death, and the passing through such crowds of people, were ten times worse than death itself; but upon the sheriff's taking notice to his lordship, that he was glad to see that he supported himself so well, his lordship replied, I thank you, Sir, I hope I shall continue so to the last.

When his lordship had got to that part of Holborn which is near Drury-lane, he said, he was thirsty, and should be glad of a glass of wine and water; but upon the sheriff's remonstrating to him, that a stop for that purpose would necessarily draw a greater crowd about him, which might possibly disturb and incommode him, yet if his lordship still desired it, it should be done; he most readily answered,—That's true, I say no more, let us by no means stop.

When they approached near the place of execution, his lordship told the sheriff, That there was a person waiting in a coach near there, for whom he had a very sincere regard, and of whom he should be glad to take his leave before he died; to which the sheriff answered, That if his lordship insisted upon it, it should be so; but that he wished his lordship, for his own sake, would decline it, lest the sight of a person, for whom he had such a regard, should unman him, and disarm him of the fortitude he possessed.—To which his lordship, without the least hesitation, replied, Sir, if you think I am wrong, I submit; and upon the sheriff's telling his lordship, that if he had any thing to deliver to that person, or any one else, he would faithfully do it; his lord-

VOL. XIX.

ship thereupon delivered to the sheriff a pocket-book, in which was a bank-note, and a ring, and a purse with some guineas, in order to be delivered to that person, which was done accordingly.

The landau being now advanced to the place of execution, his lordship alighted from it, and ascended upon the scaffold, which was covered with black baize, with the same composure and fortitude of mind he had enjoyed from the time he left the Tower; where, after a short stay, Mr. Humphries asked his lordship, if he chose to say prayers? which he declined; but upon his asking him, If he did not choose to join with him in the Lord's Prayer? he readily answered, He would, for he always thought it a very fine prayer; upon which they knelt down together upon two cushions, covered with black baize, and his lordship with an audible voice very devoutly repeated the Lord's Prayer, and afterwards, with great energy, the following ejaculation, O God, forgive me all my errors,—pardon all my sins.

His lordship then rising, took his leave of the sheriffs and the chaplain; and after thanking them for their many civilities, he presented his watch to Mr. Sheriff Vaillant, which he desired his acceptance of; and signified his desire, That his body might be buried at Breden or Stanton, in Leicestershire.

His lordship then called for the executioner, who immediately came to him, and asked him forgiveness; upon which his lordship said, I freely forgive you, as I do all mankind, and hope myself to be forgiven.—He then intended to give the executioner five guineas, but, by mistake, giving it into the hands of the executioner's assistant, an unseasonable dispute ensued between those unthinking wretches, which Mr. Sheriff Vaillant instantly silenced.

The executioner then proceeded to do his duty, to which his lordship, with great resignation, submitted.—His neckcloth being taken off, a white cap, which his lordship had brought in his pocket, being put upon his head, his arms secured by a black sash from incommoding himself, and the cord put round his neck, he advanced by three steps upon an elevation in the middle of the scaffold, where part of the floor had been raised about eighteen inches higher than the rest; and standing under the cross-beam which went over it, covered with black baize, he asked the executioner, Am I right?—Then the cap was drawn over his face: and then, upon a signal given by the sheriff (for his lordship, upon being before asked, declined to give one himself) that part upon which he stood, instantly sunk down from beneath his feet, and left him entirely suspended; but not having sunk down so low as was designed, it was immediately pressed down, and levelled with the rest of the floor.

For a few seconds his lordship made some struggles against the attacks of death, but was soon eased of all pain by the pressure of the executioner.

From the time of his lordship's ascending

3 R

upon the scaffold, until his execution, was about eight minutes; during which his countenance did not change, nor his tongue falter:—The prospect of death did not at all shake the composure of his mind.

Whatever were his lordship's failings, his behaviour in these his last moments, which created a most awful and respectful silence amidst the numberless spectators, cannot but make a sensible impression upon every humane breast.

The accustomed time of one hour being past, the coffin was raised up, with the greater decency to receive the body, and being deposited in the hearse, was conveyed by the sheriffs, with the same procession, to Surgeons-Hall,* to undergo the remainder of the sentence (viz. dissection).—Which being done, the body was on Thursday evening, the 8th of May, delivered to his friends for interment.

He was privately interred at St. Pancras near London, in a grave dug 12 or 14 feet deep, under the belfry.

It appears by the Lords' Journal, that on May 19, 1760, Washington earl Ferrers first sat in the House after the death of his brother Lawrence. Concerning the operation of attainders upon peerages, a profusion of learning has been collected and applied by Mr. Hargrave in his very able 'Opinion and Argument,' in the Stafford Barony Case. (See vol. 7, p. 1571.)

Mr. Cruise, in his "Treatise on the Origin and Nature of Dignities, or Titles of Honour, &c." ch. 4, § 68, *et seq.* (see also his Digest of the Laws of England, respecting real property, title 26,) has succinctly stated several fundamental points of law upon the same branch of the effects of attainder as follows:

"All dignities or titles of honour, whether held in fee simple, fee tail, or for life, are for-

* The statute made in the 25th year of his late majesty's reign for preventing the crime of murder, enacts, "That the body of every person convicted of murder shall, if such conviction and execution shall be in the county of Middlesex, or within the city of London, or the liberties thereof, be immediately conveyed by the sheriff or sheriffs, his or their deputy or deputies, and his or their officers, to the hall of the Surgeons' Company, or such other place as the said company shall appoint for this purpose, and be delivered to such person as the said company shall depute or appoint, who shall give to the sheriff or sheriffs, his or their deputy or deputies, a receipt for the same; and the body so delivered to the said company of surgeons, shall be dissected and anatomized by the said surgeons, or such persons as they shall appoint for that purpose; and that in no case the body shall be suffered to be buried, unless after such body shall have been dissected and anatomized." Foster.

feited and lost by the attainder for treason; of the persons possessed of them, and can never again be revived but by a reversal of the attainder." § 68.

"A dignity descendible to heirs general, is also forfeited by attainder of felony, of the person possessed of it." § 72.

"But an entailed dignity is not forfeited by attainder of felony, for the stat. 26 H. 8 does not extend to attainders for felony." § 73. And he then refers to this case as follows:

"Lawrence earl Ferrers, to whose ancestors the dignity had been granted by letters patent in 1711, to hold to him and the heirs male of his body, was convicted and executed for murder in the year 1760. The dignity however was not forfeited, but descended to his brother Washington Ferrers, (Lawrence having left no issue) who took his seat soon after the execution of his brother." § 74.

"In the case of a dignity descendible to heirs general, the attainder for treason or felony of any ancestor of a person claiming such dignity, through whom the claimant must derive his title, though the person attainted was never possessed of the dignity, will bar such claim; for the blood of the person attainted being corrupted, no title can be derived through him." § 75.

"Corruption of blood was abolished in the reign of queen Ann, but has been revived by the statute 39 George 3, c. 93." § 78.

"In the case of entailed dignities, no corruption of blood takes place, and therefore a dignity in tail may be claimed by a son, surviving an attainted father, who never was possessed of the dignity: for the son may claim from the first acquirer of the dignity, *per formam doni*; as heir male of his body, within the description of the grant; and the attainder of a father, or other lineal or collateral ancestor, who was never possessed of an entailed dignity, will not prevent the descent to his issue." § 79.

"In all cases where a person has been attainted of high treason by act of parliament, or by judgment on an indictment for high treason, petty treason or felony, the corruption of blood can only be removed by act of parliament." § 81.

"Where a person is outlawed on an indictment for high treason, petty treason or felony, his blood is also corrupted; but it may be restored by act of parliament, or by a reversal of the outlawry, by writ of error, which may be done during the life of the person outlawed, or at any time after. A writ of error to reverse an outlawry is not however *ex debito justitiæ*, and therefore can only be obtained by the favour of the crown." § 84.

"The House of Lords resolved [Journ. vol. 17, p. 119,] in 1702, that they would not in future receive any bill for reversing outlawries, or restitution in blood, that should not be first signed by her majesty or her successors, kings and queens of the realm, and sent by her or them to their House first, to be considered there." § 85.

539. The Case of JOHN WILKES, esq. on a Habeas Corpus, Common Pleas, Easter Term: 3 GEORGE III. A. D. 1763.

[The following Case is from the late Mr. Serjeant Wilson's Reports, 2 Wils. Rep. 150. But we have added another report of the Judgment from a book, intituled, "A Digest of the Law of Libels;" as on comparison it appeared to supply some defects in the Serjeant's account. It was attempted to obtain a fuller report of the Judgment than either of the two notes we lay before the reader. But we were unsuccessful.

The great point of the case, namely, Whether the privilege of parliament extended to a prosecution for a seditious libel, was the chief inducement to our inserting it. *Hargrate.*]

MR. SERJEANT WILSON'S REPORT.

ON Saturday April 30, 1763, in the morning, the defendant Wilkes was arrested by two of the king's messengers, by virtue of a warrant from the secretary of state; the tenor of which warrant is in the words following:

A member of parliament discharged, without bail, being committed for writing a seditious libel.

'George Montague Dunk, earl of Halifax, viscount Sunbury and baron Halifax, one of the lords of his majesty's most honourable privy council, lieutenant general of his majesty's forces, and principal secretary of state: these are in his majesty's name to authorize and require you (taking a constable to your assistance) to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intituled, The North Briton, N^o 45, Saturday April 23, 1763, printed for G. Kearsley in Ludgate-street, London, and them, or any of them, having found, to apprehend and seize, together with their papers, and to bring in safe custody before me, to be examined concerning the premisses, and further dealt with according to law: and in the due execution thereof, all mayors, sheriffs, justices of the peace, constables, and all other his majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you, as there shall be occasion; and for so doing this shall be your warrant. Given at St. James's the 26th day of April, in the third year of his majesty's reign. DUNK HALIFAX.'

'To Nathan Carrington, John Moneyn, James Watson, and Robert Blackmore, four of his majesty's messengers in ordinary.'

The same morning, a copy of the above warrant having been obtained from the messengers,

who then had Mr. Wilkes in their own custody, and an affidavit being made of the truth of such copy, and that Mr. Wilkes was then in custody of two of the above messengers at his house in Great George-street, in Westminster, the same were produced in the court of Common Pleas the same 30th day of April at twelve o'clock at noon, or a few minutes before or after that hour; whereupon, at the same time, it was moved by my learned brother Glynn, that a writ of Habeas Corpus might be allowed to issue instantly, returnable forthwith. The lord chief justice Pratt was pleased to say, that this was a most extraordinary warrant; and the Court ordered an Habeas Corpus to be issued instantly, returnable forthwith. It being now about one o'clock, the rule of court for the issuing the Habeas Corpus could not possibly be drawn up and entered, nor could the writ be made out, signed and passed under the seal of the Court before four or five o'clock in the afternoon: and although it was certainly known by the officers under the crown, particularly by Mr. Webb, then solicitor to the treasury, that this writ had been ordered to issue by the Court between twelve and one o'clock, while Mr. Wilkes was in the custody of the messengers at his house in Great George-street, yet, before the coming of the writ to the messengers, (the same afternoon about five o'clock) Mr. Wilkes was hastily (I had almost said in contempt of the king's high court) committed to the Tower of London.

Mr. Wilkes's solicitor, and one of his counsel, soon after they heard of such commitment, went to the Tower in order to consult and advise with him, but were denied admittance to him; major Rainsford informing them, that he had received orders from the secretary of state (lord Halifax) not to admit any person whatsoever to speak with, or see Mr. Wilkes; and further informed them, that he had just before refused the right honourable earl Temple such admittance, *ut audiui*.

On Sunday May the first, the same gentlemen went again to the Tower, between the hours of twelve and one, on the same occasion, but were again denied admittance to see or speak with Mr. Wilkes; and soon afterwards, several noblemen and gentlemen of the first distinction were refused admittance to see or speak to Mr. Wilkes, and particularly his own brother was refused, *ut audiui*.

After such denial, Mr. Wilkes's solicitor demanded of major Rainsford a copy of the warrant of commitment of Mr. Wilkes to the Tower, which was readily granted by the major, the tenor whereof is in the words following: 'Charles earl of Egremont and George Dunk earl of Halifax, lords of his majesty's most honourable privy council, and principal se-

'cretaries of state: these are in his majesty's
'name to authorize and require you to receive
'into your custody the body of John Wilkes,
'esq. herewith sent you, for being the author
'and publisher of a most infamous and sedi-
'tious libel, intitled, The North Briton, N^o 45,
'tending to inflame the minds and alienate the
'affections of the people from his majesty, and
'to excite them to traitorous insurrections
'against the government, and to keep him
'safe and close, until he shall be delivered by
'due course of law; and for so doing this shall
'be your warrant. Given at St. James's the
'30th day of April 1763, in the third year of
'his majesty's reign.

'EGREMONT, DUNK HALIFAX.'

'To the right honourable John lord
'Berkley of Stratton, constable of
'his majesty's Tower of London,
'or to the lieutenant of the said
'Tower, or his deputy.'

Mr. Webb, solicitor to the treasury, being present in major Rainsford's room when the copy of the said warrant of commitment was granted, Mr. Wilkes's counsel and solicitor applied to Mr. Webb for admittance to Mr. Wilkes; whereupon (it is true) Mr. Webb desired the major to allow such admittance, and said he would be answerable, and indemnify the major: but the major, with the true spirit of an excellent officer, answered, 'He would not, or he could not disobey orders.' Mr. Webb replied and said, he imagined, or he believed, there must have been some mistake in the orders, and that if either of the secretaries of state were in town, he would apply and endeavour to obtain the desired admittance; and that if he could succeed therein, he would send or bring an order for that purpose in the afternoon of the same Sunday, May the 1st; whereupon Mr. Wilkes's counsel and solicitor departed from the Tower, for some hours, and between the hours of eight and nine in the evening of the same day, returned again to the Tower, and applied for admittance to Mr. Wilkes; but the major not having received any orders or message from either of the secretaries of state, or from Mr. Webb, refused admittance, as he had done before, *ut audivi*.

On Monday the 2nd day of May, at the sitting of the Court of Common Pleas in the morning, the messengers returned the writ of Habeas Corpus which had issued and had been delivered to them on the 30th of April in the afternoon, after Mr. Wilkes was out of their custody, and committed to the Tower as above; the tenor of which return indorsed on the same writ returns thus, viz. 'In obedience to the
'within command, we humbly certify to
'his majesty's justices of the court of Com-
'mon Pleas at Westminster, that at the time
'of the coming of this writ to us, the within
'named John Wilkes was not, nor at any
'time since hath been in our custody, or
'in the custody of either of us;' signed by

two of the messengers to whom the writ was directed.

Upon reading the writ and the return thereof, it was moved by the king's serjeant, that the same might be affiled of record.

To which serjeant Glynn for Mr. Wilkes objected, and insisted that the return was too general in this particular case, (although it might be a good return in another case not circumstanced like the present) for that it clearly appeared to the Court by sufficient evidence, viz. the affidavit and warrant of arrest and seizure of Mr. Wilkes, upon which the writ was founded and granted last Saturday at noon, that Mr. Wilkes was then in the custody of the messengers, and therefore they ought to have returned and certified to the Court in what manner, when and by what authority he was taken out of their custody, and what was become of his body.

Some of the king's serjeants replied, that all the precedents of returns of writs of Habeas Corpus in the Crown-office, where the party therein named was not in the custody of the messengers (to whom the writ was directed) at the time of the coming of the writ, were like the return in the present case; which assertion, at first seemed to have weight with the lord chief justice and two others of the judges, who whereupon thought the return well enough; but Mr. Justice Gould was pleased to say he much doubted, whether the precedents in the Crown-office of returns to writs of Habeas Corpus were like the present return, as had been asserted by the king's serjeants; and said if the precedents were not so, he should be of opinion, that this was an insufficient return, because he thought, from what appears in evidence in the case, the Court has a right to know what is become of the king's subject Mr. Wilkes, since he was in the messenger's custody last Saturday at noon; whereupon (*hesitante curia*) the writ and return were not permitted to be affiled of record upon this motion; and precedents were ordered to be looked into, and the matter of the return was ordered to be debated at another day; but I never heard that it was.

In the case of Sir William Morris, who had a lra. cor. for his wife, the return was like the present. The like in Holmes's case for his wife. R. R. about Michaelmas term 1756.

Afterwards the same Monday, May 2, a motion was made to the Court grounded upon a copy of the aforesaid warrant of commitment of Mr. Wilkes to the Tower, and an affidavit of the truth thereof, for another Habeas Corpus to be directed to the constable, &c. of the Tower of London, which was granted returnable without delay.

Tuesday, May 3. At the sitting of the Court (which was crowded to such a degree as I never saw it before) in the morning Mr. Wilkes was brought to the bar, and sat among the serjeants (next to the reporter on his left hand,) when the lieutenant of the Tower returned upon this second writ of Habeas Corpus the warrant of commitment of Mr. Wilkes to the

Tower by the two secretaries of state (before set forth); which being read, serjeant Glynn moved the Court that Mr. Wilkes might be discharged out of custody without bail, and grounded his motion on three points, two whereof were objections to the legality of the warrant of commitment (the reader will observe that the general warrant of arrest and seizure was not now before the Court, and therefore the legality of that could not now be debated); the third point was, that Mr. Wilkes was a member of parliament, and therefore was privileged from being arrested for any crime except treason, felony, and breach of the peace; and that supposing him the author of the present supposed libel (which he absolutely denies) it is only a misdemeanor, and none of the three above-mentioned crimes and misdemeanors.

The first objection taken to the warrant of commitment was, that it doth not appear to the Court that Mr. Wilkes was charged by any evidence or information upon oath before the secretaries of state, that he was the author or publisher of the *North Briton*, N° 45, that, for any thing that appeared to the Court to the contrary, the secretaries of state committed Mr. Wilkes to the Tower, upon their own mere imagination or suspicion that he was the author and publisher of this supposed libel.*

The second objection taken to the warrant of commitment was, that it was too general, and doth not set forth sufficient, substantial matter whereupon the Court can judge whether the *North Briton*, N° 45, (supposing Mr. Wilkes the author and publisher thereof) is a most infamous and seditious libel, tending to inflame the minds and alienate the affections of the people from his majesty, and to excite them to traitorous insurrections against the government; that the warrant not having set forth the *North Briton*, N° 45, or such parts thereof as the secretaries of state deemed infamous, seditious, &c. the Court cannot judge whether any such paper ever existed, it not being before them; or if it does exist, whether it be an infamous libel or not.

In the third place, supposing the warrant of commitment to be good, yet that Mr. Wilkes being a member of parliament (which was admitted by the king's counsel) is privileged from arrests in all cases except treason, felony, and actual breach of the peace, therefore ought to be discharged without bail. That libels may, and often do tend to the breach of the peace was admitted, and therefore the Court of King's-bench frequently grants informations against the authors, printers and publishers thereof; but this is never done but upon affidavits laid before the Court ascertaining the said authors, printers or publishers: for surely that matter which only tends to a breach of the peace, cannot with any propriety be said to be

an actual breach of the peace; and it was said that it is universally agreed, a libel is not an actual breach of the peace; therefore it was insisted for Mr. Wilkes, that upon this point alone (although the others should be overruled) he ought to be discharged from his imprisonment in the Tower, without bail.

Mr. Serjeant Hewitt for the crown, in answer to the first objection said, that it was not necessary to set forth the evidence or information upon which the warrant of commitment was made, in the warrant; but as to the second objection, he admitted that it must appear upon the face of such warrant for what particular species of a crime or misdemeanor the party was committed, according to the case of the *King v. Roe and Kendall*, [1 Salk. 345, 5 Mod. 78, and in this Collection, vol. 12, p. 1299,] and that in the present case, if the commitment had been for writing and publishing a libel generally, without specifying the nature and tendency thereof, it would have been ill; but here it is said to be "for being the author and publisher of a most infamous and seditious libel, tending to inflame the minds and alienate the affections of the people from his majesty, and to excite them to traitorous insurrections against the government." This he thought was a sufficient specification of the nature of the libel, and of the misdemeanor supposed to be committed by Mr. Wilkes against the government; but he said he would not be understood to affirm that the paper called the *North Briton* N° 45, (which was not before the Court) was a libel; that he had found no case upon a libel like this, and therefore could not say what was a sufficient and precise certainty in a warrant of commitment for a libel; but he thought it not necessary to set forth the whole, or any part thereof, in the warrant.

As to the third objection of privilege, serjeant Hewitt admitted that Mr. Wilkes was a member of parliament, and could not legally be arrested but for treason, felony, or breach of the peace. He cited *Hob. 215*, *Hick's case*, to shew that a libel tends to the breach of the peace; but whether the presumed libel in the present case was a breach of the peace or not, he would not take upon himself to say; nor would he say that the arresting Mr. Wilkes in the present case was not a breach of privilege of the House of Commons.

Serjeants Whitaker, Nares and Davy, for the king, spoke to the like effect; but none of them affirmed, that the writing or publishing a libel was an actual breach of the peace (as I understood,) or that the arrest of Mr. Wilkes in the present case, was not a breach of privilege of parliament; and (I think) they all declined saying any thing more about the privilege of parliament, than what serjeant Hewitt had said before. When the king's serjeants had concluded, Mr. Wilkes made the following Speech to the Court.

'My lord; I am happy to appear before your lordship and this Court, where liberty is

* See *Bushel's Case*, vol. 6, p. 999. 2 Inst. 55 a. Bacop. Abr. title Commitment E.

so sure of finding protection and support, and where the law (the principle and end of which is the preservation of liberty) is so perfectly understood. Liberty, my lord, hath been the governing principle of every action of my life; and actuated by it, I always have endeavoured to serve my gracious sovereign and his family, knowing his government to be founded upon it; but as it has been his misfortune to have employed ministers who have endeavoured to cast the odium and contempt arising from their own terrible and corrupt measures on the sacred person of their sovereign and benefactor, so mine has been the daring task to rescue the royal person from ill-placed imputations, and fix them on the ministers, who alone ought to bear the blame and the punishment due to their unconstitutional proceedings. For the proof of my zeal and affection to my sovereign I have been imprisoned, sent to the Tower, and treated with a rigour yet unpractised even on Scottish rebels. But however these may strive to destroy me, whatever persecution they are now meditating against me, yet to the world I shall proclaim, that offers of the most advantageous and lucrative kind have been made to seduce me to their party, and no means left untried to win me to their connections. Now, as their attempts to corrupt me have failed, they aim at intimidating me by persecution. But as it has pleased God to give me virtue to resist their bribes, so I doubt not but he will give me spirit to surmount their threats in a manner becoming an Englishman who would suffer the severest trials rather than associate with men who are enemies to the liberty of this country. Their bribes I rejected, their menaces I defy; and I think this is the most fortunate event of my life, when I appear before your lordship and this Court, where innocence is sure of protection, and liberty can never want friends and guardians.'

Then the Court took time to consider, and appointed Friday following to give their opinion, and ordered Mr. Wilkes to be remanded to the Tower, and to be brought up again to the bar on Friday the 6th of May; and upon that day, Mr. Wilkes being again at the bar, the Lord Chief Justice delivered the opinion of the whole Court.

L. C. J. Pratt, after stating the warrant of commitment, said, There are two objections taken to the legality of this warrant, and a third matter insisted on for the defendant, is privilege of parliament.

The first objection is, that it does not appear to the Court that Mr. Wilkes was charged by any evidence before the secretaries of state, that he was the author or publisher of the North Briton N^o 45. In answer to this, we are all of opinion, that it is not necessary to state in the warrant that Mr. Wilkes was charged by any evidence before the secretaries of state, and that this objection has no weight.

Whether a justice of peace can, *ex officio*, without any evidence or information, issue a warrant for apprehending for a crime, is a different question. If a crime be done in his sight, he may commit the criminal upon the spot; but where he is not present, he ought not to commit upon discretion. Suppose a magistrate hath notice, or a particular knowledge that a person has been guilty of an offence, yet I do not think it is a sufficient ground for him to commit the criminal; but in that case he is rather a witness than a magistrate, and ought to make oath of the fact before some other magistrate, who should thereupon act the official part, by granting a warrant to apprehend the offender; it being more fit that the accuser should appear as a witness, than act as a magistrate. But that is not the question upon this warrant. The question here is, whether it is an essential part of the warrant, that the information, evidence or grounds of the charge before the secretaries of state should be set forth in the warrant? And we think it is not. Thomas Rudyard's case, 2 Vent. 22, cannot be applied to this case; for in the case of a conviction it is otherwise. It was said that a charge by witness was the ground of a warrant; but we think it not requisite to set out more than the offence, and the particular species of it. It may be objected, if this be good, every man's liberty will be in the power of a justice of peace. But Hale, Coke and Hawkins, take no notice that a charge is necessary to be set out in the warrant. In the case of the Seven Bishops, their counsel did not take this objection, which no doubt but they would have done, if they had thought there had been any weight in it. I do not rely upon the determination of the judges who then presided in the King's-bench. I have been attended with many precedents of warrants returned into the King's-bench; they are almost universally like this; and in sir William Wyndham's case, 1 Stra. 2, 3, this very point before us is determined. And Hawkins, in his 2 Pl. Coron. 120, sect. 17, says, "It is safe to set forth that the party is charged upon oath; but this is not necessary; for it hath been resolved, that a commitment for treason, or for suspicion of it, without setting forth any particular accusation, or ground of suspicion, is good;" and cites sir William Wyndham's case, Trin. 2 Geo. Dalt. cap. 121, Crompt. 233, b.

The second objection is, that the libel ought to be set forth in the warrant in *hac verba*, or at least so much thereof as the secretaries of state deemed infamous, seditious, &c. that the Court may judge whether any such paper ever existed; or if it does exist, whether it be an infamous and seditious libel, or not. But we are all of a contrary opinion. A warrant of commitment for felony must contain the species of felony briefly, "as for felony for the death of J. S. or for burglary in breaking the house of J. S. &c. and the reason is, because it may appear to the judges upon the return of an Habeas Corpus, whether it be felony or not."

The magistrate forms his judgment upon the writing, whether it be an infamous and seditious libel or not at his peril; and perhaps the paper itself may not contain the whole of the libel; inuendos may be necessary to make the whole out. There is no other word in the law but libel whereby to express the true idea of an infamous writing. We understand the nature of a libel as well as a species of felony. It is said the libel ought to be stated, because the court cannot judge whether it is a libel or not without it; but that is matter for the judge and jury to determine at the trial. If the paper was here, I should not be afraid to read it. We might perhaps be able to determine that it was a libel, but we could not judge that it was not a libel, because of inuendos, &c. It may be said, that without seeing the libel we are not able to fix the quantum of the bail; but in answer to this, the nature of the offence is known by us. It is said to be an infamous and seditious libel, it is such a misdemeanor as we should require good bail for, (moderation to be observed) and such as the party may be able to procure.

The third matter insisted upon for Mr. Wilkes is, that he is a member of parliament, (which has been admitted by the king's serjeants) and intitled to privilege to be free from arrests in all cases except treason, felony, and actual breach of the peace, and therefore ought to be discharged from imprisonment without bail; and we are all of opinion that he is intitled to that privilege, and must be discharged without bail. In the case of the Seven Bishops, the Court took notice of the privilege of parliament, and thought the bishops would have been intitled to it, if they had not judged them to have been guilty of a breach of the peace; for three of them, Wright, Holloway, and Allybone, deemed a seditious libel to be an actual breach of the peace, and therefore they were ousted of their privilege most unjustly. If Mr. Wilkes had been described as a member of parliament in the return, we must have taken notice of the law of privilege of parliament, otherwise the members would be without remedy, where they are wrongfully arrested against the law of parliament. We are bound to take notice of their privileges as being part of the law of the land. 4 Inst. 25, says, the privilege of parliament holds unless it be in three cases, viz. treason, felony, and the peace: these are the words of Coke. In the trial of the Seven Bishops, the word 'peace' in this case of privilege is explained to mean where surety of the peace is required. Privilege of parliament holds in informations for the king, unless in the cases before excepted. The case of an information against lord Tankerville for bribery, 4 Annot.* was within the privilege of parlia-

* This must be a mistake of the reporter; for lord Tankerville's case was in 1758. See Journ. Dom. Proc. 6 June in that year.—Hargrave.

ment. See the Resolution of Lords and Commons, anno 1675. We are all of opinion that a libel is not a breach of the peace. It tends to the breach of the peace, and that is the utmost, 1 Lev. 139. But that which only tends to the breach of the peace cannot be a breach of it. Suppose a libel be a breach of the peace, yet I think it cannot exclude privilege; because I cannot find that a libeller is bound to find surety of the peace, in any book whatever, nor ever was, in any case, except one, viz. the case of the Seven Bishops, where three judges said, that surety of the peace was required in the case of a libel. Judge Powell, the only honest man of the four judges, dissented; and I am bold to be of his opinion, and to say, that case is not law. But it shews the miserable condition of the state at that time. Upon the whole, it is absurd to require surety of the peace or bail in the case of a libeller, and therefore Mr. Wilkes must be discharged from his imprisonment.

Whereupon there was a loud buzza in Westminster-hall.* He was discharged accordingly.

LORD CHIEF JUSTICE PRATT'S ARGUMENT ON DELIVERING THE JUDGMENT OF THE COURT, FROM THE BOOK EN- TITLED, 'A DIGEST OF THE LAW OF LIBELS.'

When this return was read, my brother Glynn, counsel for Mr. Wilkes, made two objections to it; and though those should fail him, he insisted that Mr. Wilkes, from the nature of his particular station and character, as being a member of the House of Commons, was entitled to privilege of parliament, and ought for that reason alone to be discharged from his present imprisonment. To begin with the objections. The first was, that it did not appear by the warrant that Mr. Wilkes stood charged upon any evidence with being the author of the libel described in the warrant. The true question arising upon this objection, is whether stating the evidence be essential to the validity of the warrant. And upon this point we are all clearly of opinion that the warrant is good.† We consider the secretaries in the light of common justices of the peace: they no more than any common justices can issue warrants merely *ex officio*, or for offences within their private knowledge, being in those cases rather witnesses than magistrates. But though this be admitted, it will not affect the present question. The present question is, whether the stating the evidence be essential to the validity of the warrant? No authority has been

* See the Case of lord Shaftesbury, vol. 6, p. 1270, of the Seven Bishops, vol. 12, pp. 430, 431. See too the Case of the King v. Gardner, 1 Irish Term Reports 285.

† See Leach's Hawkins's Pleas of the Crown, book 2, c. 16, § 17.

cited by the defendant's counsel to show it. *Rudyard's Case* in 2 Ventr. 32, was indeed referred to; but upon examining that case, it does not apply. The commitment there was a commitment in execution, and therefore it was necessary in that case to state the evidence. It was urged farther, that the ground of the justices' jurisdiction rested in the charge by witnesses; and if it was otherwise every man's liberty would be in the power of the justices. The objection deserves an answer; and if it had not been determined before, I should have thought it very weighty and alarming: but it has been settled. Before I mention the case where it was solemnly adjudged, I would take notice, that neither my lord Coke, lord Hale, or Mr. Hawkins, all of them very able writers upon the crown law, have considered such a charge as is contended for to be essential. In the trial of the Seven Bishops, though they were committed upon a similar warrant, their counsel did not take the same objection. In referring to that great case, I am not to be understood as intending to give any weight to the determination of the judges who sat upon the bench, in that cause. I rely only on the silence of the defendants' counsel, who were all of them lovers of liberty, and the greatest lawyers of that age. We have seen precedents of commitments returned upon Habeas Corpus's into the King's-bench, where the warrants have been all in the same form, and no such objection taken; but the very point was determined in the case of sir W. Wyndham, 3 Vin. 530. 535. Stra. 2, who was committed for high treason generally, and not on the charge of any body stated in the commitment. 2 Hawk. Pl. Cr. 120, chap. 17, sect. 17, refers to the case of sir W. Wyndham, and says it is safer to set forth that the party is charged upon oath, but that is not necessary. Thus stands this point on authorities. The other objection was, that the libel itself ought to have been set forth in *hæc verba*; but upon that point too, we are all of opinion that the warrant is good. It was urged, that the specific cause of detention ought to be stated with certainty; and therefore if a man be committed for felony, the warrant must briefly mention the species of the felony. Now the species of every offence must be collected by the magistrate out of the evidence; but he is not bound to set forth the evidence: he is answerable only for the inference he deduces from it. As to a libel, the evidence is partly internal and partly external. The paper itself may not be complete and conclusive evidence; for it may be dark and unintelligible without the innuendoes, which are the external evidence. There is no other name but that of libel applicable to the offence of libelling; and we know the offence specifically by that name, as we know the offences of horse-stealing, forgery, &c. by the names which the law has annexed to them. But two reasons were urged why the *law* [qu. libel] ought to be stated. First, it was said, that without it the Court cannot

judge whether it be a libel or not. The answer is, that the Court ought not in this proceeding to give any judgment of that sort, as it would tend to prejudication, to take away the office of a jury, and to create an improper influence. The other reason was, that unless the libel be stated, the Court cannot be able to determine on the quantity of bail. I answer, that regard to the nature of the offence is the only necessary rule in bailing. As to the offence of a libel, it is an high misdemeanor, and good bail (having regard to the quality of the offender) should be required. But if the libel itself was stated, we could have no other measure of bailing than this. Besides, there has been no case shewn to warrant this reason, and it was not urged in the case of the Seven Bishops. But then it remains to be considered, whether Mr. Wilkes ought not to be discharged. The king's counsel have thought fit to admit, that he was a member of the House of Commons, and we are bound to take notice of it. In the case of the Seven Bishops, the Court took notice of their privilege from their description in the warrant. In the present case, there is no suit depending. Here no writ of privilege can therefore issue, no plea of privilege can be received. It rests, and must rest on the admission of the counsel for the crown: it is fairly before us upon that admission, and we are bound to determine it. In lord Coke 4 Inst. 24, 25, after shewing that privilege of parliament is consuable at common law, he says, that privilege generally holds, unless it be in three cases, viz. treason, felony, and the peace. We have not been able to have recourse to the original record, but in Cotton's Abridgement, fol. 596, you will find my lord Coke was right. The case I would refer to is that of William Lake, 9th of Hen. 6, who being a member's servant, and taken in execution for debt, was delivered by the privilege of the House of Commons; the book adds, (and for that purpose I refer to it) wherein is to be noted, that there is no cause to arrest any such man, but for treason, felony, and the peace. In the trial of the Seven Bishops, the words 'the peace' are explained to mean 'surety of the peace.' In the case of the King, v. sir Thomas Culpepper, reported in 12 Mod. 108, lord Holt says, that whereas it is said in our books, that privilege of parliament was not allowable in treason, felony, or breach of the peace, it must be intended where surety of the peace is desired, that it shall not protect a man against a *supplicavit*, but it holds as well in case of indictment, information for breach of the peace, as in case of actions. In the case of lord Tankerville a few years ago, which, though not reported in any law book, is upon record in parliament, it was held, that bribery, being only a constructive, and not an actual breach of the peace, should not oust him of his privilege. There is no difference between the two houses of parliament in respect of privilege. The statutes of 12 and 13 Wil. 3, c. 3, and 2 and 3 An. c. 18, speak of the

privilege of parliament in reference not to one House in particular, but to both Houses. What then is the present case? Mr. Wilkes, a member of the House of Commons, is committed for being the author and publisher of an infamous and seditious libel. Is a libel *ipso facto* in itself an actual breach of the peace? Mr. Dalton in his *Justice of the Peace*, vol. 289, defines a libel as a thing tending to the breach of the peace. In sir Baptist Hicks's case, Hob. 224, it is called a provocation to a breach of the peace. In Lev. 139, the King v. Summers, it was held to be an offence punishable before justices, because it tended to a breach of the peace. In Hawk. Pl. Cor. 193, chap. 73, sect. 3, it is called a thing directly tending to a breach of the public peace. Now, that which tends only to the breach of the peace, is not an actual breach of it, is too plain a proposition to admit of argument. But if it was admitted that a libel was a breach of the peace, still privilege cannot be excluded, unless it requires surety of the peace; and there has been no precedent but that of the Seven Bishops cited to shew that sureties of the peace are requirable from a libeller; and as to the opinion of the three judges in that case, it only serves to shew the miserable state of justice in those days. Allybone, one of the three, was a rigid and professed Papist; * Wright and Holloway, I am much afraid, were placed there for doing jobs; and Powell, the only honest man upon the bench, gave no opinion at all. Perhaps it implies an absurdity to demand sureties of the peace from a libeller. However, what was done in the case of the Seven Bishops, I am bold to deny was law.

Upon the whole, though it should be admitted, that sureties of the peace are requirable from Mr. Wilkes, still his privilege of parliament will not be taken away till sureties have been demanded and refused. Let him be discharged.

[This Judgment for Privilege of Parliament in the case of Libel, was taken into consideration by both Houses at their first meeting afterwards. The discussion ended in a joint Vote, by which it was resolved, "That the Privilege of Parliament doth not extend to the case of writing and publishing Seditious Libels, nor ought to be allowed to obstruct the ordinary course of the laws in the speedy and effectual prosecution of so heinous and dangerous an offence." [See New Parl. Hist. vol. 15, p. 1362.] This Resolution was not carried without a very strong contest. Of the debates on this occasion, no regular account has been yet published. But the Annual Register for 1763, gives a general view of the chief topics on each side; and the Protest made against the Resolution in the House of Lords, contains a masterly and spirited Argument

against thus narrowing the Privilege of Parliament. This Protest will appear by the following Extract from the Journal of the Lords.]

EXTRACT FROM THE JOURNAL OF THE LORDS.

Die Martis, 29 Novembris, 1763.

The order of the day for resuming the adjourned consideration of the report of the conference with the Commons of Friday last being read;

The third Resolution of the Commons was read, as follows:

"Resolved, by the Commons in parliament assembled,

"That privilege of parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of the laws, in the speedy and effectual prosecution of so heinous and dangerous an offence."

And it being moved to agree with the Commons in the said resolution;

The same was objected to. After long debate thereupon,

The question was put, Whether to agree with the Commons in the said Resolution?

It was resolved in the affirmative.

"Dissentient"

"Because we cannot bear without the utmost concern and astonishment, a doctrine advanced now, for the first time, in this House, which we apprehend to be new, dangerous, and unwarrantable, viz. that the personal privilege of both Houses of Parliament has never held, and ought not to hold, in the case of any criminal prosecution whatsoever; by which, all the records of parliament, all history, all the authorities of the gravest and soberest judges, are entirely rescinded; and the fundamental principles of the constitution, with regard to the independence of parliament, torn up and buried under the ruins of our most established rights.

"We are at a loss to conceive, with what view such a sacrifice should be proposed, unless to amplify, in effect, the jurisdiction of the inferior, by annihilating the ancient immunities of this superior court.

"The very question itself, proposed to us from the Commons, and now agreed to by the Lords, from the letter and spirit of it, contradicts this assertion; for, whilst it only narrows privilege in criminal matters, it establishes the principle. The law of privilege, touching imprisonment of the persons of lords of parliament, as stated by the two standing orders, declares generally, that no lord of parliament, sitting the parliament, or within the usual times of privilege of parliament, is to be imprisoned or restrained, without sentence or order of the House, unless it be for treason or felony, or for refusing to give security for the peace, and refusal to pay obedience to a writ of Habeas Corpus.

"The first of these orders was made after

3 S

* Burn. Hist. O. T. 745. 3 Mod. 239.
VOL. XIX.

long consideration, upon a dispute with the king, when the precedents of both Houses had been fully inspected, commented upon, reported, and entered in the Journals, and after the king's counsel had been heard. It was made in sober times, and by a House of Peers, not only loyal, but devoted to the crown; and it was made by the unanimous consent of all, not one dissenting. These circumstances of solemnity, deliberation, and unanimity, are so singular and extraordinary, that the like are scarce to be found in any instance among the records of parliament.

"When the two cases of surety for the peace, and Habeas Corpus, come to be well considered, it will be found that they both breathe the same spirit, and grow out of the same principle.

"The offences, that call for surety and Habeas Corpus, are both cases of present continuing violence; the proceedings in both have the same end, viz. to repress the force, and to disarm the offender. The proceeding stops in both when that end is attained; the offence is not prosecuted or punished in either; the necessity is equal in both, and, if privilege was allowed in either, so long as the necessity lasts, a lord of parliament would enjoy a mightier prerogative than the crown itself is intitled to. Lastly, they both leave the prosecution of all misdemeanors still under privilege, and do not derogate from that great fundamental, that none shall be arrested in the course of prosecution for any crime under treason and felony.

"These two orders comprise the whole law of privilege, and are both of them standing orders, and consequently the fixed laws of the House, by which we are all bound until they are duly repealed.

"The Resolution of the other House now agreed to, is a direct contradiction to the rule of parliamentary privilege, laid down in the aforesaid standing orders, both in letter and spirit. Before the reasons are stated, it will be proper to premise two observations.

"First, that in all cases where security of the peace may be required, the lord cannot be committed till that security is refused, and consequently the magistrate will be guilty of a breach of privilege, if he commits the offender without demanding that security.

"Secondly, although the security should be refused, yet, if the party is committed generally, the magistrate is guilty of a breach of privilege, because the party refusing ought only to be committed till he has found sureties; whereas, by general commitment, he is held fast, even though he should give sureties, and can only be discharged by giving bail for his appearance.

"This being premised, the first objection is to the generality of this Resolution, which, as it is phrased, denies the privilege to the supposed libeller, not only where he refuses to give sureties, but likewise throughout the whole prosecution, from the beginning to the

end; so that, although he should submit to be bound, he may, notwithstanding, be afterwards arrested, tried, convicted, and punished, sitting the parliament, and without leave of the House, wherein the law of privilege is fundamentally misunderstood, by which no commitment whatsoever is tolerated, but that only which is made upon the refusal of the sureties, or in the other excepted cases of treason or felony, and the Habeas Corpus.

"If privilege will not hold throughout in the case of a seditious libel, it must be because that offence is such a breach of the peace, for which sureties may be demanded; and if it be so, it will readily be admitted, that the case comes within the exception, 'provided always, that sureties have been refused, and that the party is committed only till he shall give sureties.'

"But first, this offence is not a breach of the peace; it does not fall within any definition of a breach of the peace, given by any of the good writers upon that subject; all which breaches, from menace to actual wounding, either alone or with a multitude, are described to be acts of violence against the persons, goods, or possessions, putting the subject in fear by blows, threats or gestures. Nor is this case of the libeller ever enumerated in any of these writers among the breaches of peace; on the contrary, it is always described as an act tending to excite, provoke, or produce, breaches of the peace; and although a secretary of state may be pleased to add the enflaming epithets of treasonable, traitorous, or seditious, to a particular paper, yet no words are strong enough to alter the nature of things. To say then, that a libel, possibly productive of such a consequence, is the very consequence so produced, is, in other words, to declare, that the cause and the effect are the same thing.

"But, secondly, if a libel could possibly, by any abuse of language, or has any where been called, inadvertently, a breach of the peace, there is not the least colour to say, that the libeller can be bound to give sureties for the peace, for the following reasons:

"Because none can be so bound, unless he be taken in the actual commitment of a breach of the peace; striking, or putting some one or more of his majesty's subjects in fear:

"Because there is no authority, or even ambiguous hint, in any law-book, that he may be so bound:

"Because no libeller, in fact, was ever so bound:

"Because no crown lawyer, in the most despotic times, ever insisted he should be so bound, even in days when the press swarmed with the most inveterate and virulent libels, and when the prosecutions raged with such uncommon fury against this species of offenders; when the law of libels was ransacked every term; when loss of ears, perpetual imprisonment, banishment, and fines of ten and twenty thousand pounds, were the common judgments in the Star-chamber; and when the

crown had assumed an uncontrollable authority over the press.

"Thirdly, this Resolution does not only infringe the privilege of parliament, but points to the restraint of the personal liberty of every common subject in these realms, seeing that it does, in effect, affirm, that all men, without exception, may be bound to the peace for this offence.

"By this doctrine every man's liberty, privileged as well as unprivileged, is surrendered into the hands of a secretary of state. He is by this means impowered, in the first instance, to pronounce the paper to be a seditious libel; a matter of such difficulty, that some have pretended, it is too high to be intrusted to a special jury of the first rank and condition: he is to understand, and decide by himself, the meaning of every innuendo: he is to determine the tendency thereof, and brand it with his own epithets: he is to adjudge the party guilty, and make him author or publisher, as he sees good: and lastly, he is to give sentence by committing the party. All these authorities are given to one single magistrate, unassisted by counsel, evidence, or jury, in a case where the law says, no action will lie against him, because he acts in the capacity of a judge.

"From what has been observed, it appears to us, that the exception of a seditious libel from privilege is neither founded on usage or written precedents, and therefore this resolution is of the first impression; nay, it is not only a new law, narrowing the known and ancient rule, but it is likewise a law *ex post facto, pendente lite, et ex parte*, now first declared to meet with the circumstances of a particular case; and it must be further considered, that this House is thus called upon to give a sanction to the determinations of the other, who have not condescended to confer with us upon this point till they had prejudged it themselves.

"This method of relaxing the rule of privilege, case by case, is pregnant with this farther inconvenience, that it renders the rule precarious and uncertain. Who can foretel where the House will stop, when they have, by one infringement of their own standing orders, made a precedent, whereon future infringements may, with equal reason, be founded? How shall the subject be able to proceed with safety in this perilous business? How can the judges decide on these or the like questions, if privilege is no longer to be found in records and journals, and standing orders? Upon any occasion privilege may be enlarged, and no court will venture for the future, without trembling, either to recognize or to deny it.

"We manifestly see this effect of excluding, by a general resolution, one bailable offence from privilege to-day, that it will be a precedent for doing so by another, upon some future occasion, till, instead of privilege holding in every case not excepted, it will, at last, come to hold in none but such as are expressly saved.

"When the case of the Habeas Corpus is relied upon, as a precedent to enforce the declaration, the argument only shews, that the mischief aforementioned has taken place already, since one alteration, though a very just one, not at all applicable to the present question, is produced to justify another that is unwarrantable.

"But it is strongly objected, that if privilege be allowed in this case, a lord of parliament might endanger the constitution by a continual attack of successive libels; and if such a person should be suffered to escape, under the shelter of privilege, with perpetual impunity, all government would be overturned; and therefore it is inexpedient to allow the privilege now, when the time of privilege, by prorogations, is continued for ever, without an interval.

"This objection shall be answered in two ways. First, if inexpediency is to destroy personal privilege in this case of a seditious libel, it is at least as inexpedient, that other great misdemeanors should stand under the like protection of privilege; neither is it expedient, that the smaller offences should be exempt from a prosecution in the person of a lord of parliament; so that if this argument of inexpediency is to prevail, it must prevail throughout, and subvert the whole law of privilege in criminal matters; in which method of reasoning there is this fault, that the argument proves too much.

"If this inconvenience be indeed grievous, the fault is not in the law of privilege, but in the change of times, and in the management of prorogations by the servants of the crown, which are so contrived, as not to leave an hour open for justice. Let the objection nevertheless be allowed in its utmost extent, and then compare the inexpediency of not immediately prosecuting on one side, with the inexpediency of stripping the parliament of all protection from privilege on the other. Unhappy as the option is, the public would rather wish to see the prosecution for crimes suspended, than the parliament totally unprivileged; although, notwithstanding this pretended inconvenience is so warmly magnified on the present occasion, we are not apprised that any such inconvenience has been felt, though the privilege has been enjoyed time immemorial.

"But the second and best answer, because it removes all pretence of grievance, is this, that this House, upon complaint made, has the power (which it will exert in favour of justice) to deliver up the offender to prosecution.

"It is a dishonourable and an undeserved imputation upon the Lords, to suppose, even in argument, that they would nourish an impious criminal in their bosoms, against the call of offended justice, and the demand of their country.

"It is true, however, and it is hoped that this House will always see (as every magistrate ought that does not betray his trust) that their member is properly charged; but when

that ground is once laid, they would be ashamed to protect the offender one moment. Surely this trust (which has never yet been abused) is not too great to be reposed in the High Court of Parliament! while it is lodged there, the public justice is in safe hands, and the privilege untouched: whereas, on the contrary, if for the sake of coming at the criminal at once, without this application to the House, personal privilege is taken away, not only the offender, but the whole parliament, at the same time, is delivered up to the crown.

"It is not to be conceived, that our ancestors, when they framed the law of privilege, would have left the case of a seditious libel (as it is called) the only unprivileged misdemeanor. Whatever else they had given up to the crown, they would have guarded the case of supposed libels above all others with privilege, as being most likely to be abused by outrageous and vindictive prosecutions.

"But this great privilege had a much deeper reach. It was wisely planned, and hath hitherto, through all times, been resolutely maintained.

"It was not made to screen criminals, but to preserve the very being and life of parliament; for when our ancestors considered, that the law had lodged the great powers of arrest, indictment, and information, in the crown, they saw the parliament would be undone, if, during the time of privilege, the royal process should be admitted in any misdemeanor whatsoever. Therefore they excepted none. Where the abuse of power would be fatal, the power ought never to be given; because redress comes too late.

"A parliament under perpetual terror of imprisonment can neither be free, nor bold, nor honest; and if this privilege was once removed, the most important question might be irrecoverably lost, or carried by a sudden irruption of messengers, let loose against the members half an hour before the debate.

"Lastly, as it has already been observed, the case of supposed libels is, of all others, the most dangerous and alarming to be left open to prosecution during the time of privilege.

"If the severity of the law touching libels, as it hath sometimes been laid down, be duly weighed, it must strike both Houses of Parliament with terror and dismay.

"The repetition of a libel, the delivery of it unread to another, is said to be a publication; nay, the bare possession of it has been deemed criminal, unless it is immediately destroyed, or carried to a magistrate.

"Every lord of parliament then, who hath done this, who is falsely accused, nay, who is, though without any information, named in the secretary of state's warrant, has lost his privilege by this resolution, and lies at the mercy of that great enemy to learning and liberty, the messenger of the press.

"For these and many other forcible reasons, we hold it highly unbecoming the dignity, gravity, and wisdom of the House of Peers, as

well as their justice, thus judicially to explain away and diminish the privilege of their persons, founded in the wisdom of ages, declared with precision in our standing order, so repeatedly confirmed, and hitherto preserved inviolable by the spirit of our ancestors, called to it only by the other House, on a particular occasion, and to serve a particular purpose, *ex post facto, ex parte, et pendente lite* in the courts below.

| | |
|--------------|-------------------|
| " Temple, | Abergavenny, |
| Bolton, | Fred. Litch. Cov. |
| Grafton, | Ashburnham, |
| Cornwallis, | Fortescue, |
| Portland, | Grantham, |
| Bristol, | Walpole, |
| Devonshire, | Ponsonby, |
| Scarborough, | Folkestone." |
| Dacre, | |

As to Scotland, Mr. Hume, 1 Comment. 75, (Trial for Crimes) after noticing the Resolutions of the two Houses of Parliament, (May 6, Nov. 24, 29, 1763,) in the case of Wilkes, and also what Blackstone says, (Comm. vol. 1, p. 166) proceeds:

"I doubt, therefore, whether this privilege have not received too broad a construction with us, on three several occasions, where such a plea has been moved. In the process December 24 (31,) 1711, at instance of Alexander Doull against sir James Dunbar, for the crimes of oppression, molestation, assault, and violation of the privileges of a royal burgh, the Lords gave this deliverance 'In respect of the above mentioned sir James Dunbar, one of the pannels, his privilege as a member of the House of Commons, and that the within libel was raised and executed against him and his servants within named, during the currency of his said privilege, desert the diet of the said libel against him, the said sir James, and against Alexander and William Sutherlands, his servants; but* prejudice to the pursuer to insist in a new libel, and prosecute the foresaids persons, for the crimes within mentioned, at any other lawful time as accords.' In the process also against sir William Gordon of Dalpholly, Feb. 9, 1713, for an assault and outrage, accompanied with the violent taking of certain papers (and this was charged as amounting to a robbery), the Court declined to proceed until the pannel should judicially waive his privilege as a member of the House of Commons; which being done, the trial went on.

"The third instance was, on the 7th of December, 1767, on occasion of the trial of Mr. Dempster, a member of the House of Commons, for bribing his electors; and here the Court sustained his privilege, to hinder arrest of his person, or any proceeding in the trial. But upon appeal to the House of Lords, an

* See the 'Divisions of Purley' and Jamieson's Etymological Dictionary, as referred to, vol. 10, pp. 1007.

opinion was signified, that this interlocutor of the Court of Justiciary was wrong; and an order was made (for the appeal was not discussed, nor any judgment given) which left it open to them to review their decision. Accordingly, on the 18th of March 1768, in respect of this order, the Court of Justiciary declared, 'That the said interlocutor shall be no precedent to any future case of the like nature, and that the matter shall lie open to the consideration of the Court upon any such future case, in the same manner as if the said interlocutor had not passed.' Since that time, there has not, however, been any opportunity of re-considering this question.

"By the last clause of the 'Act for preventing wrongous imprisonment, and against undue delays in trials,' (6th act of the 8th and 9th sessions of the 1st parliament of king William) it had been statute and ordained, that no member of parliament attending, shall

be imprisoned or confined, upon any account whatsoever, during a session of parliament, without a warrant of parliament, reserving to the high constable and marischal their privileges and jurisdictions in the time of parliament as formerly; and also providing, that if any member shall happen to commit a capital crime, or if there be a manifest hazard of the peace, any magistrate may attack for securing of the person or the peace, and deliver the person to the custody of the high constable, in order to the parliament's cognition the next sederunt.

"But at the Union, this ample protection came to be restricted to the narrower and more salutary measure of the English privilege."

For more concerning Privilege of Parliament, see *Brass Crosby's Case*, A. D. 1770; *Richard Thompson's Case*, vol. 8, p. 1, and the matter subjoined to that Case.

540. Proceedings on Error in an Action of False Imprisonment by
 DRYDEN LEACH,* against JOHN MONEY, JAMES WATSON,
 and ROBERT BLACKMORE, three of the King's Messengers,
 King's-Bench, Easter Term, 5 GEORGE III. and Michaelmas
 Term, 6 GEORGE III. A. D. 1765.

[These Proceedings, though in the case of a civil action, fully come within the idea of a State Trial. They grew out of the prosecutions for the printing and publishing N^o. 45 of the political paper called *The North Briton*, and involve the discussion of several points relative to matters of the most public nature, namely, the magisterial powers claimed as incident to the office of Secretary of State, the Seizure of Papers, and the Legality of General Warrants. The Case is entirely taken from Sir James Burrow's Report. See 3 Burr. 1692 and 1742. Easter Term, Friday, 17 May, 1765. *Hargrave*.]

Easter Term, 5 Geo. 3.

SOON after the Court sat, the lord chief justice Pratt came personally into court, to confess (*ore tenus*) his seal put to a Bill of Exceptions in this Case; pursuant to the requisition of the following Writ, viz.

'George the third, &c.—To our trusty and well-beloved Charles Pratt, knight, our chief justice of the bench, greeting.—Whereas we

* See in the Case of *Brookshaw v. Hopkins* (reported Lofft, 235. 240) the distinction between acts done in actual execution of an office, and acts done under mere colour and pretence of office.

'have lately been informed that in the record and process, and also in giving of judgment in a plaint which was in our court before you and your associates, our justices of the said bench, by our writ, between Dryden Leach, and John Money, James Watson, and Robert Blackmore, in a plea of trespass, assault, and imprisonment, manifest error hath intervened, to the great damage of the said John, James, and Robert; which said record and process, for the error aforesaid, we have caused to be brought into our court before us; and now, on the behalf of the said John, James, and Robert, we are informed, in our said court before us, that at the trial of the issue first joined between the said parties in the plea aforesaid, the counsel, learned in the law, of the said John, James, and Robert, alledged on their behalf certain Exceptions to the opinion then declared and given by you; and that the said Exceptions were then and there written in a certain Bill, to which you put your seal, at the request of the said John, James, and Robert, according to the form of the statute in such case made and provided; and the said John, James, and Robert have brought into our court before us the said Bill, with your seal put to the same, as it is said; whereupon the said John, James, and Robert have besought us to do what further should seem meet to be done in this behalf, according to the form of the said statute; and forasmuch as by the said statute it is ordained, that in such case the justice whose seal should be

‘ put to such exception be commanded to appear before us at a certain day, to confess or deny his seal; therefore we command you that you personally appear before us, on the morrow of the Ascension of our Lord, wheresoever we shall then be in England, to confess or deny the seal so put to the said Bill of Exceptions as aforesaid to be your seal, according to the form and effect of the said statute; and that you bring with you, at the same time, this writ. Witness William lord Mansfield, at Westminster, the 24th day of April, in the fifth year of our reign.’

N. B. The Bill of Exceptions, sealed by lord chief justice Pratt, had been previously brought into this court, and was now in the hands of Mr. Owen, as secondary of the office of pleas; and all the proceedings, down to and including the abovementioned writ, were entered upon the rolls of this court.

The lord chief justice Pratt being now come into this court, pursuant to the command contained in the said writ, delivered it to the Lord Chief Justice of this court; Mr. Owen, at the same time, delivering the original Bill of Exceptions into lord Mansfield's hand. Whereupon lord Mansfield, shewing to lord chief justice Pratt the seal thereto affixed, asked him, Whether that was his lordship's seal, or not. To which question his lordship answering in the affirmative, lord Mansfield re-delivered the Bill of Exceptions to Mr. Owen; at the same time delivering to him the abovementioned Writ, with orders ‘ that it should be filed.’

Note—There was no written return to this Writ; but Mr. Owen proposes to indorse upon it—‘ Sir Charles Pratt, knight, the chief justice within named, personally appeared in the court of the lord the king, before the king himself, &c. on the day within written; and confesseth that the seal put to the Bill of Exceptions within mentioned is his seal.’

Mich. Term, 6 Geo. 3, Roll 60.

Errors having been assigned upon the Bill of Exceptions mentioned above, they now came on to be argued.

This was an action of trespass* brought in the court of Common Pleas by Dryden Leach, against three king's messengers, John Money, James Watson, and Robert Blackmore, for breaking and entering the plaintiff's house, and imprisoning him, without any lawful or probable cause; to the plaintiff's damage of £2,000l.

The defendants below pleaded two pleas. The first was the general issue, ‘ Not Guilty ’ on which issue was joined.

The other plea pleaded (by leave of the Court) was a special justification, as to the breaking and entering of the plaintiff's dwelling-house, and staying and continuing therein

for six hours, and making the assault upon him, and seizing, taking, and imprisoning him, and keeping and detaining him in prison for four days: as to all which, they say, that before the commitment of the supposed trespass, viz. on 19th April 1763, the king made a speech from the throne, &c. in which speech was contained the following declaration, &c. &c. That on the 23d April 1763, a certain seditious and scandalous libel or composition, intitled, “ The North Briton, N° 45,” was unlawfully and seditiously composed, printed and published, concerning the king and his said speech; in which libel were contained, &c. &c. &c. That the earl of Halifax was then one of the privy council, and one of his majesty's principal secretaries of state; and that information was given to him of the said publication of the aforesaid libel; and the said libel was then shewn and produced to the said earl; and he thereupon in due manner issued his warrant in writing under his hand and seal, directed to Nathan Carrington and these three defendants, who were then four of his majesty's messengers in ordinary; by which warrant, the said earl did in his majesty's name authorize and require them, taking a constable to their assistance, to make strict and diligent search for the said authors, printers and publishers of the aforesaid seditious libel, intitled, “ The North Briton, N° 45, April the 23d, 1763;” and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before the said earl, to be examined concerning the premises, and to be farther dealt with according to law: in the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all others his said majesty's messengers, officers civil and military, and loving subjects whom it might concern, were to be aiding and assisting to them the said Nathan Carrington, John Money, James Watson, and Robert Blackmore, as there should be occasion. They further say, that for forty-four weeks and upwards before the issuing of the said warrant, certain weekly compositions, intitled, “ The North Briton,” and respectively numbered in a progressive order, had been printed and published on Saturday in every week; and that the said seditious libel, intitled, “ The North Briton, N° 45, Saturday April the 23d, 1763,” was one of the said weekly compositions. They say that the plaintiff followed and exercised the art and business of a printer; and did in fact print and cause to be printed one of the said weekly compositions, intitled, “ The North Briton;” to wit, the North Briton, N° 26, and that after the issuing of the aforesaid warrant, and before the committing of the said supposed trespass, to wit, on the 27th of April, 1763, information was given to them the defendants, “ That the said Dryden Leach and his servants were the printers of the aforesaid seditious libel, intitled, The North Briton N° 45, Saturday April the 23d, 1763.” Wherefore the defendants, being his majesty's messengers in ordinary as afore-

* See the 549th and 559th rolls of C. B. of Mich. term, 4 Geo. 3, and below at large.

said, took to their assistance a certain constable, to wit, one Thomas Freeman, who was then a constable of the parish of St. Margaret, Westminster, in the county of Middlesex, to aid them in the execution of the warrant; and, together with the said constable, entered into the aforesaid dwelling-house of the said Dryden Leach, in which the said Dryden Leach carried on his aforesaid business of a printer, the door thereof being then open, to search for the printers of the said seditious libel, in order to carry them before the said earl of Halifax, to be examined concerning the same: and thereupon, the said defendants, together with the constable aforesaid, did then and there find, within the same house, a newly-printed copy of one of the said weekly compositions, intitled, "The North Briton," and also an unfinished copy of part of another of the said compositions then also newly printed, and which said newly printed copies were part of a new edition, which the said Dryden Leach and his servants were then and there re-printing, of the aforesaid weekly compositions. Whereupon the defendants, together with the constable abovenamed, did gently lay their hands on the said Dryden Leach, and seized and took him into their custody, in order to bring him before the said earl of Halifax, to be examined concerning the said seditious libel; and in so searching for the printers of the seditious libel, and seizing and taking the said Dryden as aforesaid, did then and there necessarily stay and continue in the said house of the said Dryden for the space of six hours, part of the time in the declaration mentioned. And because the said earl of Halifax was, during all the said space of four days, part of the aforesaid five days in the said declaration mentioned, employed in other business belonging to his said office of secretary of state, so that the said Dryden Leach could not then or during the said four days be brought before the said earl for the purpose aforesaid, they the said defendants, together with the constable aforesaid, did keep and detain the said Dryden Leach in their custody for the said space of four days, part of the said time in the declaration mentioned, in order to carry him before the said earl of Halifax for the purpose aforesaid. They further say, that at the end of the aforesaid four days, and not before, upon the examination of the said Dryden Leach and certain other persons who were then and there examined concerning the premises, it appeared to the said earl of Halifax, "that the said Dryden Leach did not print the said seditious libel intitled, *The North Briton*, N^o 45, Saturday, April the 23d, 1763:" and thereupon, the said defendants, by the command of the said earl of Halifax, did then and there release the said Dryden Leach out of their custody, and discharged and set him free from that imprisonment. Which are the same breaking and entering of the aforesaid dwelling-house of the said Dryden Leach, in the declaration mentioned, in which, &c. and staying and continuing therein for the space of six hours, part of

the time in the same declaration mentioned; and also as to the making of the aforesaid assault upon the said Dryden Leach, and seizing, taking and imprisoning of the said Dryden Leach, and detaining him in prison for the space of four days, part of the said time in the said declaration mentioned, above supposed to have been done by the defendants, whereof the said Dryden hath above complained against them. And this they are ready to verify. Wherefore they pray judgment, if the said Dryden ought to have or maintain his aforesaid action thereof against them, &c.

The plaintiff replied, as to the said plea in bar as to the breaking and entering the dwelling-house, and staying and continuing there six hours (part of the time in the declaration mentioned), and also as to the making of the assault upon him, and seizing, taking and imprisoning of him, and keeping and detaining him in prison for four days (part of the time in the declaration mentioned); that the defendants, of their own wrong and without the cause by them in their plea alleged, broke and entered his dwelling-house, and staid and continued therein for six hours, and made an assault upon him, and seized, took and imprisoned him, and kept and detained him in prison for the four days in the plea mentioned (part of the time in the declaration mentioned), in manner and form as he has above complained against them. And upon this issue was joined.

The cause came on to be tried before lord chief justice Pratt, on the 10th of December 1763, at Guildhall: and the jury found a verdict for the plaintiff upon both issues; and gave him damages 400*l.* besides his costs and charges, &c. On the 16th of June 1764, judgment was signed for the plaintiff, for 400*l.* damages, and 5*l.* 16*s.* 8*d.* costs.

At the trial, a bill of exceptions was tendered and received; which stated the issues, the coming on to trial, &c. and the evidence, and described a printed paper, intitled, '*The North Briton*, N^o 45,' and the information given thereof to the secretary of state, and his warrant to the defendants below, together with another king's messenger, Nathan Carrington; and what Mr. Carrington had been told of Mr. Leach's being the printer of it; and their thereupon entering his house, and finding some of the other numbers of the same paper newly printed by him; and their thereupon taking him into custody, in order to carry him before the earl of Halifax, one of his majesty's principal secretaries of state; and that he, appearing not to be either author, printer or publisher of the said paper, called, '*The North Briton*, N^o 45,' was discharged by them, by the earl's order, without being ever carried before him. They say, that their evidence intitled them to the benefit of the statute of 24 George 2, c. 44. Though it was denied by the counsel for the plaintiff Leach, that either they or the secretary of state himself were within that statute, or those of 7 Jac. 1, c. 5, or 21 Jac. 1, c. 12, (the former of which, being only temporary,

was made perpetual by the latter, and by which liberty is given to justices of peace and all others acting under their command 'to plead the general issue, and give the special matter in evidence.'

That the Chief Justice of the Common Pleas was of opinion, 'that their evidence was not sufficient to bar the plaintiff of his action; whereas, the bill of exceptions insist 'that it was.

This bill of exceptions being sealed, and the seal acknowledged, as is before-mentioned, the defendants below assign errors: and a joinder in error was put in by the plaintiff Leach.

The assignment of errors was to the following effect: (It may be seen at large, in the 60th roll of Easter term, 5 Geo. 3, B. R.)

The defendants come, on Wednesday next after fifteen days of Easter, 4 Geo. 3, before our lord the king at Westminster, and say, That at the trial, their counsel proposed exceptions to the opinion of the lord chief justice Pratt; which exceptions were written in a bill, and sealed by the Chief Justice: which bill of exceptions the defendants now bring into this court, and pray a writ to the Chief Justice, to confess or deny his seal; which writ is granted to them, returnable on the morrow of the Ascension. At which day, before our lord the king at Westminster, come the defendants in their proper person, and the said Chief Justice of the Common Pleas likewise in his proper person, and acknowledges his seal put to the said bill of exceptions. [The form and ceremony of his doing this may be seen in page 1003.] Then they set out the bill of exceptions, *verbatim*, 'Be it remembered, &c.' It recites all the proceedings particularly and minutely, from the very beginning to the end, concluding with the verdict of the jury: which it would be tedious to repeat, as they have been already sufficiently specified. (They are entered upon the rolls 549 and 550 of the Court of Common Pleas, in Michaelmas term, 4 Geo. 3). The defendants (now become plaintiffs in error) then allege, (in their said bill of exceptions) that upon the trial, the counsel for the plaintiff Leach, in order to prove the defendants guilty of the trespass, gave in evidence, "that on the 29th of April 1763, the defendants entered the plaintiff's dwelling-house, searched it, and continued in it four hours; seized and took Leach into their custody against his will and consent; and kept and detained him in their custody against his will and consent for four days:" which was all the trespass, assault and imprisonment committed by the defendants, or any of them. Whereupon their counsel, in order to bar the said action, and to acquit them thereof under the general issue above pleaded, gave in evidence and proved, "That before the committing of the trespass, the king made a speech from the throne, &c. containing the several expressions stated in the second plea of the defendants; and that afterwards and before the supposed trespass, a paper, intitled, 'The North Briton,

N^o 45,' &c. was printed and published; and that the same contained the several matters set forth in their said second plea:" and it was proved on their behalf, "that the earl of Halifax was, all that time, one of his majesty's principal secretaries of state, and one of the privy council; and that information was given to him of the said publication of the above-mentioned paper; and the same was then shewn to him; and that thereupon the said earl issued his warrant in writing, under his hand and seal, directed to Nathan Carrington and the defendants, who were then four of his majesty's messengers in ordinary." And their counsel then produced and gave in evidence the warrant aforesaid, which was in the words and figures following, that is to say, "George Montague Dunk, earl of Halifax, viscount Sunbury, and baron Halifax, one of the lords of his majesty's most honourable privy council, lieutenant-general of his majesty's forces, and principal secretary of state, &c.—These are in his majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intitled, 'The North Briton, N^o 45. Saturday April 23, 1763, printed for G. Kearsly in Ludgate Street, London;' and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before me, to be examined concerning the premises, and further dealt with according to law. In the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all others his majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you, as there shall be occasion. And for your so doing, this shall be your warrant. Given at St. James's, the 26th day of April 1763, in the third year of his majesty's reign. Dunk Halifax. To Nathan Carrington, John Money, James Watson, and Robert Blackmore, four of his majesty's messengers in ordinary." And it was farther proved on behalf of the said defendants, "that several of the like warrants had been granted, at different times, from the time of the Revolution to the present time, by the principal secretaries of state, and had been executed by the messengers in ordinary for the time being; and that the paper in the said warrant described was the said paper so printed and published as aforesaid; and that the warrant aforesaid, before the committing of the supposed trespass, to wit, on the 26th day of April aforesaid, in the year of our Lord 1763, was delivered to the defendants, to be executed;" and, "that they were then three of his majesty's messengers in ordinary, and still are so." It was also proved, on their behalf, that for forty weeks and upwards next before the issuing of the aforesaid warrant, certain weekly compositions, intitled, 'The North Briton,' had been printed and published on Saturday on every week; and that the afore-

said paper, intituled, 'The North Briton, N^o 45, Saturday April 23, 1763,' described in the said warrant, being one of the said weekly compositions, was printed and published before the issuing of the said warrant, to wit, on the 23d day of April 1763; and that after the issuing of the above mentioned warrant, and before the committing of the said supposed trespass, to wit, on the 28th day of April, in the year aforesaid, the defendants were informed by Nathan Carrington, one other of the messengers in the said warrant named, and one of the persons to whom the said warrant was directed, that from the information he had received, he was of opinion, that the said Dryden Leach, who then and long before was, and still is a printer in the city of London aforesaid, was the printer of the said weekly compositions, intituled, 'The North Briton;' for that he the said Carrington had been informed that one Mr. Wilkes, a person supposed to be the author of the said weekly compositions, had been seen frequently to go into the said Mr. Leach's house; and that an old printer, whose name he the said Carrington did not mention to the defendants, had told him, that the said Mr. Leach was the printer of the said compositions; and that thereupon the defendants took to their assistance a constable, and with the constable entered Leach's dwelling-house (the door being open) to search for the said Leach and his books and papers; and to bring him, together with his books and papers, in safe custody, before the said earl of Halifax, to be examined concerning the premises, and to be further dealt with according to law; and upon that occasion did search the said house, and necessarily continued therein for the said space four hours." And it was further given in evidence and proved, on the part of the said defendants, "That upon that search, the defendants did find Leach in the said house, and did also then find a newly-printed sheet, containing a copy of one of the said weekly compositions, intituled, 'The North Briton, N^o 1,' and part of a copy of another of the said weekly compositions, intituled, 'The North Briton, N^o 2,' which sheet was printed by the said Dryden Leach." And it was further proved, "that the said Dryden Leach did also print one of the said weekly compositions, intituled, 'The North Briton, N^o 26.' And the defendants, with the assistance of the constable, did seize and take into their custody the said Dryden Leach, in order to bring him in safe custody before the said earl of Halifax, to be examined concerning the premises; and on that occasion did keep and detain him in their custody for the space of four days; at the end of which time, it appearing by the examinations of divers persons then taken, touching the author, printer and publisher of the said paper, that the said Dryden Leach was not the author, printer or publisher thereof, the defendants, by the command of the said earl of Halifax, released and discharged him from that imprisonment: but

VOL. XIX.

the said Dryden Leach was never carried before or examined by the said earl of Halifax. And that the entering the house of the said Dryden Leach, and searching the same, and taking into and detaining in their custody him the said Dryden Leach in the manner and on the occasion herein before stated, were the whole of the trespass, assault and imprisonment, committed by the said defendants, or any of them." But it was proved on the part of the said Dryden Leach, "that he was not the author, printer, or publisher of the said paper, intituled, 'The North Briton, N^o 45,' in the said warrant mentioned, nor of any other numbers of the said weekly compositions, except as before stated." Whereupon the counsel for the defendants insisted before the said chief justice, that the said several matters so produced and given in evidence on their part as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence to entitle them to the benefit of the statute of 24 Geo. 2, intituled, "An Act for rendering justices of the peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants;" and that therefore the said Dryden Leach ought to be barred of his aforesaid action, and the said defendants acquitted thereof. And thereupon the said defendants, by their counsel aforesaid, did then and there pray of the said chief justice to admit and allow the said matters and proof so produced and given in evidence for the said defendants as aforesaid, to be conclusive evidence to intitle the said defendants to the benefit of the statute aforesaid, and to bar the said Dryden Leach of his action aforesaid. But to this, the counsel for the plaintiff then and there insisted before the chief justice, that the matters and evidence aforesaid so produced and proved on the part of the defendants as aforesaid, were not sufficient, nor ought to be admitted or allowed to intitle the said defendants to the benefit of the statute aforesaid, or to bar the said Dryden Leach of his aforesaid action; and that neither the said defendants, or any of them, nor the said earl of Halifax, were or was within the words or meaning of the statute made in the seventh year of his late majesty king James the first, intituled, "An Act for ease in pleading against troublesome and contentious suits prosecuted against justices of the peace, mayors, constables, and certain other his majesty's officers, for the lawful execution of their office;" nor of the statute made in the twenty-first year of the reign of the same late king, intituled, "An Act to enlarge and make perpetual the act made for ease in pleading against troublesome and contentious suits, prosecuted against justices of the peace, mayors, constables, and certain other his majesty's officers, for the lawful execution of their office, made in the seventh year of his majesty's most happy reign;" nor of the said statute made in the twenty-fourth year of the reign of his late majesty king George the second; nor in any wise intituled to the benefit of

J T

any of those statutes. And the counsel for the said Dryden Leach further insisted, that the seizure and imprisonment of the said Dryden Leach were not made and done in obedience to the said warrant; nor had the said defendants, or any of them, in that behalf, any authority thereby. And the said chief justice did then and there declare and deliver his opinion to the jury aforesaid, "that the said several matters so produced and proved on the part of the defendants were not, upon the whole case, sufficient to bar the said Dryden Leach of his aforesaid action against them;" and, with that opinion, left the same to the said jury. Whereupon the said counsel for the said defendants did then and there, on behalf of the said defendants, except to the aforesaid opinion of the said chief justice; and insisted on the said several matters and proofs as an absolute bar to the aforesaid action, by virtue of the last mentioned statute. And inasmuch as the said several matters so produced and given in evidence on the part of the said defendants, and by their counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the aforesaid defendants did then and there propose their aforesaid exception to the opinion of the said chief justice, and requested the said chief justice to put his seal to this bill of exception, containing the said several matters so produced and given in evidence on the part of the said defendants as aforesaid, according to the form of the statute in such case made and provided; and thereupon the aforesaid chief justice, at the request of the said counsel for the above-named defendants, did put his seal to this bill of exception, pursuant to the aforesaid statute in such case made and provided, on the tenth day of December aforesaid, in the said fourth year of the reign of his said present majesty. C. PRATT, L. S.

And hereupon the said John Money, James Watson and Robert Blackmore say, that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict upon the said issue between the parties aforesaid first above joined, and also in giving the judgment aforesaid, there is manifest error, in this, that the said chief justice, before whom, &c. at and upon the trial of the said issue between the parties aforesaid first above joined, did declare and deliver his opinion to the jury aforesaid, "That the said several matters mentioned in the said bill of exceptions, and so as aforesaid produced and proved on the part of the said John Money, James Watson, and Robert Blackmore, were not, upon the whole of the case, sufficient to bar the said Dryden Leach of his action aforesaid against them;" and, with that opinion, left the same to the jury. There is also error in this, that by the record aforesaid it appears, that the verdict aforesaid was given upon the said issue first above joined, for the said Dryden Leach, against them the

said John Money, James Watson, and Robert Blackmore: whereas, by the law of the land, the verdict on that issue ought to have been given for the said John Money, James Watson, and Robert Blackmore, against the said Dryden Leach. There is also error in this, that it appears by the record aforesaid, that judgment in form aforesaid was given for the said Dryden Leach, against them the said John Money, James Watson, and Robert Blackmore: whereas, by the law of the land, the judgment aforesaid ought to have been given for them the said John Money, James Watson, and Robert Blackmore, against the said Dryden Leach. And the said John Money, James Watson, and Robert Blackmore, pray that the judgment aforesaid, for the errors aforesaid, and others in the record and proceedings aforesaid, may be reversed, annulled, and altogether had for nothing; and that they may be restored to all which they have lost by occasion of the judgment aforesaid, &c.

And hereupon, the said Dryden Leach, in his proper person, voluntarily comes here into court, and prays leave to rejoin to the errors aforesaid, before our lord the king, until on the morrow of the Holy Trinity, wheresoever, &c. and he hath it, &c. The same day is given to the said J. M. J. W. and R. B. At which day come the parties aforesaid in their proper persons: and the said Dryden Leach says, "that there is not, either in the record and proceedings aforesaid, or in the matters recited and contained in the said bill of exceptions, or in giving the verdict aforesaid, or in the judgment aforesaid, any error;" and prays that the Court here may proceed to examination as well of the record and proceedings, as of the matters aforesaid above assigned for error; and that the judgment aforesaid may be affirmed in all things.

This case was first argued on Tuesday the 18th of June last, by Mr. Solicitor General De Grey for the plaintiffs in error; and by Mr. Dunning for the defendant in error.

Mr. De Grey divided his arguments into three points.

1st, The defendants had a right to plead the general issue, and to give the special matter in evidence, under 7 Jac. 1, c. 5. Or, in other words, lord Halifax, the secretary of state, was a justice of peace within the intention of that act.

2dly, The evidence was sufficient to entitle the defendants to a verdict. Which will take in both the validity of the warrant itself, and the manner of executing it.

3dly, They were also entitled to a verdict within the meaning of 24 Geo. 2, c. 44, the plaintiff not having observed the terms required by it.

First point—Before the statute of 7 Jac. c. 5, a matter of special justification could not be given in evidence by a justice of peace, upon the general issue pleaded by him.

The question is—Who were meant in that act of parliament, by justices of the peace.

Some persons were, from ancient times, so, by office; some are so by special commission; some, by corporation-charters; some, by tenure; some, by prescription.

In the time of Edward the third, other persons were authorized to act within particular districts.

But the great officers of state had the jurisdiction, as incident to their offices. So had, in some degree, coroners and other inferior officers.

The secretaries of state must have had it as incident to an office, so anciently as to be coeval with the crown itself.

A statute in Edward the 1st's reign says,* "Desouth le Petit Seale, ne issera desormes nul brieve que touche le common ley." And lord Coke, in his comment upon it, in his 2 Inst. 556, calls it the Signetum, the king's signet, which at the making of that statute the king had; and says—"This seal is ever in the custody of the principal secretary: and there be four clerks of the signet attending on him."

This seal is as ancient as the crown; and the officer that keeps it, as ancient as the seal itself: and he is an officer well known, and recognized by many acts of parliament; and the king's warrants are countersigned by him.

In cases of treason, and of felony, the courts of law recognize his authority: and there is equal reason for it, in cases of misdemeanour; which equally affect government, and disturb the public peace.

A seditious libel is an offence against government and the public peace; and effectually undermines government.

A secretary of state is a centinel for the public peace: it is his duty to prevent the violation of it, and to bring the offenders to justice; and it is necessary that he should be invested with this power, in order to enable him to execute this his duty.

The case of *Rex v. Kendal and Roe*, 1 Salk. 347† has settled this point, as to treason: for it was there holden, "that secretaries of state might commit for suspicion of treason, as conservators of the peace did at common law; and that it was incident to the office, as it is to the office of justices of peace, who do it *ratione officii*." And the commitment to a messenger was there holden good.

In the case of the *Queen v. Derby*, B. R. 1709, 10 Ann.‡ for publishing a scandalous and

seditious libel called *The Observer*—the two points abovementioned were admitted by Mr. Lechmere, who was counsel for the defendant.

for the second reading of lord Holland's *Ex Officio Information Bills*, (See 23 Parl. Deb. 1069,) and I will therefore here insert Fortescue's report of it:

"De Term. Sanct. Mich. 10 Annæ Regiæ.
In the King's-bench.

"THE QUEEN *versus* DERBY.

"The defendant was a printer, and was committed in the vacation by a secretary of state, and on a Habeas Corpus returnable before chief justice Parker at his chamber, he was brought before the chief justice, and entered into a recognisance to appear the first day of the term.

"On that day he appeared in the King's-bench, and moved by his counsel Mr. Lechmere to be discharged, taking several exceptions to the commitment.

"The warrant appeared to be, to authorize a messenger forthwith to make strict search for Derby the printer, and to seize and secure him for publishing and sending a scandalous and seditious libel called '*The Observer*, N^o 74,' and to bring him in safe custody before me to examine the premises, and to be farther dealt with according to law.

"First Exception was, that for a libel a secretary of state could not commit; but he agreed the power of a secretary of state to commit for treason or felony, and that a messenger was a proper officer; both points being adjudged in the case of the *Queen and Kendal and Roe*, [Salk. 347, 5 Mod. 78, and vol. 12, p. 1299, of this Collection.] because it was no offence on which a commitment might by law be, till indictment or presentment; that this was an inhibition against all bail, and that commitments were punishments only after conviction, and not before; and without hearing and without oath to be seized and secured, is hard. That 25 Ed. 3, cap. 4, says, no man ought to be imprisoned but by presentment, indictment, or by process of law; and that lastly, the defendant offered the messenger 10,000*l.* bail, but it was refused, saying he had orders to bring him in custody.

"Second Exception: Here is no particular offence set out, it is only said in general terms, for a libel called '*The Observer*, N^o 74.' In high treason, it is no escape if the cause of commitment do not appear in the warrant. 3 Car. 1 is the foundation of the Bill of Rights; ministers of state sheltered themselves by urging it was '*per mandatum domini regis*;' this falls short of that, for here is no colour at all; the paper is commendable, it is a translation of Tacitus, where he talks of an angry addle-headed projector: *menti turbida* is the expression.

"Third Exception: That the conclusion is naught, because here is no time fixed, when

* V. Artic. super Chartas, 28 E. 1, c. 6.

† V. 5 Mod. 78, S. C. Vol. 12, p. 1299, of this Collection, and Comberb. 343. Holt 144. Skinner 596, and 12 Mod. 82.

‡ Of Darby's trial I know not that any full account was ever printed. But the case as here cited is reported in Foster 140. This case was mainly relied on by lord Ellenborough Ch. Just. of B. R. in his speech (July 17, 1813) in the House of Lords, upon a motion

He agreed, the power of a secretary of state to commit for treason or felony; and that a messenger was a proper officer. And in that case, the Court held the warrant good and legal.

he is to be brought before the secretary; so the time being indefinite, it is a commitment during pleasure.

"Fourth Exception: That he is to be brought before him to be examined; so that a secretary's office is to be turned into a court of inquisition, where he is to be compelled to make confession.

"Then the counsel for the prisoner offered affidavits, but the Court rejected them. In answer to the objections it was said by the attorney and solicitor general, that if these objections prevailed, it would make an end of warrants of justices of the peace; and that this warrant was not a commitment, but only what was necessary in order to his being examined; and that a justice might order to have him kept a reasonable time to be examined; that by the act of spreaders of false news, he may be detained till he discover the author; that a warrant was only to notify the crime in general; nor was there ever any such thing as a time fixed in any warrant whatever to come before a magistrate. It was said also, that he could not now take exception to the commitment, because he had entered into a recognisance to appear; so that he had acquiesced, and had got his liberty by it; and it was also insisted, that were he never so innocent he could not be discharged the first day of the term, for that the constant practice of the Court was otherwise; the true question here, is only, whether a secretary of state cannot send for an offender to examine him, which surely he may; suppose this were a libel, is there any other method in the world to fetch the party before him but this? and as to bail being offered and refused, that can be no objection, because a messenger cannot take bail, having no authority so to do if it were offered. It is agreed a secretary of state may send for a person to examine him for high treason, why not for a misdemeanor? The reason is the same. The meaning why the species of crime is set forth in the warrant, is, that it may appear the justice and magistrate has jurisdiction.

"Chief Justice Parker. The defendant cannot be discharged, and the warrant is good and legal. Suppose there be an information to a justice of peace that one is a felon, may not he send a warrant to have him come before him? If the officer must obey the warrant, (as he must,) he must seize him, and must secure him only for that purpose, and this is nothing more. To have him examined is a privilege, and for the benefit of an innocent man; for perhaps on the examination he may clear himself, and then he will be discharged: nay, in the case of felony, the justice of peace is bound to take his examination.

"But it is said, there ought to be a time fixed for his examination. This was never done in

In the case of *Rex v. Earbury*, M. 7 G. 2, 1733,* who was arrested and committed by warrant of a secretary of state; and his papers seized, which he applied to have restored; lord

this world, in any warrant whatever, nor is it possible to do it without a manifest injury to the party; for suppose, for the purpose, a fortnight should be limited, the party then must be in custody all that time, and perhaps he might be discharged the very first day, and certainly would if he did appear and was found innocent. The law has already fixed a time; for by law the officer is bound to carry him immediately before the magistrate: if he delay, any time, it is against the duty of his office.

"As to setting forth the crime in the warrant, that is well enough; for the warrant is to set forth the particular species of crime, but not the particular facts of that crime; as in a warrant for felony, you need not set out in the warrant the particular goods stolen. In the case of the *Queen and Kendal and Roe*, the prisoner was not discharged, though they held the warrant not sufficient to charge him with high treason: but they bailed him to appear to a charge for assisting one to escape for high treason. If it were for high treason, then he is not bailable: but when the species of crime does not appear, it does not appear to us he is not bailable, and therefore we bail him. Here the crime does appear, and he gives bail to be forthcoming in order to examine this matter; it is only in order to a prosecution.

"Justice Powis. It is a privilege to be examined, which is not allowed in other countries; where a warrant is to bring one before a particular justice, the officer may carry him before another, if he be a nearer especially.

"Justice Eyre. He cannot be discharged: a secretary of state has a power to issue a warrant; it was held so in the case of the *Queen and Kendal*, and settled in queen Elizabeth's time. The species of crime is set forth, which is enough, it need not set forth the facts, as on whom the robbery was committed, or whose house broke open; publishing a libel is a crime well known in our law: suppose it were only for suspicion of high treason, he shall not be discharged, but shall answer it. In that case of *Kendal and Roe*, he might be innocent of the crime charged, yet they continued him on his recognisance, but did not discharge him. I do not know that ever there was any time mentioned in any warrant, so that exception goes to all warrants. Suppose the warrant had been to commit him without bail or mainprize, if a crime certain were charged, he should not be discharged."

* See this Case reported in *Fortesc.* 37. 8 Mod. 177. In a note to *Wilkes's Case*, (4 Burrow, 2530, see this Case also in the Collection) the reporter says, that he had a note taken by himself of *Earbury's case*; and he notices that the report of that case, in the first edition of 8 Mod. was very bad, but that it was much mended in the late edition of that book.

Hardwicke held, that they could not be restored, in a summary way, on motion. The warrant there was "to search for the papers, and to bring the author before the secretary of state."

The statute of 1 E. 3 enacts, 'for the better keeping, and maintenance of the peace, good men and lawful shall in every county be assigned to keep the peace.' So 4 E. 3, c. 2.

The 18 E. 3, stat. 2, c. 2, is the first statute that gives the judicature of hearing and determining: 34 E. 3, c. 5, enlarges their powers. The 2 H. 5, c. 4,* calls them by the express name of 'justices of the peace.' Their commission impowers them to keep the peace; and also contains a distinct clause 'to hear and determine.'

Therefore, the old conservators of the peace still remain. They have also power to hear and determine as justices. They are wardens of the peace too, by their commission, as well as by common law: and they may likewise by the common law, without any special commission or warrant, use force to suppress rebels. For which last assertion, he cited Kelyng 76.

The statute of 7 Jac. 1, c. 5, (about pleading the general issue), means to protect all that act as conservators, or wardens, or justices of the peace, as well as those that act under special commissions.

The act of 2 Ph. and M. c. 18, (relating to corporation justices) calls them 'commissioners for the conservation of the peace.' Justice of peace is not a strict technical name: they may be called *custodes pacis*. In 2 Rol. Abr. 95, title, Justices de Peace, it is said, 'That an indictment taken before them, naming them *custodes pacis*, and not justices of the peace (as the statute names them) is a good indictment: for it is all one.' It is not material how the appointment is made. The statutes mean to include all conservators of the peace: they may all now plead the general issue, and give the special matter in evidence. The act of 7 Jac. 1, c. 5, does not indeed extend to any justices sitting in sessions: it only extends to them in their single jurisdiction.

The statute of 11 H. 6, c. 6, 'that suits and processes before justices of the peace shall not be discontinued by new commissions,' is no exception to this rule: neither is 2 H. 5, stat. 1, c. 4, § 2, 'that justices of the peace of the quorum shall be resident in their shire; (except lords named in the commission, &c. &c.)'

Acts of parliament shall be taken with latitude, and extended to cases within the same reason, and calling for the same remedy. Plowd. 366, Lord Zouch's case. Co. Litt. 24, b. 10 Co. 101, b. Beaufage's case. Plowd. 147, Iston v. Studd. Plowd. 36, Platt v. The Sheriffs of London. Bro. Parliament 20. Wentworth's Office of Executors 67. Sir T. Jones 62. Plummer v. Whitecoat.

* V. stat. 1, c. 4, § 2, and stat. 2, c. 1.

The rule about 'several particulars of an inferior nature being enumerated, excluding those that are of a higher nature and not enumerated,'* will not hold here. This act is not done as a higher officer; but only as a justice of peace. The bishop of Norwich being named, extended to all bishops,† so the warden of the Fleet being named, extends to all gaolers. In Moore 845, Phelps v. Winchcombe, it was resolved, 'that a deputy constable may, by the equity of the statute of 7 J. 1, c. 5, plead the general issue.'

Persons acting for preservation of the public peace ought to be protected: and these old conservators of it are more reasonably intitled to protection, than other persons are.

Second point—If the special matter may be given in evidence, then the question will be, 'Whether this matter given in evidence would, if it had been pleaded, amount to a justification.'

It is objected, 'that the warrant is not legal; and that it was ill executed.'

1st, As to the warrant itself—No such action has ever been brought upon these warrants, by persons apprehended by virtue of them: or, at least, there is none upon record.

It is said, 'that this warrant is too extensive in the description of the person: and that it has been abused.'

Answer—The power is not illegal: and the abuse of it is no objection to the warrant itself. Such warrants are agreeable to long practice and usage.

Whatever the present determination may be, in point of law, it will be in the breast of the legislature to set it right.

In the Bewdley case, reported 1 Peere Williams 207. (*Regina v. Ballivos, &c. of Bewdley*) a construction of an act of parliament contrary to the words of it was allowed, founded upon only seven years practice. In Comberb. 342, *The India Company v. Skinner*—where the warrant was granted before any default; Holt said, 'that the practice having been, in case of taxes, to grant a conditional warrant to distrain, *communis error facit jus*.'

The power of justices of peace 'to commit before indictment,' stands supported only by practice and usage. In 6 Mod. 178, *Regina v. Tracy*, Holt Ch. J. says, 'Formerly, none could be taken up for a misdemeanor, till indictment found: but now the practice all over England is otherwise.' And per Hale, 'That practice is become a law.' So likewise has usage and practice established *Ac otium, Quo minus*, new trials, &c.

The greatest judges have bailed persons taken up upon these warrants; and they have not been objected to, by either courts, or coun-

* See Blackstone's Commentaries, Introduction, sect. 3, vol. 1, p. 88.

† See Barrington's Observations on the Statute of Circumspectè Agatis, 13 Ed. 1; and Lord Coke and Fryane, as therein cited.

nel of the greatest eminence: whereas, if they were not legal, the persons apprehended upon them ought to have been discharged. For which he cited, 1 Hale's Hist. P. C. 578. The Court will not make orders upon illegal warrants: consequently, they saw no objection to them. Even the greatest friends to the Revolution have not objected to these warrants. From whence it must be inferred, that no objection lies against them.

On 6 July, 1641, in the case of sir John Elliott,* &c. the House of Commons resolved, that it was a breach of privilege: but they did not vote it illegal.

Lord Hardwicke, in Barbury's case, only said, 'he would not then determine it.'

In treason, it will scarce be objected to; nor in felony.

In Miss Blandy's case,† her bureau was broken open: and her papers seized; and given in evidence.

Indecent prints or books may be seized by a magistrate: and they often have been so.

Evidence taken from felons or other criminals may be produced against them; though a criminal shall not be compelled to produce such evidence against himself.

It is said, 'that this warrant is illegal, because it is general, to take up the author, printer, or publisher.' But it is legal to issue and execute a warrant against a person unknown, but only described. Indeed the magistrate issues it, and the officer must execute it, at their peril. And though the warrant includes seizing the papers, yet that part of it has not been executed: and the bare insertion of it shall not affect the officer who executed the other part of the warrant.

The facts are these—A warrant was directed to four messengers: Carrington, one of them, is informed, 'that Leach was the printer: and that the reputed author was frequently at Leach's house.' The other three act on this information. And this information was not groundless: for they found a sheet of another number, wet and just printed. They take him up, and carry him to lord Halifax's office; who was not then at leisure to examine him: but when he did examine him (four days after), he discharged him. Here was probable cause for taking him up.

A justice of peace having jurisdiction, may grant a proper warrant on probable cause: and ministerial officers (constables, &c.) are not to be affected by the illegality of the warrant, in other parts of it. This warrant was executed honestly, and upon a probable cause.

Third point—the plaintiff's action is sufficiently barred by 24 G. 2, c. 44, for want of observing the terms required by it. They neither proved notice, as the third section requires; nor made the demand required by the sixth section.

The defendants have acted in obedience to the warrant of a magistrate who is a justice of peace within the meaning of this act; and by his order, and in his aid.

The only doubt is, 'Whether the action is brought for any thing done in obedience to the warrant; or not.'

The defendants have obeyed it, to the best of their power.

However, as they have acted under colour of the warrant, meaning to obey it, they are not answerable, although they may have erred in the execution of it. They are protected by this act, if they have acted *bonâ fide*; even though the warrant and the execution be illegal. They are not to judge of arduous points of law: the statute means to protect them from it.

2dly. The previous step to bringing this action was not taken; viz. the demanding a perusal and copy of the warrant, and shewing a refusal of it.

If there was a fault, or negligence, or mistake in this proceeding, the fault was in the magistrate: there was none in the officer who executed it. And the requisite steps have not been taken, in order to maintain the suit.

Therefore the plaintiff is barred of this action.

Mr. Dunning, *contra*—for Mr. Leach, the plaintiff below.

The first question is, 'Whether this be a case within 24 G. 2, c. 44.' Which question will involve the question, 'Whether it be within the acts of 7 J. 1, c. 5, or 21 J. 1, c. 12.'

All these statutes, being in *pari materia*, must receive the same construction: and they are all unapplicable to the present case.

He then made three sub-divisions of his first question: viz.

1st, Whether lord Halifax, being secretary of state, is a conservator or justice of peace, within the true intent and meaning of the act of 24 G. 2, c. 44.

2dly, Whether the defendants are constables, headboroughs, or officers, &c. within the intent and meaning of that act.

3dly, Whether this action is brought and properly pursued, within the true intent and meaning of it; and for a matter done in obedience to the warrant.

First point—Lord Halifax is not a justice of peace within 24 G. 2. He is not so by commission: he is not so, as incident to his offices, either of secretary of state, or of privy councillor.

But it has been said, 'he is a conservator of the peace; and therefore within the meaning of the act.'

I deny the principle and also the conclusion. I admit the case of *Rex v. Kendal and Roe*; though the reasons of it do not appear: but I submit to the authority of it, 'That a secretary of state has a power to commit for high treason.'

* See this Case, vol. 3, p. 293.

† See her Case, vol. 18, p. 1118.

Serjeant Hawkins's reasons do not support his assertion: and I deny that a secretary of state is a conservator of the peace. He has only a power of committing for high treason, as conservators of the peace had in other cases: and Kendal and Roe's case carries it no farther. The Court never meant to resolve any thing further.

All the crown-writers are silent on this subject of a secretary of state's having this jurisdiction. None of them even hint that a secretary of state is a conservator of the peace. Staundford, Fitz-Herbert, Lambard, &c. say no such thing.

Lambard* gives the list of those officers who are conservators of the peace: but there is no mention therein, of secretaries of state. Serjeant Hawkins† copies the same list, without adding secretaries of state.

There is no proof or pretence that the conservatorship of the peace is incident to their office: nor is there any usage to support such a notion. Their claim of a power to grant such warrants as the present one, is not pretended to be older than the Revolution.

If they were justices of the peace, or conservators of the peace, they would be bound to execute the powers given to justices, or residing in constables; and they would be subject to the controul of this court.

The offices are different in creation, constitution, and execution.

The very language of the warrant shews that the secretary of state did not consider himself as a justice, conservator, or constable.

This statute is not to be extended beyond the letter of it: it is not within the maxims or reasons of extension of acts of parliament.

It is necessary to consider the former statutes of 7 J. 1, c. 5, and 21 J. 1, c. 12. (Both of which he rehearsed and observed upon).

In these, there is no mention of secretaries of state; nor is there any reason to add others not there enumerated; the rather, as the enumeration begins with persons inferior to secretaries of state. Neither is there any ground to imagine that the legislature intended to include secretaries of state within their provision. The preamble shews rather the contrary. The line drawn between those enumerated and those omitted, shews the same thing. The persons intended to be protected, are persons bound to act, and acting for the public good, without reward; not great officers with great salaries, who are not lawyers and are not bound to act.

The persons introduced by the second act (church-wardens, sworn-men, overseers, &c.) are persons within the mischief of the former: yet even they were not virtually included in the former, and are therefore particularly named in the latter.

This latter explanatory act omits, nevertheless, to name secretaries of state. But con-

stable is within the letter: and it extends to no others. And he referred to 4 Inst. 175, and the two marginal notes there; one on 7 J. c. 5, and the other, on 21 J. c. 12.

From all which premises he argued, that these acts of Jac. 1, are not to be extended beyond the letter: and if they were, yet there is no reason to extend them to secretaries of state, as not being within the same inconvenience.

No more reason is there to extend that of 24 G. 2, c. 44. If the legislature had so intended, they would not have confined it to justices of the peace, a species of magistrates well known and understood in our law.

So much for the noble lord.

2dly, As to the messengers—They do not fall within the words or meaning of the act of 7 J. 1, c. 5, which is confined to officers, who are persons known in our law, and bound to execute the warrant of a justice of peace; an office of burthen, not of profit; and incapable to distinguish the precise limits of a jurisdiction.

There is no respect in the case of the king's messengers in ordinary; who are persons unknown in our law, and mere volunteers in executing warrants of justices.

The words, 'other officers, &c.' mean borough-wardens, &c. officers of the same sort as constables and tithingmen; not king's messengers. These persons cannot be considered as aiding and assisting the constables. The warrant and the fact are quite the reverse: the constables are directed to assist them. They do not act under the command of a justice of peace, or in his assistance.

This warrant is not under the hand and seal of a justice of peace. Therefore the act does not protect the defendants.

3dly, Nor is the act done in obedience to this warrant. The warrant was 'to apprehend the author, printer, or publisher:' but they have executed it upon a person who was not the author, printer, or publisher. Consequently, as they have not acted under it, they can't be protected by it.

It is said, 'that a description is equivalent to naming the persons; and that here is a sufficient description.'

But the description of an offence is no description of the person offending: and this is only a description of the offence.

The obedience to the warrant is the condition of the protection which the act gives to the officer. Therefore, the condition failing, the protection does not take place.

Here is no probable cause, nor any reason for justifying the officer under a probable cause. It is not like the cases of apprehending traitors or felons. Here is only information from one of their own body, 'that the author of the paper had been seen going into Leach's house; and that Leach was the printer of the composition in general;' not of this particular paper.

But though neither this hearsay-information

* V. Lib. 1, c. 3.

† Lib. 2, c. 8, § 2.

was in itself true; nor would the consequence follow, if it had been true; yet they thereupon arrest and imprison an innocent man. Therefore these men themselves are to answer for doing this: not the person who issued the warrant. The warrant did not command nor authorize them to do what they have done. It is necessary for them to shew an acting in obedience to the warrant; otherwise they are not within the protection of the act. In proof of which he cited two cases; one by the name of Lawson [qu. or Dawson] v. Clark; and the other a Norwich case, where a bailiff had executed the warrant out of the proper jurisdiction.

Upon these authorities, upon the reason of the thing, and upon the words of the act, the officer is not entitled to the protection of the act; nor needs the justice be made a party, but where the officer acts in obedience to the warrant: acting under colour of it only, is not sufficient.

Besides, the party apprehended was not carried before lord Halifax, or dealt with according to law. Surely, this was the act of the officer; not of the person who signed the warrant. And no reason is given, stated, pretended, or even existed, why this matter was so transacted. Therefore there was no probable cause or reason whereupon to ground a justification of this their conduct.

So that, even allowing the secretary of state to be a justice of peace, and the officers to be constables; yet the action lies against the plaintiffs in error, who have acted in this unjustifiable manner.

It appears therefore, that even if they had a defence upon the merits, they have not properly pleaded it. However, in fact they had no defence upon the merits: the plaintiff Leach was neither author, printer, nor publisher of the paper; nor at all within the description of the warrant.

But the warrant itself is illegal. It is against the author, printer, and publisher of the paper, generally, without naming or describing them; and not founded on any charge upon oath: it is also, 'to seize his papers;' that is, all his papers.

No justice of peace has power to issue such a warrant. Therefore lord Halifax could not do it as a justice of peace. Nor is there any pretence of usage to support such a claim of doing it as secretary of state, further back than the Revolution.

It lies upon them, to prove their claim, and to shew their authority.

The practice of a particular magistrate cannot controul the law. *Communis error* is not, in this case, sufficient to make law. It is the duty, and it is therefore, doubtless, the inclination of the Court, to stop the mischief, as soon as it is complained of to them.

If 'author, printer, and publisher,' without naming any particular person, be sufficient in such a warrant as this is; it would be equally so, to issue a warrant generally, 'to take up

the robber or murderer of such a one.' This is no description of the person; but only of the offence: it is making the officer to be judge of the matter, in the place of the person who issues the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

To ransack private studies in order to search for evidence, and even without a previous charge on oath, is contrary to natural justice, as well as to the liberty of the subject: and it is as useless as it is cruel, in the case of libels; because it is the publication only that makes the crime of a libel.

To search a man's private papers *ad libitum*, and even without accusation, is an infringement of the natural rights of mankind. And this is a warrant, to 'seize all a man's papers,' without any particular relation even to the crime they would suppose him chargeable with.*

No case of this sort has ever undergone judicial discussion and determination. And as the Court does not interpose in cases not objected to, no arguments can be drawn from such as passed *sub silentio*, or were never objected to.

All the writers upon the crown law say, 'that there must be an accusation; that the person to be apprehended must be named; and that the officer is not to be left to arrest whom he thinks fit.' For which, he vouched Hale's Hist. P. C. 1st part, p. 580 and 586, and Hawkins's P. C. book 2, c. 13, § 10, p. 81, and 82.

Here, it is left to the officer, to take up any person whom he himself suspects.

Lord chief justice Scroggs was impeached for issuing such warrants as this is.

Therefore he prayed judgment for the defendant in error.

Mr. Solicitor General De Grey, in reply, on behalf of the plaintiffs in error.

A secretary of state is an officer by prescription; and his office must be as ancient as the office of the person to whom he is secretary: for he is and always has been an officer necessary to the crown; and the constitution always required the support of this office. And as this power to commit for treason depends upon prescriptive right and the nature of his office; so likewise it does, in all cases of preserving the public peace.

In the case of Kendal and Roe, the power, in treason, was acknowledged. In Darby's case, it was recognized, in felony. In Earbury's case, (where the warrant was general, as this is,) he was continued on his recognition. A secretary of state has these powers, upon the foundation of prescription; not on our law-books: and he has, equally, the power in him; whether he does or does not exert it in low and common instances. I suppose he is as compellable to act, as a conservator of the

* See the Case of Entick v. Carrington, immediately following the present.

peace formerly was, before the acts of parliament which give power to justices of peace.

Charter-justices can scarce be called commission-justices: and yet these statutes extend to them.

A 'justice of the peace' means a conservator, a warden of the peace. Therefore there was no need to name secretaries of state, in the acts of parliament: they were included, without naming them particularly.

The marginal note in lord Coke is no authority. However, these officers are named in the text, 'and certain others his majesty's officers.'

This action is brought for what was done in obedience to the warrant; which the officer was obliged to execute, in the best manner he could.

If there is any fault, it is in the magistrate: he should have described the offender with greater certainty. If the executing officer acts to the best of his ability; he is justified, and acts in obedience to his warrant.

Here the officers did so: they were reasonably satisfied, 'that Leach was the printer.' And on search, this probable cause was increased to a higher degree: for, they found another fresh sheet of the same work, just printed off, and wet. They detained him on occasion of his being to be carried before lord Halifax, to be examined. The officers have nothing to do with his examination: that was the affair of lord Halifax; and if he discharged the persons apprehended and brought before him, without examination, it was the better for them.

In *Vaughan* 111, *Stiles v. Sir Richard Coxe* and others,—it was determined, that the defendants should have the benefit of the act; because they acted by colour of the warrant.

As to the warrant itself—it is objected, 'that there is no charge upon oath.' But there was no occasion, he said, for it: and to that purpose, he cited the *Queen v. Darby* [*v. Fortescue* 141.] *Rex v. Earbury*, Mich. 7 G. 2, and 1 Hale P. C. 582, where it is laid down, that "it is convenient, though not always necessary, to take an information upon oath of the person that desires the warrant."

It is objected, 'that this warrant is not authorized by any length of usage.'

But the usage, as here stated, is sufficient: and it must be taken to be coeval with the office. The bill of exceptions indeed only takes it up from the Revolution; asserting that it has been so ever since that time: but the facts go up to the Restoration; and none of a different form were produced, prior to the Revolution.

As to seizing papers—it is difficult indeed to draw the exact line. But it is certainly necessary, in some degree: and no instance is produced, of such warrants having ever been abused as instruments of oppression.

He concluded, upon the whole, that the plaintiff had no right to bring his action.

VOL. XIX.

Lord Mansfield—I suppose, this is intended to be argued again. However, I will say something, at present, upon it.

A bill of exceptions supposes the evidence true; and questions the competency or propriety of it.

'Whether there was a probable cause or ground of suspicion,' was a matter for the jury to determine: that is not now before the Court. So—'whether the defendants detained the plaintiff an unreasonable time.'

But if it had been found to have been a reasonable time; yet it would be no justification to the defendants; because it is stated, 'that this man was neither author, printer, or publisher:' and if he was not, then they have taken up a man who was not the subject of the warrant.

The three material Questions are—1st, "Whether a secretary of state acting as a conservator of the peace by the common law, is to be construed within the statutes of James the first, and of the last king."

The protection of the officers, if they have acted in obedience to the warrant, is consequential, in case a secretary of state is within these statutes. As to the arrest being made in obedience to the warrant, or only under colour of it and without authority from it—this question depends upon the construction of the warrant; whether it must not be construed to mean 'such persons as are under a violent suspicion of being guilty of the charge;' (for they cannot be conclusively considered as guilty, till after trial and conviction.) The warrant itself imports only suspicion; for, it says,—"to be brought before me, and examined, and dealt with according to law;" and this suspicion must eventually depend upon future trial. Therefore the warrant does not seem to me, to mean conclusive guilt; but only violent suspicion. If the person apprehended should be tried and acquitted, it would shew 'that he was not guilty;' yet there might be sufficient cause of suspicion.

Mr. Dunning says, very rightly, that, 'to bring a person within 24 G. 2, the act must be done in obedience to the warrant.'

The last point is, 'whether this general warrant be good.'

One part of it may be laid out of the case: for, as to what relates to the seizing his papers, that part of it was never executed; and therefore it is out of the case.

It is not material to determine, 'whether the warrant be good or bad;' except in the event of the case being within 7 J. 1, but not within 24 G. 2.

At present—as to the validity of the warrant, upon the single objection of the uncertainty of the person, being neither named nor described—the common law, in many cases, gives authority to arrest without warrant; more especially, where taken in the very act: and there are many cases where particular acts of parliament have given authority to apprehend, under general warrants; as in the case

3 U

of writs of assistance, or warrants to take up loose, idle, and disorderly people. But here, it is not contended, that the common law gave the officer authority to apprehend; nor that there is any act of parliament which warrants this case.

Therefore it must stand upon principles of common law.

It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. This is so, upon reason and convenience.

Then as to authorities—Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary.

It is said, 'that the usage has been so; and that many such have been issued, since the Revolution, down to this time.'

But a usage, to grow into law, ought to be a general usage, *communiter usitata et approbata*; and which, after a long continuance, it would be mischievous to overturn.

This is only the usage of a particular office, and contrary to the usage of all other justices and conservators of the peace.

There is the less reason for regarding this usage; because the form of the warrant probably took its rise from a positive statute; and the former precedents were inadvertently followed, after that law was expired.

Mr. Justice *Wilmut* declared, that he had no doubt, nor ever had, upon these warrants: he thought them illegal and void.

Neither had the two other judges, Mr. Justice *Yates*, and Mr. Justice *Aston*, any doubt (upon this first argument) of the illegality of them: for no degree of antiquity can give sanction to a usage bad in itself. And they esteemed this usage to be so. They were clear and unanimous in opinion, that this warrant was illegal and bad.

Lord *Mansfield*—Let it stand over for further argument.

The Case standing in the paper, on Friday the 8th of November, 1765, for farther argument—

Mr. *Yorke*, attorney-general, was now to have argued on behalf of the plaintiffs in error; and begun to enter into his argument: but when he came to mention the two cases cited by Mr. *Dunning*, both of which were determined before lord *Mansfield*, upon 24 G. 2, c. 44, one of them at *Norwich*, summer assizes, 1761; (where damages were given); the other of them,* on a warrant under the Vagrant Act of 17 G. 2, (where his lordship held, 'that the defendant ought to shew that 'the officer had acted in obedience to the warrant'; and he did so;) he seemed to intimate that this objection 'of their not having done

'so, in the present case,' was too great a difficulty for him to encounter; and therefore rested the matter where it was, without proceeding any further in his argument.

Lord *Mansfield* remembered both these Cases; and said, He still continued of the same opinion.

Where the justice cannot be liable, the officer is not within the protection of the act. The case in *Middlesex* concludes exactly to the present case. For, here the warrant is to take up the author, printer, or publisher; but they took up a person who was neither author, printer, nor publisher: so, that case was a warrant 'to take up a disorderly woman;' and the defendant took up a woman who was not so.*

And he held the same opinion now, he said, as he did before, in the case at *Norwich*.

This makes an end of the case: for, this is a previous question; and the foundation of the defence fails.

The consequence is, that the judgment must be affirmed.

The other judges assenting, the rule of the Court was, 'that the judgment be affirmed.'—
JUDGMENT AFFIRMED.

[Thus this Case went off, without any judicial decision on any of the chief points which were raised in it. The only point professed to be regularly adjudged was, That the warrant in question had not been pursued. Whether a secretary of state is a conservator of the peace *ex-officio*, and as such within the equity of the statutes in favour of justices of the peace; whether he has power to commit for any offence under high treason; whether a single privy counsellor has a right to commit in any case; whether a warrant for the seizure of papers could not be justified in the case of a seditious libel; and whether a general warrant, neither naming the offender, nor otherwise describing him, except by relation to the offence committed, could be maintained at common law; all these important questions were left unadjudged. However, enough was said by the Court on the last of them to evince, that all the four judges thought general warrants to seize the person universally illegal, except where the granting of them was specially authorized by act of parliament; and from the attorney-general's readiness in yielding another point to avoid a decision of that concerning the legality of general warrants, it may be conjectured, that he despaired of being able to support them. How such warrants and the seizure of papers in the case of seditious libels were both finally condemned by a declaratory Resolution of the House of Commons, will be explained in a note at the end of the Case on the Seizure of Papers, which is the next in this Collection. Hargrave.]

* Dawson or Lawson, v. Clarke, v. ante, p. 1023.

* See Leach's *Hawkins's Pleas of the Crown*, b. 2, c. 13, s. 31.

541. The Case of Seizure of Papers, being an Action of Trespass by JOHN ENTICK, Clerk, against NATHAN CARRINGTON and three other Messengers in ordinary to the King, Court of Common-Pleas, Mich. Term : 6 GEORGE III. A. D. 1765.

[This Case is given with the above-mentioned title ; because the chief point adjudged was, That a warrant to search for and seize the papers of the accused, in the case of a seditious libel, is contrary to law. But this was not the only question in the Case. All the other interesting subjects, which were discussed in the immediately preceding Case, except the question of General Warrants, were also argued in the following one ; and most of them seem to have received a judicial opinion from the Court.]

The state of the case, with the arguments of the counsel, is taken from Mr. Serjeant Wilson's Reports, 2 Wils. 275. But instead of his short note of the Judgment of the Court, the Editor has the pleasing satisfaction to present to the reader the Judgment itself at length, as delivered by the Lord Chief Justice of the Common-Pleas from written notes. It was not without some difficulty, that the copy of this Judgment was obtained by the Editor. He has reason to believe, that the original, most excellent and most valuable as its contents are, was not deemed worthy of preservation by its author, but was actually committed to the flames. Fortunately, the Editor remembered to have formerly seen a copy of the Judgment in the hands of a friend ; and upon application to him, it was immediately obtained, with liberty to the Editor to make use of it at his discretion. Before, however, he presumed to consult his own wishes in the use, the Editor took care to convince himself, both that the copy was authentic, and that the introduction of it into this Collection would not give offence. Indeed, as to the authenticity of the Judgment, except in some trifling inaccuracies, the probable effect of careless transcribing, a first reading left the Editor's mind without a doubt on the subject. But it was a respectful delicacy due to the noble lord by whom the Judgment was delivered, not to publish it, without first endeavouring to know, whether such a step was likely to be displeasing

to his lordship ; and though from the want of any authority from him, the Editor exposes himself to some risk of disapprobation, yet his precautions to guard against it, with the disinterestedness of his motives, will, he is confident, if ever it should become necessary to explain the circumstances to his lordship, be received as a very adequate apology for the liberty thus hazarded. Hargrave.]

IN trespass ; the plaintiff declares that the defendants on the 11th day of November in the year of our Lord 1762, at Westminster in Middlesex, with force and arms broke and entered the dwelling-house of the plaintiff in the parish of St. Dunstan, Stepney, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c. thereto affixed, and broke open the boxes, chests, drawers, &c. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and read over, pried into and examined all the private papers, books, &c. of the plaintiff there found, whereby the secret affairs, &c. of the plaintiff became wrongfully discovered and made public ; and took and carried away 100 printed charts, 100 printed pamphlets, &c. &c. of the plaintiff there found, and other 100 charts, &c. &c. took and carried away, to the damage of the plaintiff 2,000*l*.

The defendants plead 1st, not guilty to the whole declaration, whereupon issue is joined. 2dly, as to the breaking and entering the dwelling-house, and continuing four hours, and all that time disturbing him in the possession thereof, and breaking open the doors to the rooms, and breaking open the boxes, chests, drawers, &c. of the plaintiff in his house, and the searching and examining all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and reading over, prying into, and examining the private papers, books, &c. of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration first mentioned there found, and also as to taking and carrying away the goods and chattels in the declaration last mentioned, the defendants say, the plaintiff ought not to have his action against them, because they say, that before the supposed tres-

Trespass for breaking and entering plaintiff's house, &c.

Special justification under a warrant of the secretary of state.

pass, on the 6th of November 1762, and before, until, and all the time of the supposed trespass, the earl of Halifax was, and yet is one of the lords of the king's privy council, and one of his principal secretaries of state, and that the earl before the trespass on the 6th of November 1762, made his warrant under his hand and seal directed to the defendants, by which the earl did in the king's name authorize and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled, 'The Monitor or British Freeholder, N^o 357, 358. 360. 373. 376. 378. and 380, London, printed for J. Wilson and J. Fell in Paternoster-row,' containing gross and scandalous reflections and invectives upon his majesty's government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody before the earl of Halifax to be examined concerning the premises, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all other his majesty's officers civil and military, and loving subjects, whom it might concern, were to be aiding and assisting to them the defendants, as there should be occasion. And the defendants further say, that afterwards and before the trespass on the same day and year, the warrant was delivered to them to be executed, and thereupon they on the same day and year in the declaration, in the day time about eleven o'clock, being the said time when, &c. by virtue and for the execution of the said warrant entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize the plaintiff and his books and papers in order to bring him and them before the earl of Halifax, according to the warrant; and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, &c. there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at Westminster, where the said earl then and long before transacted the business of his office, and delivered the same to Lovel Stanhope, esq. who then was and yet is an assistant to the earl in his office of secretary of state, to be examined, and who was then authorized to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards (to wit) on the 17th of November in the said year was discharged out of their custody; and in searching for the books and papers of the plaintiff the defendants

did necessarily read over, pry into, and examine the said private papers, books, &c. of the plaintiff in the declaration mentioned then found in his house; and because at the said time when, &c. the said doors in the said house leading to the rooms therein, and the said boxes, chests, &c. were shut and fastened so that the defendants could not search and examine the said rooms, boxes, chests, &c. they, for the necessary searching and examining the same, did then necessarily break and force open the said doors, boxes, chests, &c. as it was lawful for them to do; and on the said occasion the defendants necessarily stayed in the house of the plaintiff for the said four hours, and unavoidably during that time disturbed him in the possession thereof, they the defendants doing as little damage to the plaintiff as they possibly could, which are the same breaking and entering the house of the plaintiff, &c. (and so repeat the trespass covered by this plea) whereof the plaintiff above complains; and this, &c. wherefore they pray judgment, &c.

The plaintiff replies to the plea of justification above, that (as to the trespass thereby covered) he by any thing ^{Replication de injuria sua propria.} alleged by the defendants therein ought not to be barred from having his action against them, because he says, that the defendants at the parish of Stepney, of their own wrong, and without the cause by them in that plea alleged, broke and entered the house of the plaintiff, &c. &c. in manner and form as the plaintiff hath complained above; and this he prays may be inquired of by the country; and the defendants do so likewise.—There is another plea of justification like the first, with this difference only; that in the last plea it is alleged, the plaintiff and his papers, &c. were carried before lord Halifax, but in the first, it is before Lovel Stanhope, his assistant or law clerk; and the like replication of 'de injuria sua propria absq; tali causa,' whereupon a third issue is joined.

This cause was tried at Westminster-hall before the lord chief justice, when the jury found a Special Verdict to the following purport.

"The jurors upon their oath say, as to the issue first joined (upon ^{Special Verdict} the plea not guilty to the whole trespass in the declaration) that as to the coming with force and arms, and also the trespass in declaration, except the breaking and entering the dwelling-house of the plaintiff, and continuing therein for the space of four hours, and all that time disturbing him in the possession thereof, and searching several rooms therein, and in one bureau, one writing desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found, in the declaration complained of, the said defendants are not guilty. As to breaking and entering the dwelling-house, &c. (above excepted) the jurors on their oath say, that at the time of making the following information,

and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the earl of Halifax was, and still is one of the lords of the king's privy council, and one of his principal secretaries of state, and that before the time in the declaration, viz. on the 11th of October 1762, at St. James's Westminster, one Jonathan Scott of London, bookseller and publisher, came before Edward Weston, esq. an assistant to the said earl, and a justice of peace for the city and liberty of Westminster, and there made and gave information in writing to and before the said Edward Weston against the said John Entick and others, the tenor of which information now produced and given in evidence to the jurors followeth in these words and figures, to wit, 'The voluntary information of J. Scott. In the year 1755, I proposed setting up a paper, and mentioned it to Dr. Shebbeare, and in a few days one Arthur Beardmore an attorney at law sent for me, hearing of my intention, and desired I would mention it to Dr. Shebbeare, that he Beardmore and some others of his friends had an intention of setting up a paper in the city. Shebbeare met Beardmore, and myself and Entick (the plaintiff) at the Horn tavern, and agreed upon the setting up the paper by the name of the Monitor, and that Dr. Shebbeare and Mr. Entick should have 300*l.* a-year each. Dr. Shebbeare put into Beardmore's and Entick's hands some papers, but before the papers appeared Beardmore sent them back to me (Scott). Shebbeare insisted on having the proportion of his salary paid him; he had 50*l.* which I (Scott) fetched from Vere and Asgill's by their note, which Beardmore gave him; Dr. Shebbeare upon this was quite left out, and the monies have been continued to Beardmore and Entick ever since, by subscription, as I supposed, raised I know not by whom: it has been continued in these hands ever since. Shebbeare, Beardmore and Entick all told me that the late alderman Beckford countenanced the paper: they agreed with me that the profits of the paper, paying all charges belonging to it, should be allowed me. In the paper of the 22d May, called Sejanus, I apprehend the character of Sejanus meant lord Bute: the original manuscript was in the handwriting of David Meredith, Mr. Beardmore's clerk. I before received the manuscript for several years till very lately from the said hands, and do believe that they continue still to write it. Jona. Scott, St. James's 11th October 1762.'

'The above information was given voluntarily before me, and signed, in my presence by Jona. Scott.'

"And the jurors further say, that on the 6th of November 1762, the said information was shewn to the earl of H. and thereupon the earl did then make and issue his warrant directed to the defendants, then and still being

the king's messengers, and duly sworn to that office, for apprehending the plaintiff, &c. the tenor of which warrant produced in evidence to the jurors, follows in these words and figures: 'George Montagu Dunk, earl of Halifax, viscount Sunbury, and baron Halifax, one of the lords of his majesty's honourable privy council, lieutenant general of his majesty's forces, lord lieutenant general and general governor of the kingdom of Ireland, and principal secretary of state, &c. these are in his majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author, or one concerned in writing of several weekly very seditious papers, intitled the Monitor, or British Freeholder, N^o 357, 358, 360, 373, 376, 378, 379, and 380, London, printed for J. Wilson and J. Fell in Pater Noster Row, which contain gross and scandalous reflections and invectives upon his majesty's government, and upon both houses of parliament; and him, having found you are to seize and apprehend, and to bring, together with his books and papers, in safe custody before me to be examined concerning the premisses, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and other his majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you as there shall be occasion; and for so doing this shall be your warrant. Given at St. James's the 6th day of November 1762, in the third year of his majesty's reign, Dunk Halifax. To Nathan Carrington, James Watson, Thomas Ardran and Robert Blackmore, four of his majesty's messengers in ordinary.' And the jurors further say, the earl caused this warrant to be delivered to the defendants to be executed. And that the defendants afterwards on the 11th of November 1762, at 11 o'clock in the day time, by virtue and for execution of the warrant, but without any constable taken by them to their assistance, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there, and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing desk, and several drawers of the plaintiff there in order to find and seize the same, and bring them along with the plaintiff before the earl according to the warrant, and did then find and seize there some of the books and papers of the plaintiff, and perused and read over several other of his papers which they found in the house, and chose to read

The secretary of state's warrant to seize plaintiff and his books and papers,

delivered to the defendants to be executed, who on 11th of Nov. 1762, did execute the same without a constable,

and that they necessarily continued there in the execution of the warrant four hours, and disturbed the plaintiff in his house, and then took him and his said books and papers from thence, and forthwith gave notice at the office of the said secretary of state in Westminster unto Lovel Stanhope, esq. then before, and still being an assistant to the earl in the examinations of persons, books and papers seized by virtue of warrants issued by secretaries of state, and also then and still being a justice of peace for the city and liberty of Westminster and county of Middlesex, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined, and they then and there at the instance of the said Lovel Stanhope delivered the said books and papers to him. And the jurors further say, that, on the 13th of April in the first year of the king, his majesty, by his letters patent under the great seal, gave and granted to the said Lovel Stanhope the office of law-clerk to the secretaries of state. And the king did thereby ordain, constitute and appoint the law-clerk to attend the offices of his secretaries of state, in order to take the depositions of all such persons whom it may be necessary to examine upon affairs which might concern the public, &c. (and then the verdict sets out the letters patent to the law-clerk in *hæc verba*) as by the letters patent produced in evidence to the jurors appears. And the jurors further say, that Lovel Stanhope, by virtue of the said letters patent long before the time when, &c. on the 13th of April in the first year of the king was, and ever since hath been and still is law-clerk to the king's secretaries of state, and hath executed that office all the time. And the jurors further say, that at different times from the time of the Revolution to this present time, the like warrants with that issued against the plaintiff, have been frequently granted by the secretaries of state, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the king, &c. in the place of a messenger in ordinary, &c. And the jurors further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent in writing of the perusal and copy of the said warrant, so issued against the plaintiff as aforesaid, neither did the plaintiff commence or bring his said action against the defendants, or any of them, within six calendar months next after the several acts aforesaid, and each of them were and was done and committed by them as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, the said defendants are guilty of the trespass

and carried the books, &c. to Lovel Stanhope, the law clerk, who is appointed to that office by the king's letters patent, and is a justice of peace.

That the like warrants have issued since the Revolution.

That no demand was made by plaintiff of a copy of the warrant, nor did plaintiff bring his action within six months after the facts done by defendants.

herein before particularly specified in breaking and entering the house of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found; or the said plaintiff ought to maintain his said action against them; the jurors are altogether ignorant, and pray the advice of the Court thereupon. And if upon the whole matter aforesaid by the jurors found, it shall seem to the Court that the defendants are guilty of the said trespass, and that the plaintiff ought to maintain his action against them, the jurors say upon their said oath, that the defendants are guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them; and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out to 300*l.* and for those costs and charges, to 40*s.* But if upon the whole matter by the jurors found, it shall seem to the Court that the said defendants are not guilty of the said trespass; or that the plaintiff ought not to maintain his action against them; then the jurors do say upon their oath that the defendants are not guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them.

Special verdict concludes in the common form.

Damages 300*l.*

"And as to the last issue on the second special justification, the jury found for the plaintiff, that the defendants in their own wrong broke and entered, and did the trespass, as the plaintiff in his replication has alleged."

The last issue found for plaintiff.

This Special Verdict was twice solemnly argued at the bar; in Easter Term last by serjeant Leigh for the plaintiff, and Burland, one of the king's serjeants, for the defendants; and in this present term by serjeant Glynn for the plaintiff, and Nares, one of the king's serjeants, for the defendants.

Easter Term, 5 Geo. 3.

Counsel for the Plaintiff. At the trial of this cause the defendants relied upon two defences; 1st, That a secretary of state as a justice or conservator of the peace, and these messengers acting under his warrant, are within the statute of the 24th of Geo. 2, c. 44, which enacts, (among other things) that 'no action shall be brought against any constable or other officer, or any person acting by his order and in his aid, for any thing done in obedience to the warrant of a justice, until demand hath been made or left at the usual place of his abode by the party, or by his attorney in writing signed by the party, demanding the same, or the perusal and copy of such warrant, and the same hath been refused or neglected for six days after

'such demand,' and that no demand was ever made by the plaintiff of a perusal or copy of the warrant in this case, according to that statute, and therefore he shall not have this action against the defendants, who are merely ministerial officers acting under the secretary of state, who is a justice and conservator of the peace. 2dly, That the warrant under which the defendants acted, is a legal warrant, and that they well can justify what they have done by virtue thereof, for that at many different times from the time of the Revolution till this time, the like warrants with that issued against the plaintiff in this case have been granted by secretaries of state, and executed by the messengers in ordinary for the time being.

As to the first. It is most clear and manifest upon this verdict, that the earl of Halifax acted as secretary of state when he granted the warrant, and not merely as a justice of the peace, and therefore cannot be within the statute 24 Geo. 2, c. 44, neither would he be within the statute if he was a conservator of the peace, such person not being once named therein; and there is no book in the law whatever, that ranks a secretary of state *quasi* secretary, among the conservators of the peace. Lambert, Coke, Hawkins, lord Hale, &c. &c. none of them take any notice of a secretary of state being a conservator of the peace, and until of late days he was no more indeed than a mere clerk. A conservator of the peace had no more power than a constable has now, who is a conservator of the peace at common law. At the time of making this statute, a justice of peace, constable, headborough and other officers of the peace, borsholders and tithingmen, as well as secretary of state, conservator of the peace, and messenger in ordinary, were all very well known; and if it had been the intent of the statute, that a secretary of state, conservator of the peace, and messenger in ordinary, should have been within the statute, it would have mentioned all or some of them; and it not having done so, they cannot be within it. A messenger certainly cannot be within it, who is nothing more than a mere porter, and lord Halifax's footmen might as well be said to be officers within the statute as these defendants. Besides, the verdict finds that these defendants executed the warrant without taking a constable to their assistance. This disobedience will not only take them out of the protection of the statute, (if they had been within it), but will also disable them to justify what they have done, by any plea whatever. The office of these defendants is a place of considerable profit, and as unlike that of a constable and tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in person, and cannot substitute another in his room, though he may call persons to assist him. 1 Hale's P. C. 581. This warrant is more like a warrant to search for stolen goods and to seize them, than any other kind of warrant, which ought to be directed to con-

stables and other public officers which the law takes notice of. (4 Inst. 176.) 2 Hale's P. C. 149, 150. How much more necessary in the present case was it to take a constable to the defendants' assistance. The defendants have also disobeyed the warrant in another matter: being commanded to bring the plaintiff, and his books and papers before lord Halifax, they carried him and them before Lovel Stanhope, the law-clerk; and though he is a justice of the peace, that avails nothing; for no single justice of peace ever claimed a right to issue such a warrant as this, nor did he act therein as a justice of peace, but as the law-clerk to lord Halifax. The information was made before justice Weston. The secretary of state in this case never saw the accuser or accused. It seems to have been below his dignity. The names of the officers introduced here are not to be found in the law-books, from the first year-book to the present time.

As to the second. A power to issue such a warrant as this is contrary to the genius of the law of England; and even if they had found what they searched for, they could not have justified under it. But they did not find what they searched for, nor does it appear that the plaintiff was the author of any of the supposed seditious papers mentioned in the warrant; so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise. But the verdict says, such warrants have been granted by secretaries of state ever since the Revolution. If they have, it is high time to put an end to them; for if they are held to be legal, the liberty of this country is at an end. It is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study. But if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before lord Halifax. What? Has a secretary of state a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed! and if it were lawful, no man could endure to live in this country. In

* Mr. Burke in his Short Account of a late short Administration, (this administration came into employment under the mediation of the duke of Cumberland, son to George the second, in July 1765, and was removed in July 1766: during its continuance in office the marquis of Rockingham was First Lord of the Treasury, and Mr. Dowdeswell Chancellor of the Exchequer) says, 'The lawful secrets of business and friendship were rendered inviolable by the Resolution for condemning the seizure of papers.' See New Parl. Hist. vol. 16, p. 207.

the case of a search-warrant for stolen goods, it is never granted, but upon the strongest evidence that a felony has been committed, and that the goods are secreted in such a house; and it is to seize such goods as were stolen, not all the goods in the house; but if stolen goods are not found there, all who entered with the warrant are trespassers. However frequently these warrants have been granted since the Revolution, that will not make them lawful; for if they were unreasonable or unlawful when first granted, no usage or continuance can make them good. Even customs, which have been used time out of mind, have been often adjudged void, as being unreasonable, contrary to common right, or purely against law, if upon considering their nature and quality they shall be found injurious to a multitude, and prejudicial to the commonwealth, and to have their commencement (for the most part) through the oppression and extortion of lords and great men. Davis 32 b. These warrants are not by custom; they go no farther back than eighty years; and most amazing it is they have never before this time been opposed or controverted, considering the great men that have presided in the King's-bench since that time. But it was reserved for the honour of this Court, which has ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star-chamber tyranny.

Counsel for the Defendants. I am not at all alarmed, if this power is established to be in the secretaries of state. It has been used in the best of times, often since the Revolution. I shall argue, first, that the secretary of state has power to grant these warrants; and if I cannot maintain this, I must, secondly, shew that by the statute 24 Geo. 2, c. 24, this action does not lie against the defendants the messengers. 1. A secretary of state has the same power to commit for treason as a justice of peace. Kendall and Roe,* Skin. 596. 1 Salk. 346, S. C. 1 lord Raym. 65. 5 Mod. 78, S. C. Sir William Wyndham was committed by James Stanhope, secretary of state, to the Tower, for high treason the 7th of October, 1715. See the case 1 Stra. 2. And serjeant Hawkins says, it is certain, that the privy council, or any one or two of them, or a secretary of state, may lawfully commit† persons for treason, and for other

offences against the state, as in all ages they have done. 2 Hawk. P. C. 117, sect. 4. 1 Leon: 70, 71. Carth. 291. 2 Leon. 175. If it is clear that a secretary of state may commit for treason and other offences against the state, he certainly may commit for a seditious libel against the government; for there can hardly be a greater offence against the state, except actual treason. A secretary of state is within the Habeas Corpus Act. But a power to commit without a power to issue his warrant to seize the offender and the libel would be nothing; so it must be concluded that he has the same power upon information to issue a warrant to search for and seize a seditious libel, and its author and publisher, as a justice of peace has for granting a warrant to search for stolen goods, upon an information that a theft has been committed, and that the goods are concealed in such a place; in which case the constables and officers assisting him in the search, may break open doors, boxes, &c. to come at such stolen goods. Supposing the practice of granting warrants to search for libels against the state be admitted to be an evil in particular cases, yet to let such libellers escape, who endeavour to raise rebellion, is a greater evil, and may be compared to the reason of Mr. Justice Foster in the Case of Pressing, [Vol. 18, p. 1323,] where he says, 'That war is a great evil, but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war brings with it; but it is a maxim in law and good policy too, that all private mischiefs must be borne with patience, for preventing a national calamity, &c.'

2. Supposing there is a defect of jurisdiction in the secretary of state, yet the defendants are within the stat. 24 Geo. 2, c. 44, and though not within the words, yet they are within the reason of it. That it is not unusual in acts of parliament to comprehend by construction a generality, where express mention is made only of a particular. The statute of *Circumspecte agatis* concerning the bishop of Norwich extends to all bishops. Fitz. Prohibition 3, and 2 Inst. on this statute, 25 Edw. 3, c. enables the incumbent to plead in *quare impedit*, to the king's suit. This also extends to the suits of all persons, 38 E. 3, 81. The act 1 Ric. 2, ordains that the warden of the Fleet shall not permit prisoners in execution to go out of prison by bail or baston, yet it is adjudged that this act extends to all gaolers. Plowd. Com. case of Platt, 35 b. The stat. *de donis, conditionalibus* extends to all other limitations in tail not there particularly mentioned, and the like construction has been put upon several other

* See this Case, in vol. 12, p. 1209.

† With respect to the power of a secretary of state to commit, see the Cases of Wilkes, p. 982, of this volume, and of Leach against Money and others, p. 1002 of this volume.

"If we are to learn from the records in courts of justice, and from the received practice at all times what is the law of the land, I have no difficulty in saying that the secretaries of state have the right to commit. This right was not even doubted by lord Camden, who expressed as great anxiety for the liberty of the subject as

any man; indeed it has been thought by some persons eminent in our possession, who have considered the point since, that he rather overstepped the line of the law in the Case of *B. v. Wilkes*, and certainly if that judgment can be supported, many other cases that have been solemnly determined, cannot be reconciled with it." Per lord Kenyon, C. J. in the Case of the King against Despard, 7 T. Rep. 742.

statutes. Tho. Jones 62. The stat. 7 Jac. 1, c. 5, the word 'constable' therein extends to a deputy constable. Moor 845. These messengers in ordinary have always been considered as officers of the secretary of state, and a commitment may be to their custody, as in sir W. Wyndham's case. A justice of peace may make a constable *pro hac vice* to execute a warrant, who would be within the stat. 24 Geo. 2. So if these defendants are not constables, yet as officers they have power to execute a warrant of a justice of peace. A constable may, but cannot be compelled to execute a warrant out of his jurisdiction. Officers acting under colour of office, though doing an illegal act, are within this statute. Vaugh. 113. So that no demand having ever been made of the warrant, nor any action commenced within six months, the plaintiff has no right of action. It was said, that a conservator of the peace had no more power than a constable has now. I answer, they had power to bind over at common law, but a constable has not. Dalton, cap. 1.

Counsel for the Plaintiff, in reply. It is said, this has been done in the best of times ever since the Revolution. The conclusion from thence is, that it is the more inexcusable, because done in the best of times, in an era when the common law (which had been trampled under the foot of arbitrary power) was revived. We do not deny but the secretary of state hath power to commit for treason and other offences against the state; but that is not the present case, which is breaking into the house of a subject, breaking into his drawers and boxes, ransacking all the rooms in his house, and prying into all his private affairs. But it is said, if the secretary of state has power to commit, he has power to search, &c. as in the case of stolen goods. This is a false consequence, and it might as well be said he has a power to torture. As to stolen goods, if the officers find none, have they a right to take away a man's goods which were not stolen? Pressing is said to be a dangerous power, and yet it has been allowed for the benefit of the state. But that is only the argument and opinion of a single judge, from ancient history and records, in times when the lower part of the subjects were little better than slaves to their lords and great men, and has not been allowed to be lawful without an act of parliament since the time of the Revolution. The stat. 24 Geo. 2, has been compared to ancient statutes, naming particular persons and districts, which have been construed to extend to many others not named therein; and so the defendants, though no such officers are mentioned, by like reason, are within the statute of 24 Geo. 2. But the law knows no such officers as messengers in ordinary to the king. It is said the Habeas Corpus Act extends to commitments by secretaries of state, though they are not mentioned therein. True, but that statute was made to protect the innocent

VOL. XIX.

against illegal and arbitrary power. It is said, the secretary of state is a justice of peace, and the messengers are his officers. Why then did the warrant direct them to take a constable to their assistance, if they were themselves the proper officers? It seems to admit they were not the proper officers. If a man be made an officer for a special purpose to arrest another, he must shew his authority; and if he refuses, it is not murder to kill him. But a constable or other known officer in the law need not shew his warrant.

Lord Chief Justice. I shall not give any opinion at present, because this case, which is of the utmost consequence to the public, is to be argued again. I shall only just mention a matter which has slipped the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument. Suppose a warrant which is against law be granted, such as no justice of peace, or other magistrate high or low whomsoever, has power to issue, whether that magistrate or justice who grants such warrant, or the officer who executes it, is within the stat. 24 Geo. 2, c. 44. To put one case (among an hundred that might happen): suppose a justice of peace issues a warrant to search a house for stolen goods, and directs it to four of his servants, who search and find no stolen goods, but seize all the books and papers of the owners of the house, whether in such a case would the justice of peace, his officers or servants, be within the stat. 24 Geo. 2? I desire that every point of this case may be argued to the bottom, for I shall think myself bound, when I come to give judgment, to give my opinion upon every point in the case.

Mich. 6 Geo. 3.

Counsel for the Plaintiff on the second argument. If the secretary of state, or a privy counsellor, justice of peace, or other magistrate whatever, have no legal power to grant the warrant in the present case, it will follow, that the magistrate usurping such an illegal power, can never be construed to be within the meaning or reason of the statute of 24 Geo. 2, c. 44, which was made to protect justices of the peace, &c. where they made blunders, or erred in judgment in cases within their jurisdiction, and not to give them arbitrary power to issue warrants totally illegal from beginning to end, and in cases wherein they had no jurisdiction at all. If any such power in a secretary of state, or a privy counsellor, had ever existed, it would appear from our law-books. All the ancient books are silent on this head. Lambert never once mentions a secretary of state. Neither he nor a privy counsellor, were ever considered as magistrates. In all the arguments touching the Star-Chamber, and Petition of Right, nothing of this power was ever dreamt of. State-commitments anciently were either *per mandatum regis* in person, or by warrant of several of the privy counsellors in the plural number. The king has this

3 X

power in a particular mode, viz. by the advice of his privy council, who are to be answerable to the people if wrong is done. He has no other way but in council to signify his mandate. In the Case of the Seven Bishops, this matter was insisted upon at the bar, when the Court presumed the commitment of them was by the advice of the privy council; but that a single privy counsellor had this power, was not contended for by the crown-lawyers then. This Court will require it to be shewn that there have been ancient commitments of this sort. Neither the secretary of state, or a privy counsellor, ever claimed a right to administer an oath, but they employ a person as a law-clerk, who is a justice of peace, to administer oaths, and take recognizances. Sir Barth. Shower, in Kendall and Roe's case, insisted they never had such power. It would be a solecism in our law to say, there is a person who has power to commit, and has not power to examine on oath, and bail the party. Therefore whoever has power to commit, has power to bail. It was a question formerly, whether a constable as an ancient conservator of the peace should take a recognizance or bond. In the time of queen Elizabeth there was a case wherein some of the judges were of one opinion and some of another. A secretary of state was so inconsiderable formerly, that he is not mentioned in the statute of *scandalum magnatum*. His office was thought of no great importance. He takes no oath of office as secretary of state, gives no kind of security for the exercise of such judicial power as he now usurps. If this was an ancient power, it must have been annexed to his office anciently; it cannot be now given to him by the king. The king cannot make two chief justices of the Common-Pleas; nor could the king put the great seal in commission before an act of parliament was made for that purpose. There was only one secretary of state formerly: there are now two appointed by the king. If they have this power of magistracy, it should seem to require some law to be made to give that power to two secretaries of state which was formerly in one only. As to commitments *per mandatum regis*, see Staunf. Pl. Coron. 72. 4 Inst. c. 5, court of Star-Chamber. Admitting they have power to commit in high treason, it will not follow they have power to commit for a misdemeanor. It is of necessity that they can commit in high treason, which requires immediate interposition for the benefit of the public. In the case of commitment by Walsingham secretary of state, 1 Leon. 71, it was returned on the Habeas Corpus at last, that the party was committed 'ex sententia et mandato totius concilii privati domine regine.' Because he found he had not that power of himself, he had recourse to the whole privy council's power, so that this case is rather for the plaintiff. Commitment by the High Commission Court of York was declared by parliament illegal from the beginning; so in the Case of Ship-Money the parliament declared it illegal.

Counsel for the Defendants on the second argument. The most able judges and advocates, ever since the Revolution, seem to have agreed, that the secretaries of state have this power to commit for a misdemeanor. Secretaries of state have been looked upon in a very high light for two hundred years past. 27 H. 8, c. 11. Their rank and place is settled by 31 H. 8, c. 10. 4 Inst. 362, c. 77, of Precedency. 4 Inst. 56. Selden's Titles of Honour, c. Officers of State. So that a secretary of state is something more than a mere clerk, as was said. Minshew verb. Secretary. He is 'à secretioribus consiliis domini regis.' Serjeant Pengelly moved, that sir William Wyndham might be bailed. If he could not be committed by the secretary of state for something less than treason, why did he move to have him bailed? This seems a concession that he might be committed in that case for something less than treason. Lord Holt seems to agree that a commitment by a secretary of state is good. Skin. 598. 1 lord Raym. 65. There is no case in the books that says in what cases a secretary of state can or cannot commit; by what power is it that he can commit in the case of treason, and in no other case? The resolution of the House of Commons touching the Petition of Right, [Selden last volume, Parliamentary History, vol. 2, p. 374.] Secretary Coke told the Lords, it was his duty to commit by the king's command. Yoxley's case, Carth. 291, he was committed by the secretary of state on the statute of Elizabeth for refusing to answer whether he was a Romish priest. The Queen and Derby, Fortescue's Reports, 140, the commitment was by a secretary of state, Mich. 10 Annæ, for a libel, and held good. (Note. Bathurst J. said he had seen the Habeas Corpus and the Return, and that this was a commitment by a secretary of state.) The King and Earbury, Mich. 7 Geo. 2, 2 Barnard 346, was a motion to discharge a recognizance entered into for writing a paper called The Royal Oak. Lord Hardwicke said it was settled in Kendall and Roe's case, that a secretary of state might apprehend persons suspected of treasonable practices; and there are a great number of precedents in the Crown-office of commitments by secretaries of state for libels against the government.

After time taken to consider, Lord Camden, Lord Chief Justice, delivered the Judgment of the Court for the Plaintiff, in the following words:

L. C. J. This record hath set up two defences to the action, on both of which the defendants have relied.

The first arises from the facts disclosed in the special verdict; whereby the defendants put their case upon the statute of 24 Geo. 2, insisting, that they have nothing to do with the legality of the warrants, but that they ought to have been acquitted as officers within the meaning of that act.

The second defence stands upon the legality of the warrants; for this being a justification at common law, the officer is answerable if the magistrate has no jurisdiction.

These two defences have drawn several points into question, upon which the public, as well as the parties, have a right to our opinion.

Under the first, it is incumbent upon the officers to shew, that they are officers within the meaning of the act of parliament, and likewise that they have acted in obedience to the warrant.

The question, whether officers or not, involves another; whether the secretary of state, whose ministers they are, can be deemed a justice of the peace, or taken within the equity of the description; for officers and justices are here co-relative terms: therefore either both must be comprised, or both excluded.

This question leads me to an inquiry into the authority of that minister, as he stands described upon the record in two capacities, viz. secretary of state and privy counsellor. And since no statute has conferred any such jurisdiction as this before us, it must be given, if it does really exist, by the common law; and upon this ground he has been treated as a conservator of the peace.

The matter thus opened, the questions that naturally arise upon the special verdict, are;

First, whether in either of these characters, or upon any other foundation, he is a conservator of the peace.

Secondly, admitting him to be so, whether he is within the equity of the 24th Geo. 2.

These points being disposed of, the next in order is, whether the defendants have acted in obedience to the warrant.

In the last place, the great question upon the justification will be, whether the warrant to seize and carry away the plaintiff's papers is lawful.

FIRST QUESTION.

The power of this minister, in the way wherein it has been usually exercised, is pretty singular.

If he is considered in the light of a privy counsellor, although every member of that board is equally entitled to it with himself, yet he is the only one of that body who exerts it. His power is so extensive in place, that it spreads throughout the whole realm; yet in the object it is so confined, that except in libels and some few state crimes, as they are called, the secretary of state does not pretend to the authority of a constable.

To consider him as a conservator. He never binds to the peace, or good behaviour, which seems to have been the principal duty of a conservator; at least he never does it in those cases, where the law requires those sureties. But he commits in certain other cases, where it is very doubtful, whether the conservator had any jurisdiction whatever.

His warrants are chiefly exerted against libellers, whom he binds in the first instance to

their good behaviour, which no other conservator ever attempted, from the best intelligence that we can learn from our books.

And though he doth all these things, yet it seems agreed, that he hath no power whatsoever to administer an oath or take bail.

This jurisdiction, as extraordinary as I have described it, is so dark and obscure in its origin, that the counsel have not been able to form any certain opinion from whence it sprang.

Sometimes they annex it to the office of secretary of state, sometimes to the quality of privy counsellor; and in the last argument it has been derived from the king's royal prerogative to commit by his own personal command.

Whatever may have been the true source of this authority, it must be admitted, that at this day he is in the full legal exercise of it; because there has been not only a clear practice of it, at least since the Revolution, confirmed by a variety of precedents; but the authority has been recognized and confirmed by two cases in the very point since that period: and therefore we have not a power to unsettle or contradict it now, even though we are persuaded that the commencement of it was erroneous.

And yet, though the enquiry I am now upon cannot be attended with any consequence to the public, it is nevertheless indispensable; for I shall trace the power to its origin, in order to determine whether the person is within the equity of the 24th Geo. 2.

Before I argue upon that point, or even state the question, whether the secretary of state be within that act, we must know what he is. This is no very agreeable task, since it may possibly tend to create, in some minds, a doubt upon a practice that has been quietly submitted to, and which is of no moment to the liberty of the subject; for so long as the proceedings under these warrants are properly regulated by law, the public is very little concerned in the choice of that person by whom they are issued.

To proceed then upon the First Question, and to consider this person in the capacity of a secretary of state.

This officer is in truth the king's private secretary. He is keeper of the signet and seal used for the king's private letters, and backs the sign manual in transmitting grants to the privy seal. This seal is taken notice of in the *Articuli super Chartas*, cap. 6, and my lord Coke in his comment (2 Inst. 556), upon that chapter, p. 556, describes the secretary as I have mentioned. He says he has four clerks, that sit at his board; and that the law in some cases takes notice of the signet; for a *ne exeat regno* may be by commandment under the privy seal, or under the signet; and in this case the subject ought to take notice of it; for it is but a signification of the king's commandment. If at the time my lord Coke wrote his 3d Institute he had been acquainted with the authority that is now ascribed to the secretary, he would certainly have mentioned it in this

place. It was too important a branch of the office to be omitted; and his silence therefore is a strong argument, to a man's belief at least, that no such power existed at that time. He has likewise taken notice of this officer in the Prince's case in the 8th Report. He is mentioned in the statute of the 27th H. 8, chap. 11, and in the statute of the same king touching precedency; and it is observable, that he is called in these two statutes by the single name of secretary, without the addition, which modern times has given him, of the dignity of a state-officer.

I do not know, nor do I believe, that he was anciently a member of the privy council; but if he was, he was not even in the times of James and Charles the 1st, according to my lord Clarendon, an officer of such magnitude as he grew up to after the Restoration, being only employed, by this account, to make up dispatches at the conclusion of councils, and not to govern or preside in those councils.

It is not difficult to account for the growth of this minister's importance. He became naturally significant from the time that all the courts in Europe began to admit resident ambassadors; for upon the establishment of this new policy, that whole foreign correspondence passed through the secretary's hands, who by this means grew to be an instructed and confidential minister.

This being the true description of his employment, I see no part of it that requires the authority of a magistrate. The custody of a signet can imply no such thing; nay, the contrary would rather be inferred from this circumstance; because if his power to commit was inherent in his office, his warrants would naturally be stamped with that seal; and in this light the privy seal, one should think, would have had the preference, as being highest in dignity and of more consideration in law. Besides all this, it is not in my opinion consonant to the wisdom or analogy of our law, to give a power to commit, without a power to examine upon oath, which to this day the secretary of state doth not presume to exercise. Mr. Justice Rokeby, in the case of Kendall and Rowe, says, that the one is incident to the other; (5 Mod. 78,) and I am strongly of that opinion: for how can he commit, who is not able to examine upon oath? What magistrate can be found, in our law, so defectively constituted? The only instance of this kind, that can be produced, is the practice of the House of Commons. But this instance is no precedent for other cases. The rights of that assembly are original and self created; they are paramount to our jurisdiction, and above the reach of injunction, prohibition, or error.† So that I still say, notwithstanding that particular case, there is no magistrate in our law so

framed, unless the secretary of state be an exception. Now Mr. Justice Rokeby and myself, though we agree in the principle, form our conclusions in a very different manner. He from the assumed power of committing, which ought first to have been proved, infers the incidental powers of administering an oath. I on the contrary, from the admitted incapacity to do the latter, am strongly inclined to deny the former.

Again, if the secretary of state is a common law magistrate, one should naturally expect to find some account of this in our books, whereas his very name is unknown; and there cannot be a stronger argument against his authority in that light, than the unsuccessful attempts that have been made at the bar to transform him into a conservator. These attempts have given us the trouble of looking into those books that have preserved the memory of these magistrates, who have been long since deceased and forgotten. Fitzherbert, Crompton, Lambard, Dalton, Pulton, and Bacon, have all been searched to see, if any such person could be found amongst the old conservators. It is not material to repeat the whole number, and to range them in their several classes; but it will be sufficient to enumerate the principal ones; because they may be referred to in some other part of the argument.

The king is mentioned as the first. Then come the chancellor, the treasurer, the high steward, the master of the rolls, the chief justice and the justices of the King's bench, all the judges in their several courts, sheriffs, coroners, constables; and some are said to be conservators by tenure, some by prescription, and others by commission. But no secretary of state is to be found in the catalogue; and I do affirm, that no treatise, case, record, or statute, has ever called him a conservator, from the beginning of time down to the case of the King against Kendall and Rowe.*

The first time, he appears in our books to be a granter of our warrants, is in 1 Leonard 70 and 71, 29 and 30 Elizabeth, where the return to a Habeas Corpus was a commitment by sir Francis Walsingham, principal secretary, and one of the privy council. The Court takes this distinction. Where a person is committed by one of the privy council, in such case the cause of the commitment should be set down in the return; but on the contrary, where the party is committed by the whole council, there no cause need be alleged. The Court upon this ordered the return to be amended, and then the return is a commitment by the whole council.

There is a like case in the 2 Leonard, p. 175, a little prior in point of time, where the commitment is by sir Francis Walsingham, one of the principal secretaries, &c. Because the warden of the Fleet did not return for what cause Helliard was committed, the Court gives

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 16, s. 4.

† Ibid. book 2, c. 15, s. 73.

* See Leach's Hawkins's Pleas of the Crown, book 1, c. 60, s. 1.

him day to mend his return, or otherwise the prisoner should be delivered. Nobody who reads this case can doubt, but that the &c. must be supplied by the addition of privy counsellor, as in the other case.

These authorities shew, that the judges of those days knew of no such committing magistrate as a secretary of state. They pay no regard to that office, but treat the commitment as the act of the privy counsellor only; and to shew farther that the privy counsellor as such was the only acting magistrate in state matters, all the twelve judges two years afterwards were obliged to remonstrate against the irregularities of their commitments, but take no notice of any such authorities practised by the secretaries of state.

In the 3d year of king Charles the 1st, when the House of Commons started that famous dispute, upon the right claimed by the king and the privy council to commit without shewing cause, it is natural to expect, that the secretary's warrant should have been handled, or at least named among the state commitments. But there is not throughout that long and learned discussion one word said about him, or his name so much as mentioned; and the Petition of Right, as well as all the proceedings that produced it, is equally silent upon the subject.

Again, when in the 16th year in the same king's reign the Habeas Corpus was granted by act of parliament (16 Cha. 1, c. 10, s. 8,) upon all the state commitments, and where the omission of one mode of committing would have been fatal to the subject, and frustrated all the remedy of that act, and where they have enumerated not only every method of committing that had been exercised, but every other that might probably exist in after times; yet the commitment by a secretary of state is not found amongst the number. If then he had power of his own to commit, this famous act of parliament was waste paper, and the subject still at the mercy of the crown, without the benefit of the Habeas Corpus; a supposition altogether incredible: for who can believe, that this parliament, so jealous, so learned, so industrious, so enthusiastic of the liberty of the subject, when they were making a law to relieve prisoners against the power of the crown, should bind the king, and leave his secretary of state at large?

Whoever attends to all these observations will see clearly, that the secretary of state in those days never exercised the power of committing in his own right; I say, in his own right, because that he did in fact commit, and that frequently even at the time when the matter of the Habeas Corpus was agitated in the 3d of king Charles the 1st, will appear from a passage in the *Ephemeris Parliamentaria*, page 162. This passage, when it comes to be attended to, will throw great light upon the present enquiry. It is sufficient of itself to convince me, from what source this practice first arose. It was from a delegation of the king's

royal prerogative to commit by his own power, and from the king devolved in point of execution upon the secretary of state. The passage I allude to is a speech of secretary Cook.

Whilst the parliament were disputing the king's authority to commit, either by himself or by his council, without shewing the cause, the king, who was desirous to pacify those discontents, and yet unwilling to part with his prerogative, sent a message to the House of Commons to assure them, that if they would drop the business, he would promise them, upon his royal word, not to use this prerogative contrary to law. Secretary Cook delivers this message, and then the book proceeds in these words. After speaking of himself and the nature of his place, he says, "Give me leave freely to tell you, that I know by experience, that by the place I hold under his majesty, if I will discharge the duty of my place and the oath I have taken to his majesty, I must commit, and neither express the cause to the gaoler, nor to the judges, nor to any counsellor in England, but to the king himself. Yet do not think, I go without ground of reason, or take this power committed to me to be unlimited. Yea rather to me it is charge, burthen, and danger; for if I by this power commit the poorest porter, if I do not upon a just cause, if it may appear, the burthen will fall upon me heavier than the law can inflict; for I shall lose my credit with his majesty and my place: and I beseech you consider, whether those that have been in the same place, have not committed freely, and not any doubt made of it, or any complaint made by the subject."

To understand the meaning of this speech, I must briefly remind you of the nature of that famous struggle for the liberty of the subject between the crown and the parliament, which was then in agitation.

The points in controversy were these: whether a subject committing by the king's personal command, or by warrant of the privy council, ought to express the cause in the warrant, and whether the subject in that case was bailable.

The matter in dispute was confined to those two commitments. The crown claimed no such right for any other warrant; nor did the Commons demand redress against any other. The statute of Westminster the first, which was admitted on all sides to be the only foundation upon which the pretensions of the crown were built, speaks of no other arrests in the text, but the king's arrest only; and the comment of law had never added any other arrest by construction, but that only of the privy council. No other commitment whatever was deemed by any man to be within the equity of that act. The case, cited upon that occasion, speaks of no other commitments but these. Nay the House of Lords, who passed a resolution in the heat of this business in favour of the king's authority, resolves only, that the king or his council could commit, but meddle with no other commitment. Secretary Cook tells them

in this public manner, that he made a daily practice of committing without shewing the cause; yet the House takes no notice of any secretary's warrant as such, nor is the secretary's name mentioned in the course of all those proceedings. What then were those commitments mentioned by the secretary? They were certainly such only, as were 'per speciale mandatum domini regis.' They could be no other. They were the commitments then under debate. They, and they only, were referred to by the king's message, and were consequently the subject matter of the secretary's apology; for no other warrant claimed that extraordinary privilege of concealing the cause.

This observation explains him, when he calls it a power committed to him; which I construe, not as annexed to his office, but specially delegated. This accounts too for his notion, that the law could not touch him; but that if he abused his trust, he should lose his credit with the king and his place, which he describes as a heavier punishment than the law could inflict upon him. Upon this ground it will be easy to explain the notable singularities of this minister's proceeding, which are not to be reconciled to any idea of a common-law magistrate. Such are his meddling only with a few state-offences, his reach over the whole kingdom, his committing without the power of administering an oath, his employment of none but the messenger of the king's chamber, and his command to mayors, justices, sheriffs, &c. to assist him; all which particularities are congruous enough to the idea of the king's personal warrant, but utterly inconsistent with all the principles of magistracy in a subject.

If on the other hand it can be understood, that he could and did commit without shewing the cause in his own right and by virtue of his office, then was his warrant admitted to be legal by the whole House, and without censure or animadversion. It was neither condemned by the Petition of Right, nor subject to the Habeas Corpus Act of 16th of Charles the First, (c. 10.)

The truth of the case was no more than this. The council-board were too numerous to be acquainted with every secret transaction that required immediate confinement; and the delay by summoning was inconvenient in cases that required dispatch. The secretary of state, as most entrusted, was the fittest hand to issue sudden warrants; and therefore we find him so employed by queen Elizabeth under the quality of a privy counsellor. But when the attempt failed, the judges declaring, that he must shew the cause, and that they would remand none of his prisoners in any case but that of high treason, those warrants ceased, and then a new method was taken by making him the instrument of the king's *speciale mandatum*; for that is the form in which all warrants and returns were drawn, that were produced upon that famous argument.

Having thus shewn, not only negatively that this power of committing was not annexed to

the secretary's office, but affirmatively likewise that he was notifier or countersigner of the king's personal warrant acting in *alio jure* down to the times of the 16th of Charles the first, and consequently to the Restoration, for there was no secretary in that interval, I have but little to add upon this head, but observing what passed between that time and the case of Kendall and Rowe.

The Licensing Act, that took place in the 13th and 14th of Charles the Second, (c. 33), gave him his first right to issue a warrant in his own name; not indeed to commit persons, but a warrant to search for papers. Whether upon this new power he grafted any authority to commit persons in his own right, as it should seem he did by the precedent produced the other day, is not very material. But it is remarkable, that during that interval he adhered in some cases to the old form, by specifying the express command of the king in this warrant.

With respect to the cases that have passed since the Revolution, such as the King against Kendall and Rowe, the Queen against Darby, and the King and Earbery, I shall take no other notice of them in this place, than to say, they afford no light in the present inquiry by shewing the ground of the officer's authority, though they are strong cases to confirm it.

But before I can fairly conclude, that the secretary of state's power was derived from the king's personal prerogative and from no other origin, I must examine, what has passed relative to the power of a separate privy counsellor in this respect. This is the more necessary to be done, because my lord chief justice Holt has built all his authority upon this ground; and the subsequent cases, instead of striking out any new light upon the subject, do all lean upon and support themselves by my lord chief justice Holt's opinion in the case of Kendall and Rowe.

I will therefore fairly state all that I have been able to discover touching the matter; and then, after I have declared my own opinion, shall leave others to judge for themselves.

In the first place it is proper to observe, that a privy counsellor cannot derive his authority from the statute of Westminster the first; which recites an arrest by the command of the king to be one of those cases that were irrevocable by the common law. The principal commentator upon these words is Staundford, (Pl. fo. 72, b.) who says, as to the commandment of the king, this is to be understood of the commandment of his own mouth, or of his council, which is incorporate to him, and speaks with the mouth of the king himself; for otherwise, if you will take these words of commandment generally, you may say that every Capias in a personal action is the command of the king." Lambard in his chapter of Bailment, where he cites this act of parliament, gives it the same construction, by allowing a commitment by the council to be within the equity of these words, "command-

ment of the king." (Lamb. Eirenarch, & b. 3, c. 2, p. 335.) Thus far, and no further, did the crown lawyers in the third of king Charles the first endeavour to extend the text of the law; and it is plain from the cases before cited, that the judges in queen Elizabeth's time were of the same opinion, that the argument could not be extended in favour of the single counsellor; because they held, that he is bound to shew the cause upon his warrant, as distinguished from the other warrants, where they admit the cause need not be shewn.

If he is not then entitled by this statute, is he empowered by the common law? They, who contend he is, would do well to shew some authority in proof of their opinion. It is clear, he is not numbered among the conservators. It is as clear, that he is not mentioned by any book as one of the ordinary magistrates of justice with any such general authority.

The first place, in which any thing of this kind is to be found, is in the year-book of Henry the sixth, where the sheriff returns a detainer under the warrant of '*duos de concilio pro rebus regem tangentibus*.' This proof has an unlucky defect in it; because the reading is doubtful, the word *duos* as it is written standing as well for *dominos*, as for *duos*; so that till the reading is settled, which is beyond my skill, the authority must be suspended.

The next time you meet with a privy counsellor in the light of a magistrate is in the first of Edward the sixth, chap. 12, s. 19, where one of the privy council is empowered to take the accusation in some new treasons therein mentioned; and he is for this purpose joined with the justice of assize and justice of the peace. The like power is given to him by the 5th and 6th of the same king, c. 11, s. 10, in a like case; and I find in Kelyng, p. 19, that when the judges met to resolve certain points before the trial of the Regicides, they resolved, that a confession upon examination before a privy counsellor, though he be not a justice of the peace, is a confession within the meaning of the statute of the 5th and 6th of Edward the 6th. That act of parliament in the twelfth section had provided, that no person should be attainted of treason, but upon the testimony of two lawful accusers, unless the said party arraigned should willingly without violence confess the same.

It seems to me, that the ground upon which the judges proceeded in this resolution, was the express power given to the privy council in the clause next but one before that just mentioned, where the act enables them to take the accusation in the new treasons there mentioned.

Whether they reasoned in that way, or whether they conceived that the power there given was a proof of some like power which they enjoyed to take accusation in the case of treasons at the common law, the book has not explained; so that hitherto this authority in the case of high treason stands upon a very poor foundation, being in truth no more than a conjecture of law without authority to support it.

The next authorities are the cases already recited in Leonard, which to the present point prove nothing more than this; that the judges do admit a power in a privy counsellor to commit without specifying in what cases. They demand the cause, and a better return; whereupon sir Francis Walsingham, instead of relying upon his power as privy counsellor, returns a new warrant signed by the whole board.

Two years after this came forth that famous resolution of all the judges, which is reported in 1 Anderson 297, 34th of Elizabeth. There is no occasion to observe, how arbitrary the prerogative grew, and how fast it increased towards the end of this queen's reign. It seems to me, as if the privilege claimed by the king's personal warrant, and from him derived to the council-board, by construction, had somehow or other been adopted by every individual of that board; for in fact these warrants became so frequent and oppressive, that the courts of justice were obliged at last to interpose.

However they might be overborne by the terror of the king's special command either in or out of council, they had courage enough to resist the novel encroachments of the separate members; and therefore they did in the courts of King's-bench and Common Pleas set at large many persons so committed; upon which occasion a question being put to the judges, to specify in what cases the prisoner was to be remanded, they answer the question with a remonstrance of their own against the illegal warrants granted by the privy counsellors. The preamble relates entirely to these commitments, wherein they desire, that some good order may be taken, that her highness's subjects may not be committed or detained in prison by commandment of any nobleman, against the laws of the realm.

The question is this: In what cases prisoners sent to custody by her majesty, her council, or any one or more of her council, are to be detained in prison, and not to be delivered by her majesty's courts or judges.

The answer is, "We think, that if any person be committed by her majesty's command from her person, or by order from the council-board, or if any one or two of her council commit one for high treason, such persons so in the case before committed may not be delivered by any of her courts without due trial by the law and judgment of acquittal had. Nevertheless the judges may award the queen's writs to bring the bodies of such persons before them; and if upon return thereof the causes of their commitment be certified to the judges, as it ought to be, then the judges in the cases before ought not to deliver him, but to remand the prisoner to the place from whence he came; which cannot conveniently be done, unless notice of the causes in generality, or else specially, be given to the keeper or gaoler that shall have the custody of such prisoner."

There is a studied obscurity in this opinion, which shews, how cautious the judges were obliged to be in those dangerous times; for

whether they meant to acknowledge a general power in the king or his council to commit, as distinguished from a special power in one or more of his council to commit, only in the case of high treason; or whether this case of high treason is to be referred to all the commitments as the only unailable case; or again, whether in the superior commitment by the royal person or his council, they would deliver the prisoner though no cause was specified; or if one of the council committed for offences below high treason where they declare they would not remand, yet whether they would absolutely discharge or only upon bail; is altogether either ambiguous or uncertain.

It is evident to me, that the judges did not intend to be understood touching these matters; and the only propositions, that are clearly laid down in this resolution, are these.

First, that they would never remand upon the counsellor's commitment but in high-treason.

Secondly, that the cause ought to be shewed in all cases.

This resolution grew to be much agitated afterwards in the third of Charles the first, and had the honour, like other dark oracles, to be cited on both sides.

Thus much it was necessary to observe upon this famous opinion; because it was upon this opinion, that lord chief justice Holt principally relied. At this time it is apparent, that all the privy counsellors exercised this right in common. Whatever it was, the complaint shews, it was a general practice, and a privilege enjoyed by all the members of that board; from whence it is natural to suppose, that if the power was well founded, the same practice would have continued to this time in the same way, seeing how tenacious all men are of those things that are called rights and privileges. Instead of this it doth not appear, that the council from that æra have ever asserted their rights; and now at last, when the secretary of state has revived the claim, for the common benefit, as it should seem, of the whole body, no other person has followed this example, or knows to this moment that he is entitled to such right. Any body who considers what the consequence must have been from these determinations of the judges, might venture to affirm, that the privy counsellor's warrant from this period ceased and grew out of use; for as the cause in this case was necessary to be specified, and the prisoner was never to be remanded but in the case of high treason, that warrant became at once unserviceable, and the crown was forced to resort to the royal mandate or the board-warrant, which, notwithstanding the case in *Anderson*, was still insisted to be unailable and good without a cause.

Hence happened, that in the great debate in the third of king Charles the first, no privy counsellor's warrants do once occur; but instead thereof you find the secretary of state dealing forth the king's royal mandate, and the privy counsellor's authority at rest.

The only reason, why I touch upon these proceedings, is for the sake of observing, that no notice is taken in those arguments of the privy counsellor's right to commit; and yet the power of the king himself, and of his council, by the statute of Westminster the first, is largely discussed, and so fully handled, that if the warrant of one privy counsellor had then been in use, it must have been brought forth in the argument; for if it could have served no other purpose, it would have been material, in order to mark the distinction between that and the warrant of the whole board.

From these observations I conclude, that these warrants were then deceased and gone, and would probably have never made their appearance again even in description, if the bill in the 16th of Charles the first, c. 10, had not recalled them to memory, not as things either then in use or admitted to be legal, but as one of the modes of commitment which might be again revived, because it had been formerly practised.* Therefore when this form of warrant appears, as it does in the catalogue of other forms, both legal and illegal, no argument can be raised from a pretended recognition of this particular warrant; since it was necessary to name every mode, that ever had been used by the king, the council, or the Star-Chamber, in order to make the remedy by *Habeas Corpus* universal.

But if there can be a doubt, whether this act of parliament is to be deemed a recognition of this authority, there is a passage in the *Journal of the House of Commons*, that proves the contrary in direct terms.

Whilst this bill was passing, the House makes an amendment, which appears by the question put to be this, whether the House should assent to the putting the word 'liberties' out of the bill.

But as the passage in the bill is not mentioned in the *Journals*, it must be collected by inferences. By the phrase 'left out of the bill,' I presume it was permitted to stand in the preamble. Now when you look into the preamble, the word 'liberties' is there to be found in that part of the preamble which recites this usurpation of the privy council upon the liberties, as well as the properties of the subject; whereas the enacting clause condemns only the jurisdiction of that board, so far as it assumed a jurisdiction over the property of the subject; from whence I collect that the word 'liberties' stood in that clause; and the passage that follows in the *Journal* does strongly confirm it.

The words are these: "Resolved upon the question, that this House does assent to the putting the word 'liberties' out of the bill concerning the Star-Chamber and Council pleadings; because the House has a bill to be drawn to provide for the liberty of the subject in a large manner. Mr. Serjeant Wild and Mr. Whitelock are appointed to draw a bill to that

* See *Leach's Hawkins's Pleas of the Crown*, book 2, c. 15, s. 71.

purpose upon the several points that have been here this day debated.

"Resolved upon the question, that the body of the lords of the council, nor any one of them in particular as a privy-counsellor, has any power to imprison any free-born subject, except in such cases as they are warranted by the statutes of the realm."

It is pretty plain from this passage, that the debate turned upon the meaning of the statute of Westminster the first, and the resolution of the judges in *Anderson*, about which it is not fit to give any opinion; my design by citing this passage being only to shew, that this act of parliament does not even prove the actual practice of such warrants at that time, much less does recognize their legality.

What follows is still more remarkable touching this business, upon a doubt started in the trial of the Seven Bishops.* They were committed by a warrant signed by no less than thirteen privy counsellors; but the warrant did not appear to be signed by them in council. The objection taken was, that the warrant was void, being signed only by the privy counsellors separately, and not in a body. If any man in Westminster-hall at that time had understood, that one or more privy counsellors had a right to commit for a misdemeanour, that would have been a flat answer to the objection; but they are so far from insisting upon this, that all the king's counsellors, as well as the Court, do admit the warrant would have been void, if it could be taken to be executed by them out of council.

The solicitor-general upon that occasion cites the 16th of Charles the first, which statute is produced and read, and yet no argument is taken from thence to prove the authority of the separate lords, though the act is before them. Mr. Pollexfen in the course of the debate says, 'We do all pretty well agree, for 'aught I can perceive, in two things. We do not deny, but that the council-board has power to commit. They on the other side do not affirm, that the lords of the council can commit out of the council.'

'Attorney General. Yes, they may as justices of the peace.

'Pollexfen. This is not pretended to be so here.

'I. C. J. No, no, that is not the case.'

The Court at last got rid of the objection, by presuming the warrant to have been executed in council.

There cannot be a stronger authority than this I have now cited for the present purpose. The whole body of the law, if I may use the phrase, were as ignorant at that time of a privy counsellor's right to commit in the case of a libel, as the whole body of privy counsellors are at this day.

The counsel on both sides in that cause were the ablest of their time, and few times have produced abler. They had been concerned in

all the state-cases during the whole reign of king Charles the second, on one side or the other; and to suppose that all these persons could be utterly ignorant of this extraordinary power, if it had been either legal or even practised, is a supposition not to be maintained.

This is the whole that I have been able to find, touching the power of one or more privy counsellors to commit; and to sum up the whole of this business in a word it stands thus:

The two cases in *Leonard* do pre-suppose some power in a privy counsellor to commit, without saying what; and the case in *Anderson* does plainly recognize such a power in high treason: but with respect to his jurisdiction in other offences, I do not find it was either claimed or exercised.

In consequence of all this reasoning, I am forced to deny the opinion of my lord chief justice Holt to be law, if it shall be taken to extend beyond the case of high treason. But there is no necessity to understand the book in a more general sense; nor is it fair indeed to give the words a more large construction: for as the conclusion ought always to be grounded on the premisses, and the premisses are confined to the case of high treason only, the opinion should naturally conform to the cases cited, more especially as the case there before the Court was a case of high treason, and they were under no necessity to lay down the doctrine larger than the case required.—Now whereas it has been argued, that if you admit a power of committing in high treason, the power of committing in lesser offences follows *a fortiori*; I beg leave to deny that consequence, for I take the rule with respect to all special authorities to be directly the reverse. They are always strictly confined to the letter; and when I see therefore, that a special power in any single case only has been permitted to a person, who in no other instance is known or recorded by the common law as a magistrate, I have no right to enlarge his authority one step beyond that case. Consider how strange it would sound, if I should declare at once, that every privy counsellor without exception is invested with a power to commit in all offences without exception from high treason down to trespass, when it is clear that he is not a conservator. It might be said of me, 'he should have explained himself a little more clearly, and told us where he had found the description of so singular a magistrate, who being no conservator was yet in the nature of a conservator.'

I have now finished all I have to say upon this head; and am satisfied, that the secretary of state hath assumed this power as a transfer, I know not how, of the royal authority to himself; and that the common law of England knows no such magistrate. At the same time I declare, wherein my brothers do all agree with me, that we are bound to adhere to the determination of the Queen against Derby, and the King against Earbury; and I have no right to

3 Y

* See this Case, vol. 12, p. 183.

overturn those decisions, even though it should be admitted, that the practice, which has subsisted since the Revolution, had been erroneous in its commencement.

The secretary of state having now been considered in the two lights of secretary and privy counsellor, and likewise as the substitute of the royal mandate; in the two first he is clearly no conservator; in the last, if he can be supposed to have borrowed the right of conservatorship from the sovereign himself, yet no one will argue or pretend, that so great a person, one so high in authority, can be deemed a justice of the peace within the equity of the 24th of Geo. 2.

However, I will for a time admit the secretary of state to be a conservator, in order to examine, whether in that character he can be within the equity of this act.

SECOND QUESTION.

Upon this question, I shall take into consideration the 7th of James 1, c. 5, because, though it is not material upon this record to determine, whether the special evidence can be admitted under the general issue of not guilty, the defendant having in this instance justified; yet as that act is made in *eadem materia*, and for the benefit of the same persons, the rule of construction observed in that will in great measure be an authority for this.

The 24th of Geo. 2 is entitled, 'An Act for the rendering justices of the peace more safe in the execution of their offices, and for indemnifying constables and others acting in obedience to their warrants.' The preamble runs thus: 'Whereas justices of the peace are discouraged in the execution of their offices, by vexatious actions brought against them, for or by reason of small and involuntary errors in their proceedings; and whereas it is necessary that they should be, as far as is consistent with justice and the safety and liberty of the subjects over whom their authority extends, rendered safe in the execution of the said office and trust; and whereas it is also necessary, that the subject should be protected from all wilful and oppressive abuse of the several laws committed to the care and execution of the said justices of peace.' Then comes the enacting part.

The only granter of the warrant in the enacting part, as well as the preamble, is the justice of the peace. The officers, as they are described, are constables, headboroughs, and other officers or persons acting by their order, or in their aid. If any person acting in obedience to such warrant, and producing the said warrant upon demand, is afterwards prosecuted for such act, the statute says, he shall be acquitted, upon the production of such warrant. The counsel for the defendants say, the secretary and the messengers are both within the equity of this act. The first is a justice of the peace, because he is a conservator. If so the latter is his officer, which I will admit. The proposition then is,

that conservators are within the equity of this act. They are clearly not within the letter; for justice and conservator are not convertible terms; and though it should be admitted, that a justice of the peace is still a conservator, yet a conservator is not a justice.

The defendants have argued upon two rules of construction, which in truth are but one.

First, where in a general act a particular is put as an example, all other persons of like description shall be comprized.

Secondly, where the words of a statute enact a thing, it enacts all other things in like degree.

In *Flowden* 37, and 167, and 467, several cases are cited as authorities under these rules of construction; as, that the bishop of Norwich in one act shall mean all bishops; that the warden of the Fleet shall mean all gaolers; that justices of a division mean all justices of the county at large, that guardian in socage after the heir's attaining fourteen, shall be a bailiff in account; that executors shall include administrators, and tenant for years a tenant for one year or any less time; with several other instances to the like purpose.

In the first place, though the general rule be true enough, that where it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue; yet we ought to be sure, from the words and meaning of the act itself, that the thing or person is really inserted as an example.

This is a very inaccurate way of penning a law; and the instances of this sort are scarce ever to be found, except in some of the old acts of parliament. And wherever this rule is to take place, the act must be general, and the thing expressed must be particular; such as those cases of the warden of the Fleet and the bishop of Norwich: whereas the act before us is equally general in all its parts, and requires no addition or supply to give it the full effect. Therefore if this way of arguing can be maintained by either of the rules, it must fall under the second, which is, that where the words of a statute enact a thing, it enacts all other things in like degree.

In all cases that fall within this rule, there must be a perfect resemblance between the persons or things expressed and those implied. Thus for instance, administrators are the same thing with executors; tenant for half a year and tenant for years have both terms for a chattel interest, differing only in the duration of the term; and so of the rest, which I need not repeat one by one: and in all these cases, the persons or things to be implied are in all respects the objects of the law as much as those expressed. Does not every body see from hence, that you must first examine the law before you can apply the rule of construction? For the law must not be bent by the construction, but that must be adapted to the spirit and sense of the law. The fundamental rule then, by which all others are to be tried, is laid down in *Wimbish and Tailbois*, *Flowden* 57, 58, ac-

according to which the best guide is to follow the intent of the statutes. Again, according to Plowden, p. 205 and 231, the construction is to be collected out of the words according to the true intent and meaning of the act, and the intent of the makers may be collected from the cause or necessity of making the act, or by foreign circumstances.

Let us try the present case by these rules; and let the justice of the peace stand for a moment in this act as a magistrate at large; and then compare him as he is here described with the conservator.

The justice here is a magistrate intrusted with the execution of many laws, liable to actions for involuntary errors, and actually discouraged by vexatious suits; in respect of which perilous situation he is intended to be rendered more safe in the execution of his office.—He is besides a magistrate, who acts by warrant directed to constables and other officers, namely, known officers who are bound to execute his warrants.

Now take the conservator.—He is intrusted with the execution of no laws, if the word 'law' is understood to mean statutes, as I apprehend it is.—He is liable to no actions, because he never acts; the keeping of the peace being so completely transferred to and so engrossed by the justice, that the name of conservator is almost forgot. He is far from being discouraged by actions. No man ever heard of an action brought against a conservator as such; unless you will call a constable a conservator, which will not serve the present purpose, because these persons can hardly be deemed justices within the act.—Again, how does it appear, that the conservator could either grant a warrant like the present, or command a constable to execute it? These powers are at least very doubtful; but I think I may take it for granted, that the conservator could not command a messenger of the king's chamber.

Did then this act of parliament refer to magistrates of known authority and daily employment, or to antiquated powers and persons known to have existed by historical tradition only? Did it mean to redress real grievances, or those that were never felt? 'Ad ea, quæ frequenter accidunt, jura adaptantur.'

From this comparison it may appear, how little there is to drag the conservator into the law, who hardly corresponds with the justice of the peace in any one point of the description. But further, it is unfortunate for the conservators upon this question, that one half of them are the objects of the statute by name, as constables, &c. and yet not one of their acts as conservators is within the provision.

And now give me leave to ask one question. Will the secretary of state be classed with the higher or the lower conservator? If with the higher, such as the king, the chancellor, &c. he is too much above the justice to be within the equity. If with the lower, he is too much below him. And as to the sheriff and the coroner, they cannot be within the law; be-

cause they never grant such warrants as these. So that at last, upon considering all the conservators, there is not one that does not stand most evidently excluded, unless the secretary of state himself shall be excepted.

But if there wanted arguments to confute this pretension, the construction that has prevailed upon the seventh of James the first, would decide the point. That is an act of like kind to relieve justices of the peace, mayors, constables, and certain other officers, in troublesome actions brought against them for the legal execution of their offices; who are enabled by that act to plead the general issue. Now that law has been taken so strictly, that neither church-wardens, nor overseers, were held to be within the equity of the word 'constables,' although they were clearly officers, and acted under the justice's warrants. Why? Because that act, being made to change the course of the common law, could not be extended beyond the letter. If then that privilege of giving the special matter in evidence upon the general issue is contrary to the common law, how much more substantially is this act an innovation of the common law, which indemnifies the officer upon the production of the warrant, and deprives the subject of his right of action?

It is impossible, that two acts of parliament can be more nearly allied or connected with one another, than that of 24 George 2, and the 7th of James 1. The objects in both are the same, and the remedies are similar in both, each of them changing the common law for the benefit of the parties concerned. The one, in truth, is the sequel or second part of the other. The first not being an adequate remedy in case of the several persons therein mentioned, the second is added to complete the work, and to make them as secure as they ought to be made from the nature of the case. If by a contrary construction any person should be admitted into the last that are not included in that first, the person, whoever he is, will be without the privilege of pleading the general issue, and giving the special matter in evidence, which the latter would have certainly given by express words, if the parliament could have imagined he was not comprized in the first.

Upon the whole, we are all of opinion, that neither secretary of state, nor the messenger, are within the meaning of this act of parliament.

THIRD QUESTION.

But if they were within the general equity, yet it behoved the messenger to shew, that they have acted in obedience to the warrant; for it is upon that condition, that they are intitled to the exemption of the act. When the legislature excused the officer from the perilous task of judging, they compelled him to an implicit obedience; which was but reasonable: so that now he must follow the dictates of his warrant, being no longer obliged to inquire, whether his superior had or had not any jurisdiction. The late decision of the Court of

King's-bench in the Case of General Warrants* was ruled upon this ground, and rightly determined.

This part of the case is clear, and shall be dispatched in very few words.

First, the defendants did not take with them a constable, which is a flat objection. They had no business to dispute either the propriety or the legality of this direction in the execution of the warrant; nor have their counsel any right to dispute it here in their behalf. They can have no other plea under this act of parliament, than ignorance and obedience.

Secondly, they did not bring the papers to the earl of Halifax, to be examined according to the tenor of the warrant, but to Mr. Lovell Stanhope. This command ought to have been literally pursued; nor is it any excuse to say now, as they do in their plea, that Mr. Lovell Stanhope was an assistant to the earl of Halifax. If he is a magistrate, he can have no assistant, nor deputy, to execute any part of that employment. The right is personal to himself, and a trust that he can no more delegate to another, than a justice of the peace can transfer his commission to his clerk.

I shall say no more upon this head. But I cannot help observing, that the secretary of state, who has not been many years intrusted with this authority, has already eased himself of every part of it, except the signing and sealing the warrant. The law clerk, as he is called, examines both persons and papers. He backs or discharges. This is not right. I could wish for the future, that the secretary would discharge this part of his office in his own person.

FOURTH AND LAST QUESTION.

The question that arises upon the special verdict being now dispatched, I come in my last place to the point, which is made by the justification; for the defendants, having failed in the attempt made to protect themselves by the statute of the 24th of Geo. 2, are under a necessity to maintain the legality of the warrants, under which they have acted, and to shew that the secretary of state in the instance now before us, had a jurisdiction to seize the defendants' papers. If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior.

This, though it is not the most difficult, is the most interesting question in the cause; because if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

The messenger, under this warrant, is commanded to seize the person described, and to bring him with his papers to be examined be-

fore the secretary of state. In consequence of this, the house must be searched; the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer.

This power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.

This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself: the great executive hand of criminal justice, the lord chief justice of the court of King's-bench, chief justice Scroggs excepted, never having assumed this authority.

The arguments, which the defendants' counsel have thought fit to urge in support of this practice, are of this kind.

That such warrants have issued frequently since the Revolution, which practice has been found by the special verdict; though I must observe, that the defendants have no right to avail themselves of that finding, because no such practice is averred in their justification.

That the case of the warrants bears a resemblance to the case of search for stolen goods.

They say too, that they have been executed without resistance upon many printers, booksellers, and authors, who have quietly submitted to the authority; that no action hath hitherto been brought to try the right; and that although they have been often read upon the returns of Habeas Corpus, yet no court of justice has ever declared them illegal.

And it is further insisted, that this power is essential to government, and the only means of quieting clamours and sedition.

These arguments, if they can be called arguments, shall be all taken notice of; because upon this question I am desirous of removing every colour or plausibility.

Before I state the question, it will be necessary to describe the power claimed by this warrant in its full extent.

If honestly exerted, it is a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man, who is so described in the warrant, though he be innocent.

It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown.

It is executed by messengers with or without a constable (for it can never be pretended, that such is necessary in point of law) in the presence or the absence of the party, as the

* Money and others against Leach, Mich. 6 Geo. 3, ante, p. 1002.

messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof.*

If this injury falls upon an innocent person, he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken.

It must not be here forgot, that no subject whatsoever is privileged from this search; because both Houses of Parliament have resolved, that there is no privilege in the case of a seditious libel.

Nor is there pretence to say, that the word 'papers' here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm, that it has been upon a late occasion executed in its utmost latitude: for in the case of Wilkes against Wood, when the messengers hesitated about taking all the manuscripts, and sent to the secretary of state for more express orders for that purpose, the answer was, "that all must be taken, manuscripts and all." Accordingly, all was taken, and Mr. Wilkes's private pocket-book filled up the mouth of the sack.

I was likewise told in the same cause by one of the most experienced messengers, that he held himself bound by his oath to pay an implicit obedience to the commands of the secretary of state; that in common cases he was contented to seize the printed impressions of the papers mentioned in the warrant; but when he received directions to search further, or to make a more general seizure, his rule was to sweep all. The practice has been correspondent to the warrant.

Such is the power, and therefore one should

* "If a private person suspect another of felony, and lay such ground of suspicion before a constable, and require his assistance to take him, the constable may justify killing the party if he fly, though in truth he were innocent. But in such case, where no hue and cry is levied, certain precautions must be observed: 1. The party suspecting ought to be present; for the justification is, that the constable did aid him in taking the party suspected. 2. The constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it. From whence it should seem that there ought to be a reasonable ground shewn for it: otherwise it would be immaterial whether such information were given to the constable or not, as to the point of his justification. And it was formerly supposed to be necessary, that there should have been a felony committed in fact, of which the constable must have been ascertained at his peril." *East's Pleas of the Crown*, ch. 5, s. 69.

naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.

If it is law, it will be found in our books. If it is not to be found there, it is not law.

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, &c. are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

According to this reasoning, it is now incumbent upon the defendants to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.

I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall intitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.

The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my lord Coke (4 Inst. 176,) denied its legality; and therefore if the two cases resembled each other more than they do, we have no right, without an act of parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.

Observe too the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.*

On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner's behalf the officer's misbehaviour.—To say the truth, he cannot easily misbehave, unless he pilfers; for he cannot take more than all.

If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy: my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.

I come now to the practice since the Revolution, which has been strongly urged, with this emphatical addition, that an usage tolerated from the era of liberty, and continued downwards to this time through the best ages of the constitution, must necessarily have a legal commencement. Now, though that pretence can have no place in the question made by this plea, because no such practice is there alleged; yet I will permit the defendant for the present to borrow a fact from the special verdict, for the sake of giving it an answer.

If the practice began then, it began too late to be law now. If it was more ancient, the Revolution is not to answer for it; and I could

have wished, that upon this occasion the Revolution had not been considered as the only basis of our liberty.

The Revolution restored this constitution to its first principles. It did no more. It did not enlarge the liberty of the subject; but gave it a better security. It neither widened nor contracted the foundation, but repaired, and perhaps added a buttress or two to the fabric; and if any minister of state has since deviated from the principles at that time recognized, all that I can say is, that, so far from being sanctified, they are condemned by the Revolution.

With respect to the practice itself, if it goes no higher, every lawyer will tell you, it is much too modern to be evidence of the common law; and if it should be added, that these warrants ought to acquire some strength by the silence of those courts, which have heard them read so often upon returns without censure or animadversion, I am able to borrow my answer to that pretence from the Court of King's-bench, which lately declared with great unanimity in the Case of General Warrants, that as no objection was taken to them upon the returns, and the matter passed *sub silentio*, the precedents were of no weight. I most heartily concur in that opinion; and the reason is more pertinent here, because the Court had no authority in the present case to determine against the seizure of papers, which was not before them; whereas in the other they might, if they had thought fit, have declared the warrant void, and discharged the prisoner *ex officio*.

This is the first instance I have met with, where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office.

The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. Private customs indeed are still to be sought from private tradition. But whoever conceived a notion, that any part of the public law could be buried in the obscure practice of a particular person?

To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible. But if so strange a thing could be supposed, I do not see, how we could declare the law upon such evidence.

But still it is insisted, that there has been a general submission, and no action brought to try the right.

I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal booksellers have been afraid to dispute.

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 13, s. 17.

The defendants upon this occasion have stopped short at the Revolution. But I think it would be material to go further back, in order to see, how far the search and seizure of papers have been countenanced in the antecedent reigns.

First, I find no trace of such a warrant as the present before that period, except a very few that were produced the other day in the reign of king Charles 2.

But there did exist a search-warrant, which took its rise from a decree of the Star-Chamber. The decree is found at the end of the 3d volume of Rushworth's Collections. It was made in the year 1636, and recites an older decree upon the subject in the 28th of Elizabeth, by which probably the same power of search was given.

By this decree the messenger of the press was empowered to search in all places, where books were printing, in order to see if the printer had a licence; and if upon such search he found any books which he suspected to be libellous against the church or state, he was to seize them, and carry them before the proper magistrate.

It was very evident, that the Star-Chamber, how soon after the invention of printing I know not, took to itself the jurisdiction over public libels, which soon grew to be the peculiar business of that court. Not that the courts of Westminster-hall wanted the power of holding pleas in those cases; but the attorney-general for good reasons chose rather to proceed there; which is the reason, why we have no cases of libels in the King's-bench before the Restoration.

The Star-Chamber from this jurisdiction presently usurped a general superintendence over the press, and exercised a legislative power in all matters relating to the subject. They appointed licensers; they prohibited books; they inflicted penalties; and they dignified one of their officers with the name of the messenger of the press, and among other things enacted this warrant of search.

After that court was abolished, the press became free, but enjoyed its liberty not above two or three years; for the Long Parliament thought fit to restrain it again by ordinance. Whilst the press is free, I am afraid it will always be licentious, and all governments have an aversion to libels. This parliament, therefore, did by ordinance restore the Star-Chamber practice; they recalled the licences, and sent forth again the messenger. It was against the ordinance, that Milton wrote that famous pamphlet called *Areopagitica*. Upon the Restoration, the press was free once more, till the 13th and 14th of Charles 2, when the Licensing Act passed, which for the first time gave the secretary of state a power to issue search warrants: but these warrants were neither so oppressive, nor so inconvenient as the present. The right to enquire into the licence was the pretence of making the searches; and if during the search any suspected libels were found, they and they only could be seized.

This act expired the 32d year of that reign, or thereabouts. It was revived again in the 1st year of king James 2, and remained in force till the 5th of king William, after one of his parliaments had continued it for a year beyond its expiration.

I do very much suspect, that the present warrant took its rise from these search-warrants, that I have been describing; nothing being easier to account for than this engraftment; the difference between them being no more than this, that the apprehension of the person in the first was to follow the seizure of papers, but the seizure of papers in the latter was to follow the apprehension of the person. The same evidence would serve equally for both purposes. If it was charged for printing or publishing, that was sufficient for either of the warrants. Only this material difference must always be observed between them, that the search warrant only carried off the criminal papers, whereas this seizes all.

When the Licensing Act expired at the close of king Charles 2's reign, the twelve judges were assembled at the king's command, to discover whether the press might not be as effectually restrained by the common law, as it had been by that statute.

I cannot help observing in this place, that if the secretary of state was still invested with a power of issuing this warrant, there was no occasion for the application to the judges: for though he could not issue the general search-warrant, yet upon the least rumour of a libel he might have done more, and seized every thing. But that was not thought of, and therefore the judges met and resolved:

First, that it was criminal at common law, not only to write public seditious papers and false news; but likewise to publish any news without a licence from the king, though it was true and innocent.

Secondly, that libels were seizable. This is to be found in the State Trials; and because it is a curiosity, I will recite the passages at large.

"The Trial of Harris for a libel. Scroggs Chief Justice.

"Because my brethren shall be satisfied with the opinion of all the judges of England what this offence is, which they would insinuate, as if the mere selling of books was no offence; it is not long since that all the judges met by the king's commandment, as they did some time before: and they both times declared unanimously, that all persons, that do write, or print, or sell any pamphlet that is either scandalous to public or private persons, such books may be seized, and the persons punished by law; that all books which are scandalous to the government may be seized, and all persons so expounding may be punished: and further, that all writers of news, though not scandalous, seditious, nor reflective upon the government or state; yet if they are writers, as they are few others, of false news, they are indictable and punishable upon that account." [See vol. 7, p. 929.]

It seems the chief justice was a little incorrect in his report; for it should seem as if he meant to punish only the writer of false news. But he is more accurate afterwards in the trial of Carre for a libel.

"Sir G. Jefferies, Recorder. All the judges of England having met together to know, whether any person whatsoever may expose to the public knowledge any matter of intelligence, or any matter whatsoever that concerns the public, they give it in as their resolution, that no person whatsoever could expose to the public knowledge any thing that concerned the affairs of the public, without licence from the king, or from such persons as he thought fit to intrust with that power."

"Then Scroggs takes up the subject, and says, The words I remember are these. When by the king's command we were to give in our opinion, what was to be done in point of regulation of the press, we did all subscribe, that to print or publish any news-books or pamphlets, or any news whatsoever, is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose now that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicit* done, and the author ought to be convicted for it." [See vol. 7, p. 1197.]

These are the opinions of all the twelve judges of England; a great and reverend authority.

Can the twelve judges extrajudicially make a thing law to bind the kingdom by a declaration, that such is their opinion?—I say No.—It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed it. Out of this doctrine sprang the famous general search-warrant, that was condemned by the House of Commons; and it was not unreasonable to suppose, that the form of it was settled by the twelve judges that subscribed the opinion.

The deduction from the opinion to the warrant is obvious. If you can seize a libel, you may search for it: if search is legal, a warrant to authorize that search is likewise legal: if any magistrate can issue such a warrant, the chief justice of the King's bench may clearly do it.

It falls here naturally in my way to ask, whether there be any authority besides this opinion of these twelve judges to say, that libels may be seized? If they may, I am afraid, that all the inconveniences of a general seizure will follow upon a right allowed to seize a part. The search in such cases will be general, and every house will fall under the power of a secretary of state to be rummaged before proper conviction.—Consider for a while how the law of libels now stands,

Lord Chief Justice Holt and the Court of King's-bench have resolved in the King and Bear*, that he who writes a libel, though he neither composes it nor publishes, is criminal.

In the 5th Report, 125, lord Coke cites it in the Star Chamber, that if a libel concerns a public person, he that hath it in his custody ought immediately to deliver it to a magistrate, that the author may be found out.

In the case of Lake and Hutton, Hobart 252, it is observed, that a libel, though the contents are true, is not to be justified; but the right way is to discover it to some magistrate or other, that they may have cognizance of the cause.

In 1st Ventris 31, it is said, that the having a libel, and not discovering it to a magistrate, was only punishable in the Star Chamber, unless the party maliciously publish it. But the Court corrected this doctrine in the King and Bear, where it said, though he never published it, yet his having it in readiness for that purpose, if any occasion should happen, is highly criminal: and though he might design to keep it private, yet after his death it might fall into such hands as might be injurious to the government; and therefore men ought not to be allowed to have such evil instruments in their keeping. Carthew 409. In Salkeld's report of the same case, Holt chief justice says, if a libel be publicly known, a written copy of it is evidence of a publication. Salk. 418.

If all this be law, and I have no right at present to deny it, whenever a favourite libel is published (and these compositions are apt to be favourites) the whole kingdom in a month or two becomes criminal, and it would be difficult to find one innocent jury amongst so many millions of offenders.

I can find no other authority to justify the seizure of a libel, than that of Scroggs and his brethren.

If the power of search is to follow the right of seizure, every body sees the consequence. He that has it or has had it in his custody; he that has published, copied, or maliciously reported it, may fairly be under a reasonable suspicion of having the thing in his custody, and consequently become the object of the search-warrant. If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution. All these particulars must be explained and proved to be law, before this general proposition can be established.

As therefore no authority in our books can be produced to support such a doctrine, and so many Star-Chamber decrees, ordinances, and acts have been thought necessary to establish a power of search, I cannot be persuaded, that such a power can be justified by the common law.

I have now done with the argument, which

* Reported Carth. 407. 1 L. Raym. 414. 12 Mod. 299. 2 Salk. 417. 646.

has endeavoured to support this warrant by the practice since the Revolution.

It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislation be of that opinion, they will revive the Licensing Act. But if they have not done that, I conceive they are not of that opinion. And with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

Serjeant Ashley was committed to the Tower in the 3d of Charles 1st, by the House of Lords only for asserting in argument, that there was a 'law of state' different from the common law; and the Ship-Money judges were impeached for holding, first, that state-necessity would justify the raising money without consent of parliament; and secondly, that the king was judge of that necessity.

If the king himself has no power to declare when the law ought to be violated for reason of state, I am sure we his judges have no such prerogative.

Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.

In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.

Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.

It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.

Observe the wisdom as well as mercy of the law. The strongest evidence before a trial, being only *ex parte*, is but suspicion; it is not proof. Weak evidence is a ground of suspicion, though in a lower degree; and if suspicion at large should be a ground of search,

VOL. XIX.

especially in the case of libels, whose house would be safe?

If, however, a right of search for the sake of discovering evidence ought in any case to be allowed, this crime above all others ought to be excepted, as wanting such a discovery less than any other. It is committed in open daylight, and in the face of the world; every act of publication makes new proof; and the solicitor of the treasury, if he pleases, may be the witness himself.

The messenger of the press, by the very constitution of his office, is directed to purchase every libel that comes forth, in order to be a witness.

Nay, if the vengeance of government requires a production of the author, it is hardly possible for him to escape the impeachment of the printer, who is sure to seal his own pardon by his discovery. But suppose he should happen to be obstinate, yet the publication is stopped, and the offence punished. By this means the law is satisfied, and the public secured.

I have now taken notice of every thing that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.

Before I conclude, I desire not to be understood as an advocate for libels. All civilized governments have punished calumny with severity; and with reason; for these compositions debase the manners of the people; they excite a spirit of disobedience, and enervate the authority of government; they provoke and excite the passions of the people against their rulers, and the rulers oftentimes against the people.

After this description, I shall hardly be considered as a favourer of these pernicious productions. I will always set my face against them, when they come before me; and shall recommend it most warmly to the jury always to convict when the proof is clear. They will do well to consider, that unjust acquittals bring an odium upon the press itself; the consequence whereof may be fatal to liberty; for if kings and great men cannot obtain justice at their hands by the ordinary course of law, they may at last be provoked to restrain that press, which the juries of their country refuse to regulate. When licentiousness is tolerated, liberty is in the utmost danger; because tyranny, bad as it is, is better than anarchy; and the worst of governments is more tolerable than no government at all.

[A great change of the king's ministers happened in the July before the judgment in the preceding case; particularly the marquis of Rockingham was placed at the head of the treasury. The judgment was soon followed with a resolution of the House of Commons, declaring the seizure of papers in the case of a libel to be illegal. Journ. Com. 22 April, 1766. At the same time the Commons passed a resolution

condemning general warrants in the case of libels. The latter resolution was afterwards extended by a further vote, which included a declaration, that general warrants were universally illegal, except in cases provided for by act of parliament. Journ. Com. 25th April, 1766.—All these resolutions were in consequence of Mr. Wilkes's complaint of a breach of privilege above two years before. Journ. Com. 15th November, 1763. Two prior attempts were made to obtain a vote in condemnation of general warrants and the seizure of papers, one in 1764, the other in 1765. Journ. Com. 14th and 17th February, 1764; 29th January, 1765. [See, too, New Parl. Hist.] But they both had miscarried, and one of the reasons assigned for so long resisting such interposition of the House was the pendency of suits in the courts of law. This objection was in part removed by the solemn judgment of the Common Pleas against the seizure of pa-

pers, and the acquiescence in it. Whether the question of general warrants ever received the same full and pointed decision in any of the courts, it is not in our power at present to inform the reader. The point arose on the trial of an action by Mr. Wilkes against Mr. Wood; and lord Camden in his charge to the jury appears to have explicitly avowed his own opinion of the illegality of general warrants; but what was done afterwards is not stated. How a regular judgment of the point was avoided, in the case of error in the King's-bench between Money and Leach, by conceding that the warrant was not pursued, we have observed in a former Note, see p. 1028. As to the action, in which Mr. Wilkes finally recovered large damages from the earl of Halifax, it was not tried till after the declaratory vote of the Commons, which most probably prevented all argument on the subject. *Hargrave.*]

542. Proceedings in the Case of JOHN WILKES, esq. on two Informations for Libels, King's-Bench and House of Lords: 4 GEORGE III.—10 GEORGE III. A. D. 1763—1770.

[This Case is wholly extracted from sir James Burrow's Reports. 4 Burr. 2527.]

Wednesday, February 7, 1770.

AS this cause, in the several branches of it, came several times before the Court, it seemed better to reserve a general account of it till a final conclusion of the whole, than to report the particular parts of it disjointedly, in order of time as they were respectively argued and determined.

In Michaelmas Term 1763, the 4th year of his present majesty king George the 3d, sir Fletcher Norton, then his majesty's solicitor-general, (the office of attorney-general being then vacant,) exhibited an information against Mr. Wilkes, for having published, and caused to be printed and published a seditious and scandalous libel (the North Briton, N^o 45.)

And soon after, he exhibited another information against him, (the office of attorney-general still remaining vacant,) for having printed and published, and caused to be printed and published, an obscene and impious libel (an Essay on Woman, &c.)

Mr. Wilkes having pleaded Not Guilty to both these informations, and the records being made up and sealed, and the causes * ready for trial, the counsel for the crown thought it expedient to amend them, by striking out the word 'purport,' and in its place inserting the word 'tenor.' The proposed amendments were in all those parts of the information where the

charge was, that the libel printed and published by Mr. Wilkes contained matters 'to the purport and effect following, to wit:—' which the counsel for the crown thought it advisable to alter into words importing that such libel contained matters 'to the tenor and effect following, to wit.'

Sir Fletcher Norton (then become himself attorney-general) directed Mr. Barlow, clerk in court for the crown, to apply to a judge for such an order; apprehending it (as he afterwards publicly declared) to be a matter of course.

Mr. Barlow, in pursuance of these directions, applied to lord Mansfield, for a summons to shew cause 'why such amendment should not be made.' And his lordship issued a summons in each cause, dated 18th of February, 1764, for the defendant's clerk in court, agent, attorney or solicitor, to attend him at his house in Bloomsbury-square on Monday the 20th of February at eight o'clock in the morning; to shew cause why the information should not be amended, by striking out the word 'purport,' in the several places where it is mentioned in the said information, and inserting instead thereof the word 'tenor.' N. B. The summons in the cause relating to the seditious libel excepted the first place—'except in the first place.'

On notice of this summons, Mr. Philips, agent and solicitor for Mr. Wilkes, and Mr. Hughes his clerk in court, and attorney for him upon the record, both attended his lordship, at his own house, upon the said 20th of February 1764, accordingly, (being now vacation time, and no court sitting;) and did not

* They were tried on the 21st of February, 1764.

object to the proposed amendment: on the contrary, Mr. Hughes, upon being asked as a fair practitioner, candidly acknowledged 'that it was amendable;' and Mr. Philips acquiesced in it, though he said he could not consent to it. Lord Mansfield having, in the presence of these gentlemen, consulted and produced many precedents, and being fully satisfied 'that the amendment might be made, and that it might be made by a single judge at his house or chambers,' told Mr. Philips, 'that there was no need of his consent;' and immediately made the following order—"Upon hearing the clerks in court on both sides, I do order that the information in this cause be amended; by striking out the word 'purport' in the several places where it is mentioned, in the said information, and by inserting instead thereof the word 'tenor.' Dated this 20th day of February 1764."

The orders in both causes were exactly alike; only that the words 'except in the first place' were added in that of the information for the seditious libel.

Mr. Wilkes was at this time in France; whither he had voluntarily retired some time before, and from whence he did not return till towards the election of members for the new parliament (into which he was afterwards chosen.)

The trial came on at the appointed time, and proceeded in the usual manner; Mr. Wilkes's counsel and agents making no objection thereto, nor declining to enter into his defence. Verdicts were found against him, upon both informations: after which, judgment was duly signed against him, in each cause; and writs of *Capias* were awarded and issued against him, as in ordinary cases of convictions upon informations for misdemeanours.—Upon his non-appearance, the proceedings were carried on to proclamation and exigents: and upon his not appearing on the fifth time of being exacted, he was, by the judgment of the coroners of the county of Middlesex, according to the law and custom of the realm, outlawed.

On Wednesday the 20th of April 1768, (being the 1st day of Easter Term 1768,) soon after the sitting of the Court, and before any process had issued on this outlawry, Mr. Wilkes voluntarily made his personal appearance in it; accompanied by three or four friends, who probably meant to become his bail, in case of his being now admitted to bail.

He opened with a speech, which is already in print,* and therefore needs not be here re-

peated. He took notice, in it, that the record was altered, before the trial, by lord Mansfield's order: so that he was tried upon altered facts. This he particularly complained of, as

country. Two verdicts have been found against me, one is for the republication of the North Briton, N° 45, the other for the publication of a ludicrous poem. As to the republication of the number of the North Briton, I cannot yet see that there is the smallest degree of guilt. I have often read and examined that famous paper. I know that it is in every part founded on the strongest evidence of facts. I find it full of duty and respect to the person of the king, although it arraigns, in the severest manner, the conduct of his majesty's then ministers, and brings very heavy charges home to them. I am persuaded that they were well grounded, because every one of those ministers has since been removed. No one instance of falsehood has yet been pointed out in that pretended libel, nor was the word 'false' in the information before this Court. I am therefore perfectly easy under every imputation respecting a paper, in which truth has guided the pen of the writer, whoever he was, in every single line; and it is this circumstance which has drawn on me as the supposed author, all the cruelties of ministerial vengeance. As to the other charge against me, for the publication of a poem which has given just offence, I will assert that such an idea never entered my mind. I blush again at the recollection that it has been at any time, and in any way, brought to the public eye, and drawn from the obscurity in which it remained under my roof. Twelve copies of a small part of it had been printed in my house, at my own private press: I had carefully locked them up, and I never gave one to the most intimate friend. Government, after the affair of the North Briton, bribed one of my servants to rob me of the copy, which was produced in the House of Peers, and afterwards before this honourable Court. The nation was justly offended, but not with me, for it is evident that I have not been guilty of the least offence to the public. I pray God to forgive, as I do, the jury who have found me guilty of publishing a poem I concealed with care, and which is not even yet published, if any precise meaning can be affixed to any word in our language. But, my lords, neither of the two verdicts could have been found against me, if the records had not been materially altered without my consent, and, as I am informed, contrary to law. On the evening only before the two trials, the Lord Chief Justice caused the records to be altered at his own house, against the consent of my solicitor, and without my knowledge; for a dangerous illness, arising from an affair of honour, detained me at that time abroad. The alterations were of the utmost importance; and I was in consequence tried the very next day on two new charges, of which I could know nothing: I will venture to declare this proceeding uncon-

* It was printed in the public papers of the next day, 21st of April 1768. Burrow.

It is also inserted in the Annual Register for the year 1768, Chronicle p. 93, and is as follows:

"My lords; according to the voluntary promise I made to the public, I now appear before this sovereign court of justice, to submit myself in every thing to the laws of my

being unconstitutional and illegal; and was advised, he said, that it rendered both the verdicts absolutely void.

Mr. Attorney General (Mr. De Grey) prayed that Mr. Wilkes might stand committed; as he had been convicted of printing and publishing one of these libels, and of publishing the other; and had now avowed himself to be the person so convicted.

Mr. Serjeant Glynn, of counsel for Mr. Wilkes, opposed this. He said, he had several objections to the outlawry; and that, till last night, they had expected a Fiat for a writ of error: but that, last night, Mr. Attorney General declined granting one, because he doubted 'whether it belonged to his office to grant it,' or 'whether it ought not to be granted by the lord chief justice.*' He said, Mr. Attorney General did not refuse his Fiat, from any doubt about the propriety of the application for it, or the sufficiency of the objections to the outlawry; but merely from a doubt 'to whom it belonged to allow the writ of error.' He said, he would propose some errors, which he hoped would satisfy the Court that a writ of error ought to be granted. They were of two sorts: first, errors in fact; 2dly, errors in law.

1st. An error in fact was, 'that Mr. Wilkes was absent and out of the kingdom, at the time of the award of the writ of Exigent.'

2dly. Three errors in law. First, 'that the sheriff has returned no proclamations.' It is only said, 'that he has obeyed the writ;'

stitutional. I am advised that it is illegal, and that it renders both the verdicts absolutely void. I have stood forth, my lords, in support of the laws against the arbitrary act of ministers. This court of justice, in a solemn appeal respecting general warrants, shewed their sense of my conduct. I shall continue to reverence the wise and mild system of English laws, and this excellent constitution. I have been much misrepresented, but under every species of persecution, I will remain firm and friendly to the monarchy, dutiful and affectionate to the illustrious prince who wears the crown, and to the whole Brunswick line. As to all those intricate points of law, I am sensible how narrow and circumscribed my ideas are; but I have experienced the deep knowledge and great abilities of my counsel. With them I rest the legal part of my defence, submitting every point to the judgment of this honourable Court, and to the laws of England."

It appears, that the omission of the word 'false,' noticed by the defendant, had been adopted by sir Fletcher Norton, for the purpose of contracting the scope for dispute between judges and juries; concerning which, see vol. 8, p. . . See also the Dean of St. Asaph's Case, A. D. 178 . . . Concerning the words 'falsè' 'et malitiosè' in indictments and informations for libels, see Emlyn's Preface inserted in vol. 1, p. xxx, xxxi.

* See Salk, 264, pl. 7, 504, pl. 2.

whereas he ought to have returned particulars; that the Court might judge of them. Secondly, it is not stated in the return of the Exigent, 'that Mr. Wilkes was exacted in the county of Middlesex;' nor is it said to be 'at a county-court.' It is only said to be 'at his county-court at the Three Tons in Brook-street near Holborn, in the county of Middlesex;' which is no allegation 'that Brook-street is in the county of Middlesex.' And though it is said 'at my county-court,' yet he might be sheriff of two counties. He cited 2 Roll's Abr. 802, title 'utlagaire, error utlagarie.' Thirdly, no judgment of the coroner is here stated; but only a mere fact, 'that he was outlawed by the coroner.' In support of which objection, he cited 1 Brown's Entries 361, as in point. He therefore prayed that his lordship would grant Mr. Wilkes an allowance of his writ of error, in order to his getting this erroneous outlawry reversed. He said it was improper at this time to enter into any litigation about the validity of the convictions upon which these judgments are founded. Mr. Wilkes's present circumstances under the outlawry are more penal than the convictions themselves. Therefore it is incumbent upon him, first to get rid of the outlawry. And he prayed that Mr. Wilkes might be, in the mean time, admitted to bail.

Mr. Recorder of London, [Eyre, afterwards successively baron and lord chief baron of the Exchequer, and lord chief justice of C. B.] on the same side, enforced what the Serjeant had urged; and observed, that by 4, 5 W. and M. c. 18, § 4, Mr. Wilkes was not compellable to appear in person; but might have appeared by attorney, and reversed the outlawry without bail (unless otherwise ordered by the Court.) He therefore proposed, that he should either appear by attorney, to reverse it; or give bail to prosecute a writ of error. And he cited Earbury's case in this court, in Easter and Trinity Terms 1723, 9 Geo. 1.*

Mr. Mansfield, on the same side, argued that Mr. Wilkes was clearly intitled to be admitted to bail, under this statute. The convictions cannot at this time be proceeded upon; as the sentence of outlawry is standing out against him. He has done all that is in his power to do. He appears in court, and submits to the laws of his country. He has shewn errors of weight, in the outlawry; and has used all methods to obtain a writ of error to be allowed; and prays to be admitted to bail by the Court, as he must have been by the sheriff, if he had been taken upon a Capias Utlagatum.

Mr. Davenport, on the same side, spoke to the same effect.

Mr. Attorney General explained the fact,

* That case was an outlawry for non-appearance; I have a note of it, of my own taking. And there is a report of it in Fortescue Auld 37, and another in 8 Mod. 177, very bad in the 1st edition, but much mended in the late edition of that book. Barrow.

and the reason of his declining to grant the fiat for a writ of error. He said, that upon the application made to him on the part of the defendant, he directed an attendance: which was accordingly had. That he thought the errors specified to him, to be a sufficient foundation for a fiat, in case the party had been in custody; but he could not find any precedent for an attorney-general's granting a fiat when the party was not in custody.* The writ of error was not tendered to him, he said, till last night: and the Court was to sit this morning. He was ready to listen to any method that could have been shewn to be proper: but none was proposed. He added, that he thought Mr. Wilkes could not be intitled to his writ of error, till he should be in custody. He observed, that this was not an outlawry for non-appearance; but an outlawry upon and after conviction.

Lord Mansfield. Here are two motions made, upon the defendant's appearing personally in court: one, for committing him; the other, for bailing him.

I am of opinion against both these motions.

He ought to be brought in regularly, upon a return of the Capias by the sheriff. I have no doubt but that we might take notice of him, upon his voluntary appearance as the person outlawed; and commit or bail him: but we are not absolutely bound to do it, without some reason to excuse the going out of the regular course.†

If the defendant could shew that the attorney general refused to take him up and bring him into court, in order to prevent his having this advantage; or if the attorney general had in fact used all methods to take him up, and he had concealed himself and absconded, and afterwards had come in thus voluntarily, in order to surprize; upon either of these, or any other extraordinary ground, we should be bound to interpose, and overlook the impropriety of the defendant's coming, instead of being brought into court.

But the real cause of this irregularity is the strongest argument, why we should not give way to a new mode, liable to misconstruction, and carrying a bad appearance. It is notorious, that the defendant has appeared very publicly: why was he not apprehended?

The outlawry must certainly be disposed of, before you can come at any thing else: the judgment upon the convictions cannot, at present, be proceeded upon.

I could wish this gentleman had been better advised than to have come thus prematurely, with a written speech to justify the crimes of

which he stands convicted; and to arraign an order made by me.

I am very happy in having this opportunity of explaining my conduct in making the amendment that has been mentioned. If I was wrong, I should think it more honourable to acknowledge and rectify any error that I should have committed, than to justify and defend it. The application to me was, to amend the word 'purport' into 'tenor.' Mr. Hughes, the clerk in court for the defendant, agreed it to be amendable. I recollected a case of the like kind, of an amendment of an information just before trial: and, looking for it, I found a collection of such cases. After reading one or two, Mr. Phillips, attorney and agent for the defendant, was perfectly satisfied, and desired me not to give myself any further trouble; but said 'he could not consent to it.' I said, 'I did not want a consent.' I thought myself bound to order the amendment; and did so.* I

* Great clamour was raised by Wilkes's partisans against lord Mansfield for causing this amendment to be made. The transaction was mentioned with much acrimony in the "Letter concerning Libels, Warrants, Seizure of Papers," &c. which caused the attorney general (sir Fletcher Norton), to move the Court of King's-bench for an attachment against Mr. Almon, the publisher of that letter. It appears, that the matter was argued upon a rule to shew cause why a writ of attachment should not be issued; the proceedings, however, were discontinued. Mr. Justice Wilmot had prepared a learned opinion on the punishment of contempt by attachment, which is published in the "Notes of his Opinions and Judgments," &c. p. 243.

In 'Another Letter to Mr. Almon' is the following passage:

"Let us recollect what a noise the alteration of a record, after issue joined, produced; it being unusual. After discussion and search of precedents, it was found to be sufficiently warranted both by law and practice. It may be done by any judge at his house, the very minute before trial without the defendant's consent. However, nothing but a solemn decision on the point would have appeased all discontent about it. The notion that a defendant might have so far trusted to some flaw in the pleadings, which he was well advised would be fatal, as to forego the bringing of testimony in his behalf, notwithstanding he really could have done so, was the ground of people's alarm. The making of a defence on the merits necessary, just as the cause is called on, which was unnecessary before, made the world conceive an honest defendant might be convicted sometimes by surprize, and that such an alteration of the record could not therefore be just, and consequently not legal. They had heard that it had grounded a complaint to parliament in king William's time, against a judge (one Holloway I think). But it is now settled, and therefore no-

* Qu. the stat. 4 and 5 W. and M. c. 18.

† "If we see one against whom there is a judgment of this Court walk in Westminster-hall, we may send out an officer to take him up if the plaintiff desires it, without a writ of execution." Per Holt, 7 Mod. 52.

had made some such orders before; and I have made several such orders since; even in Quo Warranto informations. In this case, it made no alteration in the defendant's defence. His counsel never objected to it, nor took any notice of it. I think it right and usual, and as of course; not but that I am open to conviction, and ready to hear what can be said to shew that it was wrong.

Mr. Justice Yates. If this amendment was wrong, it will still be open to the consideration of the Court; although the proper opportunity of objecting to it was at the trial. In the case of the King against Charlesworth, an information for forging a warrant of attorney 'to acknowledge satisfaction upon a judgment,' was amended, without costs (the prosecutor having been admitted a pauper), and without giving the defendant leave to plead *de novo*. 2 Stra. 871.

As to the two present opposite motions, one for committing, the other for bailing the defendant; the same answer serves for both: 'the Court can take no notice of any thing but what comes judicially before them.' We cannot take cognizance of this matter, in the method in which it now comes before us: we cannot take judicial notice 'that this is the person convicted or outlawed.' Mr. Browne's case in Dyer 192, is clear and strong, as to the outlawry. And as to committing him upon the convictions, that can't be done whilst the outlawry is subsisting: the outlawry must first be disposed of, before we proceed upon the convictions. The judgment of outlawry suspends all proceedings upon them. The judgments on the convictions would probably be fine and imprisonment. But it would be manifest oppression to set a fine upon him, when all his effects stand forfeited to the king already: and he is already liable to imprisonment upon the outlawry; from which he can never be freed whilst that stands in force. There cannot be two different judgments for the same offence: there cannot be judgment of outlawry, and judgment for the misdemeanour likewise. In the case of the King and Queen against Tippin, 1 W. and M. Salk. 494, the defendant was outlawed upon an information for a misdemeanour, and fined 5,000*l*. It was moved, on his behalf, that he could not be fined upon the outlawry; because, in misdemeanour, the outlawry does not enure as a conviction for the offence, (as it does in cases of treason and felony,) but as a conviction of the contempt for not answering; which contempt is punished by the forfeiture of his goods and chattels: and if he might be fined now, he

torious, and nobody in particular can be injured by such practice hereafter; Mr. Wilkes no more than Dr. Shebbeare. The occasion, too, frequently adds to the suspicion, and none is so likely to minister ground of offence as the case of a writer against administration."

must be fined again, upon the principal judgment. And the first* was held to be irregular: for the outlawry in these cases is not a conviction; as appears by Fleta 42. 'Quamvis quis pro contumacia et fuga utlagetur, non propter hoc convictus est de facto principali.' And there is a case in Bro. Abr. title 'Utlagary,' pl. 26, where a man was outlawed of felony, and taken by a Capias Utlagatum, and detained in the King's-bench; and divers bills were brought against him in custody of the marshal: and the Court would not suffer it. For, his body, lands, and goods are the king's; and therefore the plaintiff cannot have the effect of his suit against him before the outlawry: but if he obtains a pardon, the plaintiff shall be answered. If the defendant in the present case had come in by process, his identity would have appeared. If he had come in by record, he might have applied to be bailed, either upon the statute of 4, 5 W. and M. c. 18, (if that statute can be shewn to be applicable to an outlawry on a misdemeanour), or under the plenary power of the Court upon the circumstances of his case. But that statute seems only applicable to civil cases. I mention this, only for the consideration of the counsel, when it shall come before the Court. By the 5th section, the sheriff may 'take security of the defendant taken upon a Capias Utlagatum, in cases where bail is required, in double the sum for which bail is required.' But how can the sheriff, under the directions of this statute, take bail in double the sum, in a criminal case? How can the sheriff know what the fine will be? Or why should the sum of the fine be doubled? The statute seems to relate only to civil cases, and to mean 'double the debt.'

The defendant ought, in my opinion, to have come hither in a regular way: but as the matter now stands, upon this voluntary appearance, without return of process or any matter of record whatsoever, the Court can neither commit him nor bail him.

Mr. Justice Aston. I think there is but one question: and I shall keep to that. It is, "whether he shall be committed." The attorney-general prays us to commit a man as an outlaw, against whom he himself would not issue process of outlawry; though there do not appear to be any particular circumstances to prevent his issuing such process. The officers of the crown might have exercised their power by proper process; and then he would have been in custody. But they have not chosen to do so: and he remains as much at his liberty, as he was before he came into court. The motion to commit him seems unnecessary: and I shall not, at present, take notice of any other question; he not being at all in custody.

* "I suspect this word 'first' to be an error of the press; and that it should be 'fine.'" Burrow.

Mr. Justice Willes. There has been, for some time, a judgment of outlawry against the defendant, who is not an absconding person. The attorney-general has not thought proper to issue process against him upon it. And now he comes into court gratis, voluntarily, not by any return of process, or any matter of record. We cannot take any notice at all of him; nor can we know, judicially, that he is the man. I don't see why the attorney-general should demand of the Court to commit the defendant upon this outlawry, when he himself has long suffered him to go at large, without any attempt to take him up, or even issuing process against him.

Nothing was taken by either of the two motions; namely, the attorney general's, 'that the defendant might be committed;' or his own counsel's, 'that he might be bailed.'

On Wednesday the 27th of April 1768, (a week after the former transaction,) Mr. Wilkes having this morning surrendered himself to the sheriff of Middlesex upon a *Capias Ulagatum* which had been since the last motion issued against him, and being now in the sheriff's custody, was brought into court by the said sheriff, upon the return of a *Habeas Corpus* directed to him for that purpose. In the mean time, Mr. Attorney-General had granted his fiat for a writ of error: which he did immediately upon receiving an assurance that Mr. Wilkes was in actual custody upon the *Capias Ulagatum*. The return to the *Habeas Corpus* being read in court, it appeared that the defendant was charged with two outlawries; viz. one on each conviction for the respective misdemeanors before mentioned. A writ of error in each cause was delivered into court.

The outlawries, the writs of error, and the assignment of errors, were exactly alike in both causes: it will therefore be sufficient to specify only one of each sort.

The material part of the outlawry, on which the question turned, was this. The sheriff returned the writ of Exigent executed and indorsed as follows—'By virtue of this writ to me directed, at my county court held at the house known by the sign of the Three Tuns in Brook-street near Holborn in the county of Middlesex, the 12th day of July in the fourth year of the reign of our present sovereign lord George the third now king of Great Britain, &c. the within named John Wilkes was the first time exacted, and did not appear.' It goes on in the same manner, till the *quinto exactus*; viz. 'at my county court held at the same place the 9th day of August in the year aforesaid, the said John Wilkes was a second time exacted, and did not appear:' and so, in the same words, only changing the days, to the 5th inclusive. Therefore by the judgment of Edward Umfreville, esq. and Thomas Phillips, gent. his majesty's coroners of the county of Middlesex, the said John Wilkes, according to the laws and customs of this realm, is outlawed.

The writ of error was *verbatim* as follows—Of Easter term 1768, ^{Writ of Error.} 8 G. 3. Our lord the king hath sent to his justices appointed to hold pleas before him his writ closed in these words (that is to say) George the third by the grace of God of Great Britain, France, and Ireland king, defender of the faith, &c. To our justices appointed to hold pleas before us greeting. Forasmuch as in the record and process, as also in the publication of an outlawry against John Wilkes late of Westminster, in the county of Middlesex, esq. on a certain information against the said John Wilkes, for printing and publishing a certain libel or composition, intitled *An Essay on Woman*; whereof the said John Wilkes is impeached, and thereupon by a jury of the county is convicted, as it is said; manifest error hath intervened, to the great damage of the said John Wilkes, as by his complaint we are informed: we, willing that the said error (if any be) be duly amended, and full and speedy justice done to the said John Wilkes in this behalf, do command you, that if the said outlawry be returned before us as hath been said; then inspecting the said record and process, you cause further to be done therein for annulling the said outlawry as of right, and according to the law and custom of England, shall be meet to be done. Witness ourself at Westminster; the 27th day of April, in the eighth year of our reign.

And hereupon the said John Wilkes comes in his proper person, ^{Assignment of error.} and says, that in the record and process, and also in the publication of the aforesaid outlawry, there is manifest error in this, that there is no sufficient information filed or exhibited against the said John Wilkes, whereon to ground the process of the outlawry aforesaid: by reason whereof, the said outlawry is void and of no effect or force whatsoever. There is also error in this, that no public proclamation whatsoever is mentioned to have been made at any open county court, or at any general quarter-sessions of the peace whatsoever, or at the door of any parish church where the said John Wilkes was an inhabitant, according to the exigency of the said writ of *Capias cum proclamatione*: therefore in that, there is manifest error. There is also error in this, that it is not shewn, nor does it appear by the return of the sheriff of Middlesex, that the sheriff of Middlesex did cause to be exacted the said John Wilkes in the said county of Middlesex, from county court to county court, until he was outlawed according to the law and custom of England, as the said sheriff by the said writ of Exigent is commanded; and that it is not shewn nor does it appear by the return of the sheriff of Middlesex, that the said John Wilkes was a first, second, third, fourth and fifth time exacted at the county court of the county of Middlesex, as by the law of the land he ought to have been before he was outlawed: therefore in that, there is manifest error. There is also error in this, that in the record

and process aforesaid, and in the publication of the outlawry aforesaid, it is no where expressly shewn that the place called Brook-street (if any such there be) where the several county courts are supposed to have been held, at which the said John Wilkes is said to have been exacted, is in the county of Middlesex, or in any or what other county. Therefore in that, there is manifest error. There is also error in this, that it does not appear that any judgment of outlawry was given or pronounced against the said John Wilkes; or, if any such judgment was given or pronounced, in what form the same was so given or pronounced; as it ought to have done, in order that the legality and propriety of the said judgment might have been seen and examined: but in the record and process aforesaid, and in the publication of the outlawry aforesaid, reference and relation only are had to some judgment not shewn or expressed, but supposed to have been before given against the said John Wilkes. Therefore in that, there is manifest error. Wherefore the said John Wilkes prays that the outlawry aforesaid, for the errors aforesaid, and other errors appearing in the record and process aforesaid, may be reversed and held for nothing; and that he may be restored to the common law, and to all which he hath lost by occasion of the outlawry aforesaid, &c.—And William De Grey, esq. now attorney-general of our present sovereign lord the king, present here in court in his proper person, having heard the matters aforesaid above assigned for error, for our said lord the king saith, that neither in the record and process aforesaid, nor in the publication of the aforesaid outlawry is there any error; and he prays that the Court of our said lord the king now here may proceed to the examination as well of the record and process aforesaid, as of the matters aforesaid above assigned for error; and that the outlawry aforesaid may in all things be affirmed.

Lord Mansfield. Let the writs of error be allowed.

His lordship then asked the Attorney-General, 'to what prison he prayed that the defendant might be committed.'

Mr. Attorney-General answered—'To the Marshal.'

Lord Mansfield. Let him be committed to the Marshal.

Mr. Serjeant Glynn moved, that he might be admitted to bail, on 4 and 5 W. and M. c. 18, (vide § 4.) which, he said, extended to cases of misdemeanour. He was supported by Mr. Recorder of London, Mr. Mansfield, and Mr. Davenport.

They urged the spirit, scope and design of this statute, as well as the words of it, as arguments to prove that it extended to misdemeanours; and that the preamble and enacting part of it do, both of them, apply to Mr.

Wilkes's case: and they said, that even if the words were doubtful, the construction of them ought to be such as would be most favourable to liberty. But these words are express; they include all causes, except treason and felony. 'For the more easy and speedy reversing of outlawries in the court of King's-bench, be it enacted, that no person or persons whatsoever, who are or shall be outlawed in the said court, for any cause, matter or thing whatever, (treason and felony only excepted), shall be compelled to come in person into, or appear in person in the said court, to reverse such outlawry; but shall or may appear by attorney and reverse the same, except where special bail shall be ordered by the said court.' Cases of misdemeanour are within the same mischief as civil cases: and it extends to outlawries after conviction of misdemeanours, as well as to outlawries upon mesne process. If the question should take a long time in discussing, the defendant may be actually punished by an imprisonment upon the outlawry, though it should be at last reversed; or still more unjustly, in case it should afterwards appear that no punishment ought to be inflicted upon the convictions themselves. In civil cases, a pardon is of course, upon paying the debts and costs: but a defendant outlawed upon mesne process for a misdemeanour has no such opportunity of getting rid of the outlawry. He ought to have an opportunity of putting himself in a condition of being amenable to the justice of his country. Though some of the expressions in this statute may seem more applicable to civil cases, yet there are general words sufficient to take in criminal misdemeanours. They mentioned sir John Read's case, and that of Matthias Earbury in 1723.

Mr. Attorney-General (Mr. De Grey), sir Fletcher Norton, and Mr. Morton, on the other side, argued that this statute relates only to civil cases; and not to criminal misdemeanours. The expressions of it relate to civil property. It can relate only to such cases where a defendant can appear by attorney. The preamble (vide § 2) says, 'Whereas divers persons are prosecuted in the said court of King's-bench, to outlawries for debts, trespasses, or other misdemeanours; and there is no reversing such outlawries but by the personal appearance of the persons outlawed: so that the persons arrested upon such outlawries, if poor, lie in prison till their deaths; but if able, it costs them very dear, to reverse the same outlawries.' The former of these words relate to property: the latter to actions for malicious prosecutions and such like. The whole relates only to civil suits. And as to Earbury's case, they said it was neither a direct determination, nor any authority in the present case.

Serjeant Glynn replied, that 'trespasses' include all other actions not arising *ex contractu*: and 'misdemeanours' must mean

offences. 'All causes, matters, and things,' certainly include criminal offences and misdemeanours. And the statute speaks of outlawries in general. It is not reasonable, that the defendant should undergo the penalty of a contempt for withdrawing from justice, when the very validity of the outlawry itself is in question. And Earbury's case, though it was not an outlawry after conviction (as this is), yet clearly proves 'that this act does relate to misdemeanours:' for, the judges were all of that opinion.

Lord Mansfield. God forbid that the defendant should not be allowed the benefit of every advantage he is intitled to by law!

It is to be considered, how he is in custody.

After conviction, if he had been present in court, he might have been committed: if not present, he might have been taken by a Capias.

It is, indeed, in the discretion of the Court, to bail a person so circumstanced.

But discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular.

This defendant was not present, when convicted. He afterwards withdrew from justice, and was outlawed: and a Capias Utlagatum has now issued; and he is in custody upon it.

If a person convicted be taken upon a Capias pro fine, he is liable to be committed, unless the prosecutor consents to his being bailed. This is the common course of proceeding: though it is usual to admit to bail, upon the prosecutor's consenting to it. In the case of the journeymen Taylors, and again in that of the Weavers, the defendants were by consent bailed, and by consent were not to appear till called upon. But I do not remember any case where such a person has been bailed without consent. When a person so convicted is committed, such commitment shall be taken into consideration by the Court when they come to pronounce their sentence upon him, and shall go as part of his punishment.

Here, the defendant is in custody under the conviction; for, he is in custody upon the Capias Utlagatum, which issued upon his conviction.

Now, whatever doubts there may be about what is within the act of parliament of the 4 and 5 W. and M. c. 18, it is most certain that a person convicted of a misdemeanour is not within it; because his case is not a bailable case. Nothing therefore can be clearer, than that such a person is not within an act of parliament that relates only to bailable cases. This act relates to cases where no special bail is required, and to cases where special bail is required: (vide § 5) and the sheriff is directed what to do in either case. Where the case is bailable, the defendant is to be discharged upon the security-bond. But even in civil actions, he could not be bailed, where he

VOL. XIX.

was not bailable: he is only to be put into the same condition as if he had not been outlawed at all. If the outlawry was after judgment in debt, or any other civil action, and the defendant was not bailable before the outlawry, the act did not make such defendant bailable, who was not so before the outlawry. I am clear, that this case is not within the act.

Mr. Justice Yates was also clear in the same opinion. It is said, 'that misdemeanours of all kinds are within the words of this act, as well as within the scope and meaning of it.' But misdemeanours are here (vide § 2.) connected with debts and trespasses; which are descriptions of civil actions: and so may the word 'misdemeanour' be. This act might, in the general words of the preamble, have a view to actions of conspiracy, deceit, or popular actions upon penal statutes; (on which an outlawry was given by 21 Ja. 1, c. 4.) And taking the whole of the act together, there can be no doubt about it: for, it must be construed of those cases where the clauses of the act are practicable; which, in the present case, they are not. A conviction in a criminal case cannot be within this act. The sheriff is directed by it, 'to take security of the person outlawed, in the penalty of double the sum for which special bail is required.' But the sheriff cannot take bail of a person after his being convicted of a crime. The sheriff cannot form his own idea of the offence, or settle a sum wherein he should take the bail of such a person: nor can he require bail in double the fine, or any thing more than what the fine shall be fixed at; which is uncertain and future. The concluding words of the security-bond, 'and to do and perform such things as shall be required by the said court,' mean putting in bail to a new action, pleading within a limited time, putting the plaintiff in the same condition, and such like matters. And it should be considered, how the law stood in civil cases, before this act of parliament; and that no bail could then be taken on a Capias Utlagatum. Vide 13 Car. 2, stat. 2, c. 2, § 4.

What I have been saying, may throw some light upon this act of parliament. But I confine my opinion to its being an outlawry after conviction in a criminal case: which cannot be a case within this act of parliament.

If a defendant is taken upon a Capias pro fine (or *pro redemptione*;) it is an execution; and no sheriff can take bail of him: it is a favour, if the Court does it. By 5 E. 3, c. 12, no pardon for an outlawry shall be granted, till the chancellor is certified that the plaintiff is satisfied of his damages. In a criminal case, if the party be convicted, and a Capias ad satisfaciendum issues, and he is taken upon it, he is in execution, to make satisfaction; and the sheriff can never foretel, before the Court have given the final judgment, what that satisfaction is to be, on which he should admit the defendant to bail, on the Capias Utlagatum: he has nothing to direct himself by. No clause of this act can

be put in execution, on an outlawry upon a conviction in a criminal case. Therefore I am of opinion, that the present case is not within it.

Mr. Justice *Aston*. I am of the same opinion. I think this act of parliament relates only to civil actions: this is evidently the true spirit of it. It cannot be imagined, that the act can mean to allow of a defendant's appearing by attorney, in cases where the defendant is obliged to appear personally, and cannot appear by attorney at all: neither can it extend to taking bail in cases not bailable. But surely it cannot extend to cases of criminal misdemeanours, after conviction; because in such cases, a defendant is not entitled to be bailed at all. Outlawries after conviction are very different from the case of outlawries for non-appearance upon *mesne process*. After conviction, there is no case where it has been holden that the defendant has a right to be admitted to bail. In an outlawry after conviction for misdemeanour, no sheriff could take bail: and consequently this act could not have any such case in view, or be meant to extend to it.

Mr. Justice *Willes*. It is clear that the defendant has no right to demand being admitted to bail. This is an outlawry after conviction. If it should be granted that he is intitled to be bailed upon the outlawry, yet as he stands convicted of the crime, he must be committed upon the conviction. This statute is indeed as obscure a one as any in the statute-book: it is difficult to ascertain its true meaning. Therefore I do not chuse to give any direct opinion about its extent; unless it should become absolutely necessary for me to do so. As the present case arises upon an outlawry after conviction, it is clearly not a case within this act of parliament. In treason and felony, outlawries were convictions of the fact: and therefore they are particularly excepted out of this act. But outlawries in cases of misdemeanour are not convictions of the fact: yet after actual conviction of a misdemeanour, the defendant is not entitled to bail; whether he be or be not outlawed. Even in a civil action, a person outlawed after judgment could not have a pardon, till payment of the debt. In the present case, it would be merely nugatory, to discharge the defendant upon giving bail to prosecute his writ of error upon the outlawry, when we must immediately commit him upon the conviction. How can the sheriff know, at the time of the defendant's being taken upon the *Capias Utlagatum*, whether the Court will at all admit of special bail, or not? Or if they should, how shall the sheriff know in what sum it shall be? Or, if he should be fined, what will be the amount of his fine? Clearly, an outlawry after conviction of a misdemeanour is not within this act; whatever else may be within it.

The Court having thus declared their unanimous opinion, 'that Mr. Wilkes, under his

present circumstances of standing convicted of a criminal misdemeanour, had no right to demand being admitted to bail, under this act of parliament;'

His counsel moved that he might be bailed, upon the foot of the general discretion which the Court would exercise, of bailing or committing a person convicted of a misdemeanour, according to the particular circumstances of his case: which they alledged to be sufficient, in this gentleman's case, to induce the Court to permit him to remain at large, under proper bail. Public justice was not intended, they said, nor at all likely to be evaded. He had always been amenable to justice: he now surrendered voluntarily. Indeed, little care had ever been taken to apprehend him. He always appeared publicly upon the hustings, both in London and Middlesex; and he is member of parliament for the latter county.

Lord *Mansfield*.—I have said, 'that I knew no case where a person convicted of a misdemeanour has been admitted to bail without consent of the prosecutor.' If any gentleman knows any such case, I should be glad to be informed of it: I know of none. We cannot therefore do it, if the attorney-general does not consent. For, we must act alike in all cases of like nature: and what we do now, ought to be agreeable to former precedents, and will become a precedent in future cases of a like kind.

The Court declining to bail him without the consent of the Attorney General as prosecuting for the crown, he was committed to the Marshal.

His counsel then moved for a rule to bring him up to-morrow, to assign errors. Which was granted.

There were two rules. The former was this. "The defendant being brought here into court, in custody of the sheriff of the county of Middlesex, by virtue of a writ of *Capias Utlagatum*; it is ordered, upon the motion of Mr. Attorney General, that the said defendant be now committed to the custody of the Marshal of the Marshalsea of this court, to be by him kept in safe custody until he shall be from thence discharged by due course of law. And the said defendant now here in court producing a Writ of Error, and prayingoyer of the Record, it is ordered by this Court, that the said Writ of Error be allowed. On the motion of Mr. Attorney-General."

The other rule, "that the Marshal or his deputy bring the defendant up to-morrow, to assign errors," was a distinct rule; and was taken up on the motion of one of the defendant's counsel.

On Wednesday the 4th of May, 1768, (a week after the last mentioned rule), the defendant having assigned errors upon the record of the outlawry, and the crown having joined in error; (all which was, by consent on both

sides, privately transacted between the agents, without actually bringing Mr. Wilkes into court.)

Mr. Davenport moved to make the joinder in error a Concilium: and Saturday next was agreed upon as the day on which it was to be argued.

Accordingly, on Saturday the 7th of May, 1768, it was argued by serjeant Glynn on the part of the defendant, and Mr. Thurlow on the part of the crown. It was very well argued on both sides: but it would draw this report out into an insufferable length, if the particulars of it should be here inserted.

The great and capital error that the Serjeant insisted upon, was the insufficiency of the return in not shewing that the defendant had been five times exacted from county-court to county-court, till he was outlawed, as the law directs, and the writ requires. He argued that this ought to appear certainly and precisely upon the sheriff's return; that outlawries are odious; and that the Court will intend nothing in support of so cruel a proceeding, but, on the contrary, listen to the least objection of error in it. And here the first exaction does not appear to have been made in the county of Middlesex; nor any of the subsequent ones, which are said to have been at the same place with the first. The words, 'near Holborn, in the county of Middlesex;' do not import its being in the county. Besides, the time and place of the second, third, fourth and fifth exactions ought to have been particularly specified and described; and not by reference only to the first. Moreover, the sheriff ought to have stated the proclamations explicitly and particularly, and the particular manner and circumstances of them. He also made a question, 'Whether an outlawry lies upon an information?' And he concluded with an objection to the information, as not being properly exhibited; being exhibited by his majesty's solicitor-general, without taking any notice of the vacancy of the office of attorney-general: whereas the attorney general is the known and proper officer of the crown for this purpose; and the solicitor-general has no such right.

He cited a great number of cases and precedents, in support of his objections.

Mr. Thurlow defended the regularity of the whole proceeding, by reason, argument, and practice: and he also cited a great number of cases and precedents, to support his arguments and allegations.

To which Mr. Serjeant Glynn having replied; and the counsel for the defendant having declared, 'that they did not desire a second argument;'

The Court said, that the very great number and variety of authorities and precedents that had been produced and very ably urged on both sides, deserved and would require their mature

consideration; and directed copies of the records cited on both sides to be laid before them; or at least one copy of each record, which they would deliver over from one to another.

On Saturday the 14th of May, 1768, (a week after the before-mentioned argument,) after lord Mansfield and Mr. Justice Yates were gone,

Mr. Davenport moved for a rule to bring the defendant up on Monday, in order to be bailed: but he had no affidavit of any particular circumstances to induce the Court to grant such a rule.

Mr. Justice Aston did not see, he said, how the Court could bail him, without any particular circumstances being laid before them, when they had already and so lately determined, after a full hearing of counsel on both sides, 'that he was in execution upon the outlawry after conviction of misdemeanors, and was not admissible to bail.' He would not therefore, after two of the four judges were gone away, make such a rule as was prayed: but Mr. Davenport might move it again, if he pleased, on Monday morning at the sitting of the Court; and that would allow time enough for the defendant's being brought up the same day, to be bailed, if the Court should think it a reasonable motion.

Mr. Justice Willes was of the same sentiments with Mr. Justice Aston; and agreed to Mr. Davenport's having leave to move it at the sitting of the Court on Monday.

Upon Monday the 16th of May 1768, the Court being then full,

Mr. Davenport accordingly renewed his motion. He could only urge, that there were but two grounds of imprisonment: one, for security; the other, for punishment. The former failed in the present case; because Mr. Wilkes had always [qu. already] voluntarily surrendered: the latter failed, because it was premature; for, the case was not yet ripe for judgment upon the conviction; and the validity of the outlawry was at present doubtful.

Mr. Davenport, upon being asked by lord Mansfield, 'Whether he had given notice to the Attorney General of this motion,' owned that he had not.

Lord Mansfield. However, it cannot prevail; because the defendant is in custody after conviction: which is a custody in execution. It is not a custody for security only; but goes in part of the punishment, and will be taken into consideration, upon the final judgment: and so we told you before. It was so in Lookup's case, and in the case of a Welch clergyman.

A defendant in execution upon an outlawry after conviction of a misdemeanor, in crown prosecutions, cannot be admitted to bail without the consent of the attorney-general.

If the Court had been of opinion, upon the last argument, to reverse the outlawry, yet the

defendant must have continued in custody upon the conviction.

Errors upon outlawries have seldom been solemnly argued. This writ of error has been solemnly and exceedingly well argued: and the matter deserves to be seriously considered. What is determined upon solemn argument establishes the law, and makes a precedent for future cases: which is not the case of questions agreed by consent of parties, or never litigated. This will be a precedent.

The Court, in all cases (without regarding who is the particular defendant), leans to the reversal of outlawries; because the punishment of the outlawry is often greater than the punishment of the offence itself. Here, the defendant had the merit of coming in voluntarily; not being brought in by process and in custody. But the Court cannot make errors; nor reverse for errors which do not exist, or which they cannot see: they must be satisfied, that there are errors. If the Court had been satisfied on any one error assigned, they would have reversed the outlawry for that error. We did, several of us, when we came into court, seem to think that the want of proclamations was a flaw: but my brother Yates doubted 'Whether proclamations were at all necessary in such a proceeding as this.' I wish that the precedents and acts of parliament may be looked into, to see 'whether process of outlawry will lie upon informations for misdemeanors;' as well as to see, 'Whether proclamations are necessary or not, upon process of outlawry after convictions for misdemeanors.' I desire that the counsel will apply themselves to search into this point, 'Whether process of outlawry will at all lie upon informations for misdemeanors.' And, as many precedents have been already cited and produced, I desire also that the precedents may be left with us, for our perusal and consideration.

Mr. Just. Yates. I should have thought that what was said by the Court upon the former argument, would have been sufficient to have spared the present motion. The matter was then largely and very well argued; and the Court explained their sentiments very fully at that time: their opinion was, 'that the defendant being in execution, he could not be bailed, without consent of the Attorney-General on the part of the crown.' To bail him upon the mere assignment of errors, would be prejudging upon the errors: it would presuppose 'that they were fatal.' He is at present in execution; and cannot be taken out of execution, without consent of the Attorney-General on behalf of the crown.

But since this matter is again brought upon the tapis, it gives me an opportunity of suggesting my own doubts. If proclamations are necessary, I should think this return to be clearly bad: but if proclamations are not necessary, it is then immaterial when, or where, or how they were made. As to what has been

said about the expression, 'at my county-court,' not being determinate, because he might be sheriff of two counties—there are two authorities which either were not mentioned at the bar, or at least were not fully stated. One of them is 1 Ventris, 108, where an outlawry was reversed, for that the proclamations were returned to be 'ad comitatum meum tent. apud' such a place 'in comp. predict.;' and not said, 'pro comitatu:' for, anciently one sheriff had two or three counties, and might hold the court in one county for another. The other of these cases is in 2 Roll's Reports, 52. Robert Alder's case; who was outlawed for murder: and it was moved for error, that the sheriff returned, 'ad comitatum meum tentum apud D. in le county de Northumberland;' and did not say, 'Comitat. meum Northumbrie tentum, &c.' And this was holden to be error, by the Court; according to the case in 6 H. 4, where it is returned, 'ad com. meum Somersettentum.' And therefore it was holden erroneous: for, one may be sheriff of Surrey and Sussex, and also of Huntingdonshire and Cambridgeshire. But this is not possible in the case of the sheriff of Middlesex. The sheriffs of London have been immemorially the sheriff of Middlesex: therefore he could not have two counties. But I should always incline to favour errors assigned in outlawry; because it is more just and right, that judgment should be given upon the conviction for the offence. Therefore, my doubt being against the errors assigned, I should be unwilling that more regard should be paid to it, than it shall appear strictly to deserve: and I would not have proposed it, if I had not thought it incumbent upon me to communicate it, since it has occurred to me, and seems to me to have more weight than perhaps it might appear to others to have.

But my lord's doubt is a very material one—'Whether the offence charged in the information is such a crime as will warrant an outlawry.'*

The 18 Ed. 3, stat. 1, c. 1, has negative

* "Whether the common law gives process of outlawry against crimes, being merely constructive breaches of the peace, was questioned in a late case before the King's-bench on a libel. But the Chief Justice, in delivering the Court's judgment, spoke at large to prove, that such process lies against crimes universally. Mr. Wilkes's case, 4 Burrow, page 2537. However, the reasoning, on which this opinion is grounded, stands opposed by a former judgment of the Common Pleas on a prior case relative to the same gentleman. 2 Wils. 151. But it was adopted by both Houses of Parliament, when, in his case, they resolved, that privilege of parliament doth not extend to libels. See Annual Reg. for 1764. The arguments for the contrary opinion are forcibly expressed in a protest by some of the Lords, who were against making such a resolution. Journ. Dom. Proc. 29th Nov. 1763." Harg. Co. Lit. 128, b. Note (1).

words in it, in the printed edition of the Statutes; though it is said not to be so in the Parliament-Roll. (Vid. also stat. 2, c. 5.) At common-law, outlawry lies only for treason and felony, as I apprehend. Therefore the Court will be glad of hearing the arguments at the bar, to assist their inquiry in this doubt.

Mr. Just. *Aston*. The opinion of the world ought not to weigh at all with the Court in forming their opinion upon the validity of the errors assigned upon this outlawry. If one flat decisive objection had clearly appeared, the Court would have immediately given their opinion, upon the first argument. I was not satisfied, myself, that the minor objections had sufficient force in them: and as to the greater ones, the counsel for the defendant seemed to me to be too sanguine and too much attached to their own opinions, when they declined the offer of a further argument, when the Court wished to be further informed by hearing it argued again. But this doubt which my lord has mentioned, 'Whether process of outlawry will lie for the crimes charged in these informations,' is a very material one, and ought to be well considered. It may be necessary to look into Bracton and other books; and the statutes of 18 Ed. 3, st. 1, c. 1, and st. 2, c. 5, and 1 Ed. 1, c. 20, and a case in the Year-book of 35 H. 6, f. 6, pl. 9, 'that process of outlawry did not lie; because the action was not for a tort supposed to be done *vi et armis*.' It may be a doubt, 'Whether process of outlawry lies on informations of this kind, for offences which though expressed to be done *vi et armis*, are not really done with actual force.' The 18 Ed. 3, stat. 2, c. 5, says, 'that no exigent shall go, where a man is indicted of trespass, if it be not against the peace, or of things contained in 18 E. 3, st. 1.' And though the words, '*nemy des autres*,' are not to be found in the Parliament-Roll, yet they are in several manuscript copies. These things deserve to be maturely considered.

It is proper also to inquire into the practice and precedents; and to see whether they have been uniform and concomitant. Trespasses in parks may be effectually done, without actual force.

The Court will not keep back their opinion, without having sufficient ground for doubting, and a necessity of taking time to satisfy their doubts: on the other hand, they will not give their opinions over-hastily and prematurely, merely to gratify the humours or passions of mankind.

Mr. Justice *Willes* concurred that the defendant was not bailable; being in execution upon the outlawry after conviction. He thought, with Mr. Justice *Aston*, that the defendant's counsel were in the wrong when they declined a second argument, which might have given the Court further light. He expressed his inclination towards the reversal of outlawries, on account of the severity of the judgment upon

them, which sometimes exceeded what would be the punishment upon the conviction itself.

For the reasons above particularized, Mr. Davenport took nothing by this motion.

On Wednesday the 8th of June 1768, (being the sixth day of Trinity term. 8 G. 3.) Mr. Attorney-General and other counsel for the crown were further heard. But the counsel for the defendant rested their case upon the former argument.

Lord *Mansfield* expressed himself to the following effect:

Great pains have been taken, and great searches have been made, since the last argument; not only (as I see now) by Mr. Attorney-General and those he has employed, but by some of us; I say, 'some of us;' because I cannot, with truth, assume the merit to myself: the load of other business which lay upon me, made it impossible. But from the able assistance of those who have taken the trouble to make searches and to collect materials, I think I am now thoroughly master of a subject which I am not at all ashamed to say I knew very little of before: and I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it. It is not only a justice due to the crown and the party, in every criminal cause where doubts arise, to weigh well the grounds and reasons of the judgment; but it is of great consequence, to explain them with accuracy and precision, in open court; especially if the questions be of a general tendency, and upon topics never before fully considered and settled; that the criminal law of the land may be certain and known.

Outlawry is a very important part of that law. Yet it is no wonder, that the forms and method of proceeding are so little attended to, and so little understood: for, this is perhaps the first occasion where any question of law, upon a writ of error to reverse an outlawry in a criminal case, ever underwent a serious litigation.

Outlawry in civil actions is considered as in the nature of civil process, to compel an appearance to the suit; or, if after judgment, to procure satisfaction. The forfeiture, though nominally to the king, yet in truth goes to the plaintiff, towards payment of his demand. If the outlaw appears, pays all the costs, puts in sufficient bail, and does every thing he can to put the plaintiff in as good a condition as he would have been in originally; or if, after judgment the outlaw pays the debt and costs; the Court reverses the outlawry upon motion, without any writ of error. The form of the reversal always is, "For the errors assigned and other errors appearing upon the record:" although there is, in truth, no error at all.

Flight, in criminal cases, is itself a crime. If an innocent man flies for treason or felony, he forfeits all his goods and chattels. Outlawry, in a capital case, is as a conviction for

the crime: and many men who never were tried have been executed upon the outlawry.

In misdemeanours, outlawry is generally a more severe punishment than would be inflicted for the crime of which the outlaw stands accused or convicted. It is a forfeiture of his goods and chattels, and all the profits of his real estate; and perpetual imprisonment, with many incapacities. If it is erroneous, it cannot be reversed without a writ of error.

Till the third of queen Anne, a writ of error in any criminal case was held to be merely *ex gratia*. Lord-keeper lays it down*, "that a writ of error in a criminal matter was *ex gratia regis*, in all cases;" and said,† "He had a collection of several cases out of the old books of the law, that were given him by lord chief justice Hales, which shew that writs of error in criminal cases are not grantable 'ex debito justitiæ,' but 'ex gratia regis:' and in such a case, a man ought to make application to the king; and he will then refer it to his counsel; and if they certify that there is error, the king will not deny a writ of error." It never was granted, except when the king, from justice, where there really was error, or from favour, though there was no error, was willing the outlawry should be reversed. After a writ of error granted, the attorney-general never made any opposition; because, either he had certified 'there was error,' and then he could not argue against his own certificate; or the crown meant to shew favour, and then he had orders 'not to oppose.' The king, who alone was concerned as the prosecutor, and who had the absolute power of pardon, being willing that the outlawry should be reversed, this court reversed upon very slight and trivial objections, which could not have prevailed, if any opposition had been made, or if the precedent had been of consequence. The form of reversal, 'for the errors assigned and other errors appearing upon record,' delivered the Court from the necessity of specifying any; and they might think themselves well warranted to reverse, upon the tacit or express consent of the king, where he alone was concerned to oppose; though there really was no error at all: and, as the king had the power to refuse a writ of error, the precedent was of no consequence.

But in the 3d of queen Anne,‡ ten of the judges were of opinion, 'that in all cases under treason and felony, a writ of error was not merely of grace; but ought to be granted.' Price and Smith were of a contrary opinion, "that a writ of error was of grace only, in all criminal cases." The ten did not mean 'that it was a writ of course;' but that, 'where there was probable error, it ought not to be denied.'

It cannot issue now, without a fiat from the

attorney-general; who always examines whether it be sought merely for delay, or upon a probable error.

In the case of the King against Earbury,* the opinion of the Court was taken, before the attorney-general granted his fiat for a writ of error. In the present case the attorney-general refused his fiat, while the defendant was out of custody.

This opinion in the 3d of queen Anne has made a great alteration as to outlawries in criminal cases under treason and felony. In a misdemeanour, if there be probable cause, it ought not to be denied. This Court would order the attorney-general to grant his fiat. But be the error ever so manifest in treason or felony, the king's pleasure to deny the writ is conclusive. Lord Muskerry, the son and heir of the earl of Clancarty, petitioned for a writ of error, to reverse his father's outlawry; because his father was a prisoner in the Tower of London during the whole time of the proceedings against him. The fact was verified beyond doubt, by entries from the books of the Tower, and by the affidavit of the duchess of Marlborough. The late lord chief justice Willes, then attorney-general, reported the writ to be merely of grace: and, upon political reasons, it was absolutely refused; and the outlawry stands.

A writ of error being as a matter of right, where there is error in the outlawry; since the 3d of queen Anne, in all crimes under treason and felony, 'What is an error?' became an important question: which was of no consequence, before. Since that time, this Court has not given way to trivial objections, though admitted by the attorney-general. In 1708, lord Griffin† was brought into this court upon an outlawry for high treason: and upon the prayer of the solicitor-general, (there being then no attorney-general,) a rule was made for his execution. He was reprieved, from time to time, till his death. His grandson and heir, from the grace and favour of king George the 1st, obtained a writ of error. Sir Philip Yorke, then attorney-general, came into court, and said he had a sign manual, 'to confess the errors and consent to the reversal.' The Court told him, 'His confessing an error in law would not do: they must judge it to be an error; and their judgment would be a precedent. But the plaintiff in error might assign an error in fact; which, by proper authority, he might confess.' Accordingly, the plaintiff assigned an error in fact, viz. 'that the place of his grandfather's residence was in the county of Northampton; whereas he had been outlawed in London.' The attorney-general confessed the fact: whereupon, the outlawry was reversed.‡ Since the 3d of queen Anne, no question of law has been litigated, upon a writ of error to re-

* 1 Vernon 170. *Crawle v. Crawle*.

† Vid. 1 Vern. 175, in the *Rioters' case*.—Burrow. Qu. also, and vide Salk. 504.

‡ V. the *Allsbury Case*, vol. 14, p. 861. Salk. 264.

* 9 Geo. 1. *Fortes*, 38, 39.

† See concerning him, the *Case of lord Delemere*, vol. 11, p. 511, and vol. 18, pp. 854, 855.

‡ *Hill*, 13 G. 1.

verse an outlawry; no criminal outlawry has been reversed upon a trivial objection: no case, since that time, has been found, of either kind.

Outlawry is an essential part of the criminal law. The rules and method of proceeding are wisely calculated to prevent ignorance and surprise. The consequences are made severe, because the offence is heinous; and it imports the state, that no man should fly from the laws and justice of his country. This Court is bound to pronounce the law as they think it is; always leaning to the favourable side, where they doubt: for, so says the law. It is as much a breach of duty to reverse a good as it would be to affirm a bad outlawry. The mischief goes farther than an unrighteous sentence in the particular case. For, to reverse without an error, is to abolish that part of the law. And therefore serjeant Glynn admitted that criminal outlawries were not to be reversed of course: an error must be found.

In a matter where the consequence may be so penal to the defendant in this particular case; where the grounds of the judgment must be so important to a very essential part of the criminal law, never before brought adversely in question, and therefore lying under great obscurity and confusion; I feel myself extremely obliged (and I think the public obliged) to those who, in the short time taken for consideration, have searched the subject to the bottom. From the materials with which I have been furnished, I think myself sufficiently instructed, to form an opinion: and I will declare the grounds and reasons of that opinion which I have formed, to this great and numerous audience, with as much accuracy and precision as I can, to prevent misapprehension.

There are two sorts of error which have been assigned and argued.

1st, The first sort are errors which give rise to questions of law, and to real arguments.

2d, The second are criticisms upon words and syllables in the return.

Of the first sort, two are assigned.—

That there is no sufficient information filed or exhibited against the defendant, whereon to ground the process of outlawry.

That no public proclamation whatsoever is mentioned to have been made at any open court, or at any general quarter sessions of the peace whatsoever; or at the doors of any parish church where the said defendant was an inhabitant; according to the exigency of the said writ of *Capias cum Proclamatione*.

Under the first error assigned, three objections have been made.—

1st, That the information is by the solicitor-general, and not the attorney-general.

2d, That an outlawry does not lie upon an information.

3d, That though it may lie upon an information, yet it does not lie for such an offence as is prosecuted in either of these cases.

First—The information is by the solicitor-general.

If this objection is founded, it will equally hold upon a motion in arrest of judgment. But, I believe, none of us, from the beginning, ever entertained the least doubt concerning it. An information for a misdemeanour is the king's suit. The title of the cause is, 'The king against the defendant:' the oath, at the trial, to the jurors and the witnesses, is 'between the king and the defendant.' As a subject sues by attorney, so does the king; with a little variation of form, from decency: instead of saying, 'The king sues by—,' it is said, 'sues for the king;' and yet, "*Ceram domino rege venit*," *dominus rex per attornatum suum, et inde producit sectam*," was held to be good. (Male chief justice said, it was but an unmannerly way of declaring for the king.) The attorney is answerable, if he acts without authority; and upon complaint by the party whose name he has falsely used, the Court would punish him, and set aside the proceedings: but while the principal avows him, neither the adverse party nor the Court can dispute his authority. The coroner of this count prosecutes informations for the king, as his attorney. The form of the proclamation at criminal trials is a strong proof that anciently the king's serjeant might prosecute for the king. When there did not exist such an officer as solicitor-general, the king's serjeant or his attorney or other that would sue for the king, should be received to aver against the testimony of the parties imprisonment, where the outlawry was pronounced at the king's suit.† These are many entries in *Rastal*,‡ which shew that at the common law others than the attorney-general have sued for the king; or, in other words, the king has sued by others as his attorney. Serjeant Glynn cited a manuscript treatise concerning the Star-chamber; of which Mr. Filmer has a copy: the original is in the Museum.§ The author's name is preserved in a note written in this present book, at the beginning, by the lord keeper Finch, as follows— "This treatise was compiled by William Hudson of Gray's-inn, esq. one very much practised and of great experience in the Star-chamber, and my very affectionate friend. His son and heir, Mr. Christopher Hudson, (whose hand-writing this book is), after his father's death gave it to me, 19 December, 1635, J. Finch." The whole passage should be taken together; and is in these words (fol. 84, and 85. "It remaineth that I shall, in the next place, treat of the king's ordinary suits: which are of two sorts; either by his attorney, informing of himself, or by other men's relations, and by the king's almoner; the one being in criminal causes, the other in civil. For the

* 2 Lev. 82. 3 Keble 137. *Rastal's Entr.* 655, b. See, also, stat. 33 H. 8, c. 30, s. 59.

† Vid. 5 Ed. 3, c. 13.

‡ Title Debt. 192, c. pl. 4. Title Escheat 114, b. pl. 3. Title Quare impedit, 527, b. pl. 1.

§ Harleian Catalogue, No. 1226, vol. 1. It has been since published.

king's attorney, I have known it much questioned, whether any other of the king's counsel may not inform for the king, as well as the attorney general. And it is true, that in Easter term, 8 H. 8, it is ordered that the king's solicitor shall not prosecute any further the merchants of the Stiliard, till it were otherwise ordered by the council: and the same term, the solicitor was commanded to sue out process against some which acquitted one Blase of a rape. (fol. 85.) So that it seemeth, that others of the king's counsel did prosecute causes for the king, as well as the king's attorney. But in 1 and 2 James the first, it was resolved by the Court, that it belongeth to the place of the attorney. And serjeant Heale, the king's serjeant, putting in a bill against sir John Luson, was denied that privilege. For, if a bill be put in by the king's counsel as for the king, there are no costs to be paid for the defendant, nor fees for the prosecution: but in this case, serjeant Heale's bill was dismissed with 30*l.* costs; it continuing in prosecution not above two terms." It is astonishing how any other law-officer of the king could claim, as an official right, to be the king's attorney in all suits which he should think fit to bring in the king's name. The very constitution of an attorney-general is decisive against it. He might stop every suit brought by another. And therefore the counsel did very right, as between the king's law-officers, to over-rule serjeant Heale: but they did not mean, that the king himself, for special reasons, might not appoint another to act as his attorney. In that reign afterwards, Yelverton was suspended, and the solicitor appointed to act. Suppose the attorney-general personally the defendant: there must be another to sue for the king. Suppose the attorney-general out of the realm; or under a disability from sickness: suppose the office of attorney-general vacant. When it is, the business (which cannot stand still) must devolve upon another of the king's counsel: and there is nothing so certain, as that the whole business and authority of the attorney devolves upon the solicitor-general. I am satisfied, that if the matter was traced, the two precedents in Easter term, 8 Hen. 8, mentioned by Mr. Hudson, were during the vacancy of the attorney's office. It is impossible the counsel could, in the same term, order the solicitor-general to stop one public prosecution and commence another, if there had been an attorney-general. As far as the memory of the vacancies of the attorney's office has led to a search, precedents have been found of informations filed by the solicitor-general, in Chancery, and on the law side of the Exchequer. In this court, the information against the earl of Devonshire* was prosecuted by the solicitor-general: and though the enormity of the fine set, and the revolution of government which immediately followed, made this case the subject of much

animadversion and just censure; 'the solicitor-general having prosecuted,' was never objected. There are precedents of replying, demurring, taking issue, praying judgment or award of execution, by the solicitor general, during the vacancy of the other office. We all know, from our own experience, that upon every vacancy which we remember of the attorney's place, his office has been executed by the solicitor-general. But it is said, 'The information ought to have suggested that the office of attorney was vacant.' Many of the precedents do not suggest it; and there can be no occasion. The attorney general is a great officer of the law and of this court. The Court take notice when the office is vacant; and by whom it is filled, when full. They gave credit to the solicitor-general, when he sues as attorney for the king, 'that he has authority.' He does it at his peril. In this case, before the defendant pleaded, the solicitor-general was made attorney, and in that capacity brought into court the information he had filed as solicitor. If an objection could lie to his authority as solicitor, the only question would be, 'From what time the information should be considered as commenced: from the filing by the solicitor; or the bringing into court by the attorney.' And that could be of no consequence, but in respect of the time when the defendant ought to plead. But he has pleaded to the information brought in by the attorney-general; and been tried. In every light and in every view, this objection is groundless: nothing has been offered to support it, but serjeant Heale's case. Upon so plain a point, I certainly should not have said so much, but that the objection also goes in arrest of judgment, and therefore may be argued again. The counsel are apprized of my reasons; and if they should think their objection tenable, I am open to conviction.

Second objection under the first error assigned—'That an outlawry does not lie upon an information.'

The counsel for the defendant supported this objection, two ways. First, they say, the books were silent on this head: the statute of Additions mentions only that 'in original writs 'of personal actions, appeals, and indictments, 'in which the exigent shall be awarded, &c.'* But an information is not therein mentioned. Secondly, they said, that from the nature of the process in an information, the exigent was not awardable. For, the proceeding by information in this court is similar to the Star-Chamber precedents: and in such proceedings, they did not award a Capias, but a Subpoena. That here, the antecedent process is by summons of attachment, not by Capias: and consequently, if there is no Capias to introduce the process of exigent, it cannot lie in this case. Serjeant Glynn admitted, as a point beyond all doubt, 'that informations of this kind were

* 3 Jac. 2. See vol. 11, p. 1353.

* Vid. 1 H. 5, c. 5, § 1.

'competent, in this court, at the common-law.' No lawyer ever doubted of it: no lawyer would seriously argue against it. So that sir Bartholomew Shower had no opportunity to deliver the argument he has printed.* Informations here neither derive their being, nor the form of proceeding upon them, from the Star-Chamber; but from the common-law of the land, and the usage and practice of this court where they are exhibited. Although informations are not mentioned in the statute of Additions, yet the same requisites of certainty and precision must be in an information, as in an indictment.† Presentment is not mentioned in this statute. And yet, on a presentment before the coroner, 'That French was *felo de se*,' (which was certified into the King's-bench,) 'and that certain of French's goods were in the possession of J. S.' process issued against J. S. until he was outlawed. 'And upon error brought for that there was not any addition given to the said J. S. in the presentment upon which he was outlawed,' it was at first doubted 'whether upon that presentment process of outlawry did lie:' and I've, clerk of the Crown-office, said to the Court, 'that such process in such case did lie: and that he could shew five hundred precedents of it.' And, secondly, it was moved, 'if this outlawry ought to be reversed for default of addition.' But it was agreed by the whole Court, that as to this purpose, the presentment should be accounted in law as an indictment.‡ To an information in nature of a Quo Warranto, to shew by what authority the defendant claimed to be a burghess of Grampound, the defendant pleaded in abatement, for want of proper addition; the information styling him 'labourer,' whereas he was clothier; and this plea was moved to be set aside, on the ground, 'that an addition was not necessary.' The Court refused to set it aside on that ground: but they found another, the want of a proper affidavit to verify the plea.|| There seems as good ground to say, upon the foot of precedents and construction of the statute of Additions, 'that process of outlawry lies, and addition is requisite in an information,' as in the presentment in French's case. As to the other argument from the nature of the process—there was no authority or precedent cited or produced, to prove the assertion. On the contrary, there are many precedents where the process was by Capias; and the Exigent followed: some, as in the present case; though most are before conviction. But 'that a Capias does lie, in process upon these informations,' I take to be as old as their existence. If not, how could there have been such a number of outlawries upon informations; and some,

of ancient date? All these records are so many authorities to support this process; which are not, after so great a length of unquestioned usage, to be now impeached.* And it is observable on the 18 Edw. 3, stat. 1, that it not only clearly relates to a proceeding before judgment; but it gives the Exigent, if the party is not brought in on an attachment or distress. However, there is no need to resort to that kind of reasoning, when usage supports the Capias, in the present case, as the common process upon these occasions.

Third objection under the first error assigned—'That outlawry does not lie, from the nature of the offence.'

This objection was slightly touched by Mr. Serjeant Glynn; but struck us, at first, as a point fit to be considered: and I mentioned to the bar, 'that it might be proper to look into it.' The doubt was, 'whether the offence charged in either of these informations was such as rendered the person accused of such crime liable to the process of outlawry, either at common-law, or by any statute.' In Coke Littleton, 128 b. it is said, 'that in the reign of king Alfred, and till a good while after the Conquest, no man could be outlawed but for felony; the punishment whereof was death: but after, in Bracton's time and somewhat before, process of outlawry was ordained to lie in all actions that were *'quare vi et armis,'* which Bracton calls *'Delicta,'* for there the king shall have a fine.' The 18 Edw. 3, st. 1, declares the cases and offences for which the Exigent shall be awarded, if the party cannot be found or brought in by attachment or distress; and not against any other. Also, the 18 Edw. 3, stat. 2, c. 5, says,—'No Exigent shall from henceforth go out, where a man is indicted of trespass; unless it be against the peace, or of things which be contained in the declaration made in that case at the last parliament.' But upon full consideration, I am very well satisfied that the counsel for the defendant judged right in laying no stress upon this objection. The offences laid in these informations, and the proceedings upon them, are at the common-law. The statutes giving process of outlawry in certain cases, and restricting its issuing in others but under certain circumstances, do not affect the present question: the process is warranted, in the present case, by the common-law, or not at all. Actual force or violence does not appear to be the criterion upon which the process of outlawry was founded. The greatness of the crime, and the severity of the punishment, seem to be the material circumstances originally attended to, in founding this process, according to the passage I have just cited from Coke, as to the earliest times; for, felony does not imply or convey the idea of actual outrage; grand larceny being in its definition, as well as practice, different. And Hawkins confirms this no-

* 1 Shower 106. *Rex. v. Berchet, et al.* *Pryon's Case*, 5 Mod. 459.

† 2 Hawkins P. C. 260, 261.

‡ *French's Case*, Mich. 26 Eliz. 2 *Leonard* 200.

|| *The King against Pardew*, H. 15 G. 2, 1741.

tion, by saying, 'that this process probably lay for all crimes of a higher nature* than 'trespass vi et armis.' The extension of this process is supposed by lord Coke, in the passage I quoted, (and what he says, is repeated, without examination, by a variety of authors), to have been somewhat before Bracton's time. The establishing that period, for a supposed ordinance concerning outlawries, strongly authenticates the testimony of that contemporary writer, touching the cases in which, and under what circumstances this process lay. Lord Coke saw, that it was impossible to say, 'that outlawry did not lie for any crime under felony;' universal practice shewed the contrary. So he supposes a positive statute made about Bracton's time. There does not appear any particular ordinance for extending this process: and there is no authority for the supposition. But Bracton (who wrote in the reign of Henry the 3d) † says, 'that it lay in omni transgressionibus quas fit contra pacem;' and afterwards, 'pro omni transgressionibus, licet minimis, ubi quis ad pacem domini regis vocatus, venire recusaverit, et hoc propter contumaciam.' That this necessary ingredient, 'contra pacem,' did not mean positive force in the committing of the offence, appears from the reason given why it lay for felony, 2 Ro. Abr. 805. 'Outlawry lay for felony; because it was *contra pacem*.' For, that could not mean (as I have already said) more than its being an offence in its nature against the laws of society, and a disturbance of that good order and government which keeps a state in unity and peace: The crime of larceny, in its very nature, is secret and fraudulent, unless it be done with open violence; and then it is distinguished by the aggravated name of robbery. Besides, in the case of writs *quare vi et armis*, (in which cases this process is given,) it is acknowledged to be on account of the supposed, not the actual force. And so is the same place in 2 Ro. Abr. 805, and the 35 H. 6, (a) and (b) and many other books. In fact, therefore, it appears from Bracton, 'that every offence committed against the peace subjected the delinquent to the process of outlawry.' And the cases shew, that the peace of the king is broke by disorders without force. And indeed some of the greatest crimes are without force. If force was the criterion on which this process of exigent was founded at common-law, why was that process given by the first statute of Edward the third, ‡ in the case of riots, &c.? Or what occasion had there been for the subsequent statute of Edward the third || to say—'From henceforth, it shall not issue in trespass, unless it is against the peace,' if the practice had not been, upon indictments, though not so alleged, for process of exigent to issue? And that seems to be the

* 2 Hawkins P. C. l. 2, c. 27, p. 302.

† Lib. 3, p. 127, b.

‡ 18 Edw. 3, st. 1.

|| 18 Edw. 3, st. 2, c. 5.

true reason of the last restrictive statute. I do not find it ever was denied, but that upon a presentment or indictment for the king, process of outlawry lay: and so it is expressly said to be agreed, in Brooke, title 'Exigent;' which cites 8 H. 6.* But a number of outlawries have been found, in crimes laid to be *contra pacem*, without *vi et armis*, and which could not be committed with force; and this error never assigned: which, alone, is decisive. I think, Mr. Attorney General produced one as far back as the fifth of Edward the fourth.

The second error assigned is as to the proclamations.

The return says—'I have caused public proclamation to be made, in manner and form as I am within commanded.' This is certainly too loose: the proclamations are not sufficiently set out, for the Court to judge whether they were properly made or not. I thought this error fatal. But Mr. Thurlow satisfied me, 'that it was unnecessary to make any proclamation at all.' The statutes which require proclamations do not extend to this case: and they are not required by the common-law. Indeed, this error was in a manner dropped and given up by serjeant Glynn, upon his reply: he did not contend, 'that they were necessary.' The present record, drawn in the Crown-office and settled by the king's counsel, shews under what obscurity and perplexity this matter lies: the result of ignorance in the practisers; and productive of a shameful confusion in the precedents of the office. They have not distinguished between civil and criminal outlawries: they have not distinguished between the manner of proceeding to outlaw in criminal cases, before and after conviction.† All is jumbled together: whatever is required in any case, they have applied to all. Circumstances are unnecessarily required, and defectively returned; because former mistakes are copied as precedents, without examination. But, as the proclamations, in this case, were nugatory and superfluous, the imperfection of the return is of no consequence: it is no error.

Of the second sort of errors, critical and

* Vide Bro. Abr. title Exigent and Capias, pl. 29, and title Process, pl. 16.

† "The stat. 31 Eliz. c. 3, settles the form in civil proceedings; and the 4 & 5 W. & M. c. 22, § 4, extends the provisions of the former act to criminal cases before judgment. For there is a difference in that respect whether the outlawry be after or before judgment, for if after judgment no proclamation is necessary. And unless that distinction be attended to in Wilkes's Case, that case, as reported in Burrow may mislead, for the arguments are not stated. In fact that was an outlawry after conviction, and therefore it did not come within the statute of W. & M." Per Buller J. in the Case of George Barrington, 3 Term Rep. 499; see, too, p. 503.

verbal, two are assigned: which were argued.

1st, For that it is not shewn, nor does it appear by the return of the sheriff of Middlesex, 'that the defendant was a first, second, third, fourth, and fifth time exacted at the county-court of the county of Middlesex;' as, by the law of the land, he ought to have been, before he was outlawed.

Under this error thus assigned, two objections were made: as to the first exaction; and as to the subsequent.

First, As to the first.—The return is by two men, sheriff of Middlesex: 'At my county-court, held, &c.' So that two men, making one officer, that is, sheriff of the county of Middlesex, say, 'At my court held in the county of Middlesex.' To raise a doubt, it is necessary to go out of the record, into history and law. We know from thence, that the same man might be sheriff of two counties. Till the 13th of Elizabeth one person was sheriff of Somerset and Dorsetshire; and so of Sussex and Surrey; of Oxford and Berks; of Nottingham and Leicestershire: and to this day, the same person is sheriff of Cambridge and Huntingdonshire. Such a sheriff might by law hold in either, the county-court of the other. 6 H. 7, 15 b. In the case of the sheriff of Somerset, who was then also sheriff of Dorsetshire, 'my court in the county of Somerset' was adjudged uncertain. 11 H. 7, 10 a, in a like case, Rede Fairfax and Hussey inclined to think it certain enough; and adjourned the consideration. But here it is impossible to raise a doubt. Unless the sheriff of Middlesex may hold the court of another county in Middlesex, 'At my county-court,' can only be the county-court of Middlesex. Two men, sheriff of Middlesex, never were nor could be sheriff of any other county. The error is not assigned, for want of any technical form of words; but 'that it is not shewn, nor does it appear by the return:' whereas I am of opinion it is shewn, and does appear by the return, that the county-court was of Middlesex, and could not possibly be the court of any other county.

Secondly.—As to the subsequent exactions.—The objection is, 'that it is not shewn, nor does it appear, where the court was held, at which he was exacted.' The return, having specified the place where the court was held at which he was first exacted, states severally the subsequent exactions, 'at my court held at the same place.' So that the whole doubt is, 'whether the same place includes the description of the place referred to:' which cannot be a doubt, in any language of the world. For, in truth, the doubt can be no other than 'whether the same place means the same place, that is, the place before described.'

Second critical error. The only other error assigned and argued, is—

'It is no where expressly shewn, that the place called Brook-street, where the several county courts are supposed to have been held,

is in the county of Middlesex.' The return says,—'At the house known by the sign of the Three Tuns in Brook-street, near Holborn, in the county of Middlesex.' The counsel for the defendant contend, that the true construction ought to be, to apply 'in the county of Middlesex,' to Holborn, and not to Brook-street; and so make a stop, at Brook-street.* It is impossible for me to doubt whether 'near Holborn,' is not part of the description of Brook-street.† It could be added for no other

* See 16 Vin. 208. Dyer 376, a. 2 Hale's Hist. Pl. Cr. 203. 16 Vin. 210, pl. 17.

† In the case of *Thebussan v. Woodford* (4 Vesey junior, 227) in argument concerning the construction of a will it was contended (p. 240) that the rule "ad proximum antecedentem fiat relatio nisi impediatur sententia," (as to which see *Rosewell's Case* vol. 10, p. 147), is a rule of grammar, of law, and of common sense, and that the law forbids reference to a former antecedent unless upon necessity. But sir Richard Pepper Arden (afterwards lord Alvanley, Ch. Just. of C. B.) Master of the Rolls, (p. 330) denied the rule that words of restriction are to be applied only to the last antecedent. And by him "It is not so even in criminal proceedings; to which it is said we must compare this: but I deny that there is such a rule even in criminal cases. In those, as in all other cases, the question as to the intention of words of reference must depend upon the context. There are two remarkable cases in the memory of every one who hears me; the one a capital case; the other a case upon an outlawry, a case in which the Court is more desirous of finding objections than in any other; and in that very case the objection, upon which the outlawry was ultimately reversed, was considered by many persons too refined." The case of outlawry to which his honour alluded was that of *Wilkes*: the capital case was that of *Rex v. Royce*, 4 Burrow, 2073. In that case the jury found in a special verdict that certain persons unlawfully, &c. began to demolish and pull down a dwelling house, and that at the time they began to demolish the dwelling house, the defendant did encourage and abet the said persons in beginning to demolish and pull down the dwelling house, by shouting and using expressions to incite the said persons so to do; and it was argued that the abetting was confined to "shouting and using expressions to incite the said persons so to do," that is "to shout," for shouting is the last antecedent. But by lord Mansfield, delivering the opinion of the Court, "We are all of opinion that there is really no colour for that construction; it will not hold either in regard to the obvious and manifest sense and meaning of the sentence and its context, or in point of grammar; 'so to do,' is 'to do the act,' which act is two or three times over in this same sentence specified and described to be, "beginning to demolish and pull down a dwelling house." In the case of *Carbone v. Davies*, Trin. 1720, (1 Stra. 394),

reason: it could answer no end, to say, 'near Holborn,' but as part of the name or description of this Brook-street, in contradistinction to some other Brook-street. It is immaterial what county Holborn is in: but the sheriff was bound to shew that Brook-street was in Middlesex. There is no law in this: it is a question of construction. All men can judge of it; and would treat with contempt the judgment of this sovereign court, if it could be founded upon so pitiful a prevarication. It is not permitted to me to say 'I doubt of the construction,' unless I do doubt; how much soever I may wish that this outlawry should not stand. I am of opinion, that, according to the letter, sense, and grammatical construction of the sentence, the Court was held in 'Brook-street near Holborn;' and that 'Brook-street near Holborn' lies in the county of Middlesex: and I am persuaded, there is no man who can think otherwise.

These are the errors which have been objected; and this the manner and form in which they are assigned. For the reasons I have given, I cannot allow any of them. It was our duty, as well as our inclination, sedulously to consider whether upon any other ground, or in any other light, we could find an informality which we might allow with satisfaction to our own minds, and avow to the world.

But here, let me pause—

It is fit to take some notice of the various terrors hung out; the numerous crowds which have attended and now attend in and about the hall, out of all reach of hearing what passes in court; and the tumults which, in other places, have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion.

Give me leave to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are vain. Unless we have been able to find an error which will bear us out, to reverse the outlawry, it

upon a promissory note set out to be made 2d of November 1719, to pay on the 31st of December next, it was argued that the word 'next,' did not refer to the date of the note, but to the time of declaring; so that the plaintiff complains in Trinity term, that at that time the defendant had not paid a sum of money which he was obliged by note to pay in December next. But *per curiam*, "We must take it 'secundum subjectam materiam,' and as a translation of the note, and then it can be no otherwise than a note the 2d of November 1719, to pay in December next, which is next after the date of the note." See also in vol. 13, p. 224. lord chief justice Treby's qualification of the rule for applying the relative to the last antecedent.

must be affirmed. The constitution does not allow reasons of state to influence our judgments: God forbid it should! We must not regard political consequences, how formidable soever they might be: if rebellion was the certain consequence, we are bound to say, 'Fiat justitia, ruat cælum.' The constitution trusts the king with reasons of state and policy; he may stop prosecutions; he may pardon offences; it is his, to judge whether the law or the criminal should yield. We have no election. None of us encouraged or approved the commission of either of the crimes of which the defendant is convicted: none of us had any hand in his being prosecuted. As to myself, I took no part (in another place,) in the addresses for that prosecution. We did not advise or assist the defendant to fly from justice: it was his own act; and he must take the consequences. None of us have been consulted, or had any thing to do with the present prosecution. It is not in our power to stop it: it was not in our power to bring it on. We cannot pardon. We are to say, what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences.

I pass over many anonymous letters I have received. Those in print are public: and some of them have been brought judicially before the Court. Whoever the writers are, they take the wrong way. I will do my duty, unawed. What am I to fear? That *mendax infamia* from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust, that my temper of mind, and the colour and conduct of my life, have given me a suit of armour against these arrows. If, during this king's reign, I have ever supported his government, and assisted his measures, I have done it without any other reward, than the consciousness of doing what I thought right. If I have ever opposed, I have done it upon the points themselves, without mixing in party or faction, and without any collateral views. I honour the king; and respect the people: but, many things acquired by the favour of either, are, in my account, objects not worth ambition. I wish popularity*, but it is that popularity

* "A popular judge is a deformed thing: and plaudites are fitter for players than for magistrates. Do good to the people; love them and give them justice; but let it be as the psalm says, 'nihil inde expectantes,' looking for nothing, neither praise nor profit." Lord Bacon's speech in the Star Chamber before the summer circuits in the year 1617.

Lord Mansfield's expressions in the text concerning popularity were some years afterwards criticised by Mr. Horne in the court of King's bench. See his Case for a libel, A. D. 1776. The general structure of this speech of the Chief-Justice was not spared by his enemies at the time. In 'Another Letter to Mr. Almon' is the following passage:

which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, upon an occasion and under circum-

"With acute practisers every studied preface of impartiality, of prodigious firmness, of a disregard of danger even to the loss of life, and of an extreme anxiousness in any crown prosecution to find out the smallest iota of justification for the defendant, will only raise an extraordinary attention to every colour of good or evil, to every shade or light, made use of by such judge, and to the whole of his gesture; for their jealousy will be set on the watch by the undueness and unusualness of an elaborate exordium from the chaste bench of sober judicature. What should make so artificial a beginning necessary? Judges who mean nothing unfair need never recur to these meretricious arts. Why then should you use them? Do you imagine the world suspects you of some design of not doing your duty? If not, it must be your consciousness of intending some duplicity that makes you thus call in beforehand such guards to your reputation. Genuine simplicity and pure virtue are ever devoid of fictitious ornaments. Every extraordinary declaration, side speech, hint, tone of voice, look or gesticulation will furnish matter of animadversion, and the user finally dupes himself and becomes the sacrifice of his own artifice; whatever seeming conviction and rhetorical applause his argument or oration may carry with them at the time. Truth stands the edge of professional and popular discussion, but sophistry of neither; for it cannot alter the nature of things, although it will disguise their appearance for a while. Time will always sooner or later detect the adultery. 'Opinio non commenta delet dies, naturæ judicia confirmat.'"

And it is to be observed that to the quotation from Cicero "*Ego hoc animo*," &c. Mr. Sergeant Hill in his copy of Burrow had written as a note the following passage of Swift. (See 4 Burrow, 2562-3. 8vo edition of 1812.)

"The world will never allow any man that character which he gives to himself by openly professing it to those with whom he converseth. Wit, learning, valour, acquaintance, the esteem of good men, will be known although we should endeavour to conceal them, however they may pass unrewarded: but I doubt our own bare assertions upon any of these points, will be of very little avail, except in tempting the hearers to judge directly contrary to what we advance."

stances not unlike, "*Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, haud infamiam, putarem.*"

The threats go further than abuse: personal violence is denounced. I do not believe it: it is not the genius of the worst men of this country, in the worst of times. But I have set my mind at rest. The last end that can happen to any man, never comes too soon, if he falls in support of the law and liberty of his country (for, liberty is synonymous to law and government.) Such a shock, too, might be productive of public good: it might awake the better part of the kingdom out of that lethargy which seems to have benumbed them; and bring the mad part back to their senses, as men intoxicated are sometimes stunned into sobriety.

Once for all, let it be understood, 'that no endeavours of this kind will influence any man who at present sits here.' If they had any effect, it would be contrary to their intent: leaning against their impression, might give a bias the other way. But I hope, and I know, that I have fortitude enough to resist even that weakness. No libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather against allowing the defendant, upon this and every other question, not only the whole advantage he is entitled to from substantial law and justice; but every benefit from the most critical nicety of form, which any other defendant could claim under the like objection. The only effect I feel, is an anxiety to be able to explain the grounds upon which we proceed; so as to satisfy all mankind, 'that a flaw of form given way to in this case, could not have been got over in any other.'"

From the precedents we have seen, it appears, that a series of judgments have required a technical form of words, in the description of the county-court at which an outlaw is exacted: that after the words 'at my county-court,' should be added the name of the county; and after the word 'held,' should be added—'for the county of _____' (naming it). Whereas here, the sheriff says, 'at my county court,' without adding—'of Middlesex:' and he says—'held at the house,' &c. without adding the words, 'for the county of Middlesex,' after the word 'held.'

As to the first expression, the cases begin as far back as the seventh of James the first. As to the second expression, they begin about the 18th of Charles the second.

If we are compelled by authority to look upon either expression as technically necessary, it is sufficient upon this occasion; because, here, both are wanting.

If an outlawry be returned in this manner—'Ad com. meum tent. apud Cicestriam in comitatu Sussex, &c.' it is erroneous; because it is not said 'ad com. meum Sussex tentum, &c.*' Alder was outlawed for murder; and

* P. 7 Jac. 2. Ro. Abr. 802, Whiting's Case.

it was moved for error, that the sheriff returned 'ad com. meum tentum apud D. in the county of Northumberland,' and did not say, 'ad com. meum Northumbrie tentum, &c.:' and this was holden to be error.* Among the errors for which, the reporter says, the outlawry was reversed, the second is—not said 'Suffolc'm,' after 'com. meum:' and this, he says, had been a common exception.† Three copies have been left with us, from the records: and they are, 'ad com. meum† Middlesex tent. &c.:' agreeably to the judgments I have mentioned. Winnington assigned error of outlawry: and one, said to be allowed, was, 'that the court is said to be held at the county of Hereford;' and doth not say 'for the county.'‡ An outlawry was reversed, because said 'ad com. meum, &c.' and not said 'pro comitatu.'§ This term, several outlawries were reversed, for want of 'pro com.' or 'nec eorum aliquis,' or 'per iudicium coronatorum.'** One who was outlawed for the murder of sir Edmondbury Godfrey, now brought a writ of error in his hand to the bar; praying 'that it might be read and allowed.' The outlawry was reversed. Among the errors assigned, one was, 'that it did not appear the Court was held pro comitatu.' The other was clearly a fatal objection.†† After stating the case, sir Bartholomew Shower says—'she brings a writ of error, to reverse the outlawry: and the error which I assigned *ore tenus*, was the usual fault, in not saying the county-court was held 'pro comitatu.' The outlawry was reversed.‡‡ This is a very strong authority, to shew that in the third of W. and M. it was settled 'that the words 'pro comitatu' were technically necessary.' A record of an outlawry has been found, agreeable to this form, established as necessary; and says 'ad com. meum. tent. pro com. Middlesex, apud le Cheshire. obcease in Gray's-inn lane in com. predict.'||| No case, report, or record has been found, since the third of queen Anne, which can be of any use, either way, upon this point, or any of the errors assigned.

The authorities I have stated stand to this day uncontradicted. They are many; and have prevailed above a century. I think, they begun against law and reason. The former authori-

* Mich. 16 Jac. Alder's Case, 2 Roll's Reports 52.

† Tr. 13 Car. 2. 1 Keble 50, 51, Rex v. Siclemore.

‡ Rex v. Hallet, H. 22, 23 Car. 2, rotulo 16. Rex v. Preston, H. 22, 23 Car. 2, rotulo 17. Rex v. Vernatt, H. 1, 2 J. 2, rotulo 9.

|| M. 18 Car. 2. Rex v. Tufton, 2 Keble 128.

§ H. 22, 23 Car. 2. 1 Vent. 108, anonymous.

** E. 31 Car. 2. 2 Shower 60.

†† H. 1 J. 2. 3 Mod. 89, anonymous: (S. C. as Rex v. Vernatt, left with us from the record.)

‡‡ M. 3 W. and M. 1 Show. 309. Rex v. Lady Oneby alias Truder.

||| Tr. 9 W. 3, 1697. rotulo 1 Rex v. Bell.

ties were otherwise: the precedent in Dalton is otherwise. There is no reason for requiring these words: there is sufficient certainty, without them. It is impossible to doubt, upon this record, but that the county-court at which the defendant was exacted, was the court of and held for the county of Middlesex. But, this is a criminal case, highly penal. Outlaws have had the benefit of this exception, for a great length of time. Can we refuse it to the defendant? We cannot: though I am clearly of opinion, 'there was not a colour originally, to hold these words to be necessary.' The objection to the blunder between the peace 'of the now,' and 'the* late king,' after conviction, has not much more solidity in it: yet the House of Lords thought themselves bound by precedents. And so must we, had the flaw been discovered before judgment. I cannot say, 'that it does not appear upon this record, that the Court was of and held for the county of Middlesex:' because I am clearly of opinion, 'that, most manifestly, it does.' But I can say, that a series of authorities, unimpeached and uncontradicted, from the 7th of James 1, as to one expression, and from the 18th of Charles 2, as to the other, have said 'such words are formally necessary.' I can say that such authority, though begun without law, reason or common sense, ought to avail the defendant. It would be dangerous, to say that any exception allowed so long, should now be over-ruled. The exception certainly would not have prevailed, had it been opposed at first: but, before the third of queen Anne, there being no opposition after a writ of error was granted, the Court considered the crown as consenting to the reversal upon any pretence, how slight soever. Though that is not the case now, the necessity of the form of words must not be canvassed; since it has been so often adjudged necessary. The officers of the crown are in fault, for not attending to the form prescribed, and copying the precedent of the King v. Bell.

There can be no mischief or incertainty arise from this determination: because, it being once known 'what form of words is necessary,' it is easy to follow it. But great suspicion and incertainty must follow, from this court's allowing a formal exception one day, and disallowing it in another.

I beg to be understood, that I ground my opinion singly upon the authority of the cases adjudged; which, as they are on the favourable side, in a criminal case highly penal, I think ought not to be departed from: and therefore I am bound to say that, for want of these technical words, the outlawry ought to be reversed.

The other three judges spoke *seriatim*. But, as their arguments tended to support and illustrate the same doctrine which his lordship had laid down; and as they did not differ, in any

* Vide Lookup's Case.

part, from the opinion given by his lordship; I omit, for the sake of brevity, reporting particularly what they said.

A rule was accordingly made (in each cause) 'That the outlawry be reversed.'^{*}

On the same 8th of June 1768,

Rules were made, for the prosecutor to shew cause (upon Tuesday then next) why the judgment should not be arrested; and why the verdict should not be set aside.

And also a rule for now remanding the defendant to the custody of the marshal, and for bringing him into court again upon Tuesday next.

Accordingly, on Tuesday the 14th of June 1768, the two following points were argued, very strenuously and very copiously on both sides: namely, 'whether the informations 'could be exhibited by the solicitor-general; and 'whether the amendment could be made 'by a single judge out of court, in the manner 'before specified.' The former was objected to, as a ground for arresting the judgment: the latter, as a ground for a new trial.

Lord Mansfield, as to the motion in arrest of judgment, adhered to the opinion he had before given, 'that the informations were well 'exhibited by the solicitor-general.'

As to the motion for a new trial on account of the amendment, he declared his satisfaction at the motion's having been made, and the matter so fully discussed and understood.

Matters of practice, he observed, are not to be known from books. What passes at a judge's chambers is matter of tradition: it rests in memory. In cases of this kind, judges must inquire of their officers. This is done in court, every day, when the practice is disputed or doubted. It is in its nature official. The officers are better acquainted with it, than the judges. For his own part, neither his education, nor his walk in life before he came into this court, ever led him into any knowledge of the practice of orders made by judges in the vacation. The making this order for the amendment appeared to him to be right, and to be a matter of course. It came to him as a matter of course, and recommended as such from a gentleman of great experience, who (he knew) would as soon have cut off his right hand, as have deceived him by representing this as a thing of course, when it was not so. Accordingly, he issued a summons, 'to shew cause 'why the amendment should not be made.' A summons always issues, before a judge makes

^{*} For the effect of reversal of outlawry and for the distinction between an outlawry at the suit of a subject, and one in the case of the crown, see the Case of St. John's College v. Mincott, 7 Term Rep. 259. That the greatest strictness is required in proceedings of outlawry, see in Rex v. Almon, Pasch. 33 G. 3, 5 Term Rep. 202, and Gilb. Hist. of C. B. therein cited.

an order. A summons therefore, went out, of course. Upon the attendance, his lordship asked Mr. Hughes (an old and experienced officer), the defendant's clerk in court, 'whether there was any doubt but that this was 'amendable.' He, very rightly, and as was his duty, admitted 'that it was amendable, 'and that he could not say otherwise.' His lordship then took down a book in which were entered some cases where informations were amended by a judge's order, just before trial; and after reading one or two, Mr. Phillips, the defendant's attorney, desired him not to give himself any further trouble. Mr. Phillips said indeed, 'that he could not consent to it.' But he did not object to it, nor contradict it; nor was it objected to, at the trial. The counsel saw that there could be no objection made to the order.

Mr. Justice Blackstone, in his third volume,^{*} gives the rise and history of amendments, very shortly and in few words. He shews how it stood, before the reign of Edward 1, in whose time, (probably about his 13th year) Britton's treatise was published, in the king's name and by the king's authority: which seems intended to give a check to the unwarrantable practices of some judges who had made false entries on the rolls, to cover their own misbehaviour. And about the 18th year of his reign, almost all the judges, even the most able and upright, were prosecuted by him; and some of them very heavily fined; and one of the causes assigned for it, was erasing and altering records: particularly, sir Ralph Hengham was fined 800 marks at least, (some say 7,000) for altering, out of mere compassion, a fine set upon a very poor man, from 13s. 4d. to 6s. 8d. Upon this, the judges grew so strict, that after inrollment they would not amend their judgments, even to set them right. They were so alarmed by this severity, that through a fear of being said to do wrong, they hesitated at doing that which was right; and because criminal and clandestine alterations, to make a record speak a falsity, were forbidden, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. But declarations and pleas might always be amended at any time: it was only inrollments that were prohibited by Britton. There never was any distinction (as to amendments at the common law) between criminal and civil causes; that is, before the 8 H. 6, c. 12, of Jeofails. The judges adhered to such strictness, that justice was entangled in the net of form. The legislature was therefore forced to interpose; and no less than twelve statutes of amendment were made, to remedy these opprobrious niceties.

The fundamental question here is, 'whether 'an information may be amended, at common 'law, at the desire of the crown, after plea 'pleaded.'

Notwithstanding precedents are produced, from

^{*} Book 3, c. 25, p. 407.

the time of queen Elizabeth, and all through the reigns of James 1, and Charles 1, and many side-bar rules, which shew that it was of course: for, if it were not of course, it would have been moved in court, as every thing not of course is.

So long ago as 6 W. 3, lord chief justice Holt treats it as a known thing, a thing of course. 1 Salk. 47, the King against Harris. A motion was made, to amend an information for perjury; and opposed, because the defendant had pleaded. Et per Holt chief justice 'as to amendment after plea pleaded, there is no great matter in that. After a record has been sealed up, I have known it amended, even just as it was going to be tried.' In 12 W. 3,* sir Bartholomew Shower moved to amend an information of forgery, in ten places: and, though opposed, the motion was granted, because it made no alteration of the fact; and that, without costs or imparlance. In the case of the King against Charlesworth, 2 Stra. 871, the information was for forging a warrant of attorney to acknowledge satisfaction upon a judgment of Easter term: and, after issue joined, the record appearing to be of Hilary term, the information was amended, without costs (the prosecutor having been admitted a pauper,) and without giving the defendant leave to plead *de novo*. And Hil. 10 Anne, the Queen against Simmonds was there cited: where the title of an act set forth in an information was amended. And there is no authority to the contrary. There can be no doubt therefore of its being amendable; upon the authority of a series of precedents, without any objection, and all these printed cases uncontradicted.

And why should it not be amended? If it had not been amended, the attorney-general would have dropped this information, if he thought there was a slip in it; and have brought another. And this would have been more inconvenient to the defendant, and have harassed him more: he would have no benefit, and more vexation. This amendment avoids delays, and saves expences: it saves the defendant the expence of bringing his witnesses up again. The attorney-general pays no costs. The defendant never asked leave to plead again, or to have the trial put off: nor was there any cause for it. The defence was not at all varied. The substance of the charge was not at all altered: it remained the very same. The true merits of the cause stood the very same. There is no difference at all, but that the prosecutor must prove more. The nature of the paper was the same: every objection was equally open to the defendant, and he had the further advantage of any verbal slip in setting out the libel upon the record.

But it is objected, 'that it could not be done out of court.'

Answer. It might be done by the Court: it might be done at the side-bar. And a great

deal that may be done in court, is done by judges at chambers, in term-time: in vacation, a great deal more is done by them at chambers; because it can be done no where else. Most of the precedents of amendments before trial are in the vacation. Lord chief justice Lee amended a record of an information, sent up from York; the mistake being there discovered during the assizes: and the record so amended was returned, and immediately tried. I am obliged to a gentleman at the bar, who sent me a case of the King against King, 19th of March 1746, where Mr. Justice Foster ordered the word 'division' to be struck out, and 'parish' to be inserted; though it was strenuously opposed, and the defendant must have been acquitted, if it had stood unamended. Mr. Justice Foster had applied himself particularly to the crown law; was a strict adherer to legal forms; and had more experience in business proper to be done out of court, than any other judge.

'Whether it was a necessary amendment, or not,' I give no opinion, nor form any.

There is a great difference between amending indictments, and amending informations. Indictments are found upon the oath of a jury; and ought only to be amended by themselves: but informations are as declarations in the king's suit. An officer of the crown has the right of framing them originally; and may, with leave, amend, in like manner as any plaintiff may do. If the amendment can give occasion to a new defence, the defendant has leave to change his plea: if it can make no alteration as to the defence, he don't want it. In this case, the defendant could not possibly plead any other plea.

I am fully satisfied, that none of the defendant's counsel or agents ever thought there was the least colour of objection to the order for amendment: but, long after the trial, it occurred to others, that by calling it 'an alteration of the record,' instead of 'an order to amend the information,' they who derive all their knowledge and law from libels in the news-papers, might be bewildered and misled.

Mr. Justice Yates took notice of a difference which there seemed to him to be, between the attorney-general and the master of the Crown-office: the attorney-general is the officer of the king; the master of the Crown-office, the officer of the public. Informations exhibited by the king's attorney-general are considered as the king's own prosecutions, and are called 'declarations for the king': therefore no costs are paid upon them. In the other informations, costs are often payable.

He said, he was greatly confirmed in his opinion, upon the case now before the Court, and had the greater reason to think it a right one, as his brother Glynn had not, by all his arguments, been able to shake it.

He agreed that the statute power of amending does not extend to criminal proceedings: but in common law amendments, there is no

* 1 Salk. 50, anon.

difference between criminal and civil proceedings. And he cited, and repeated (in part) the case of the Queen against Tutchin, in 6 Mod. 268 to 287.* He cited also, to the same purpose, the case of Bondfield *qui tam*, &c. v. Miller, in this court, M. 1 G. 3.

The question therefore turns upon what is a common-law amendment.

Many cases have been cited, of common-law amendments. But there is one, which has not been mentioned: it is the King against Goffe, in 1 Lev. 189. It was moved to amend an information of perjury. And it was ruled, that they should give notice of the things to be amended, to the defendant; and he to shew cause why it should not be amended: for, the Court said, 'it might be amended.' The case of the King against Charlesworth was a very strong one: for, the defendant must have been acquitted; and yet that amendment was made without payment of costs, and without liberty to plead *de novo*.

Indictments, being upon oath, cannot be amended.† But informations may be amended; because they are declarations for the king, 2 Viner 394, title Amendment and Jeofails, pl. 12. 12 Mod. 229. The King against Lewis, 6 Mod. 281. 1 Stra. 185, *Rex v. Nixon*.

It is clear, therefore, that informations may be amended, at common-law.

As to their being amended by a judge at chambers—it is, most certainly, the practice. *Non constat* 'when it begun:' but it seems to have been exercised time out of mind; and that the business of the Court could not be done without it. The business done at chambers is the most irksome part of the office of a judge: but it is greatly for the benefit of the subject, and tends to the advancement and expedition of justice. It arises from the overflowing of the business of the Court; which cannot be all transacted in court. The order of a judge is subject to an appeal to the Court: but if acquiesced under, it is as valid as any act of the Court. It is common, to apply to the Court, 'to discharge a judge's order:' but the very course of applying to the Court, 'to discharge the order of a judge, made at chambers,' supports the proceeding; and shews that the order is valid as to its effect, if it be not discharged. Indeed, if it becomes necessary to enforce it by attachment, there must be a motion 'to make it a rule of Court.' The validity of a judge's order can be impeached only two ways: either by appealing to the Court, to set it aside; or, if made in vacation, by applying in the next term, to set aside the proceedings that have been had under it. Now, this order was made

in vacation. The defendant might have declined going to trial, and might have moved, in the next term, 'to set aside the verdict.' But he acquiesced, and went to trial.

The materiality of this amendment is not in any degree equal to many of those that were made in the cases that have been cited. The defence was, indeed, made easier thereby: for, the word 'tenor' imports a literal copy.* It could not vary the nature of the defence: the proof lay upon the crown. If the defendant had had any objection to the alteration, he should have made no defence at the trial: that would have been a consistent conduct. But as he did make a defence, he has acquiesced in it. And yet, if he had made no defence at the trial, the verdict nevertheless would have stood: for, it could not have been set aside, unless the order was a bad one; which it now clearly appears, 'that it was not.' Therefore it ought to be supported by the Court.

This is a motion for a new trial, after a series of proceedings upon it. The Court have indeed spontaneously relaxed their own rule, in order to give an opportunity of having this matter fully and fairly argued and considered: which I am glad of; but I hope, it will not be made a precedent.

Mr. Justice Aston.—I entirely concur with my lord and my brother Yates, in discharging these rules. I think, the importance of this case does not consist in the nature of it; but in the noise and clamour that it has occasioned, and the misrepresentations that have been thrown out to the public, of the conduct of the judges in the course of the proceedings in it; who have been very unjustly charged with being induced to it by partial motives.

In the case of the Queen and Norton, reported in lord Fortescue's Reports 232, the Court agreed that it is a general rule, 'to amend informations at any time, even just before trial:' but then it must not make the information different. And, to be sure, it ought not: for, it would make a different defence. In the case of Rush and Seymour, 10 Mod. 88, it is said, 'that statutes of amendment extend only to pleadings of record; and that pleadings, while in paper, are amendable by common-law; and that it is a motion that the Court cannot refuse: but they may refuse it, if the party desiring it refuse to pay costs, or the amendment desired should amount to a new plea.' And as to the practice, it was almost of course, where the amendment made no alteration in the defence. Where it altered the defence, then it was upon terms. There is nothing that I ever looked upon as so plain.

Then as to doing it at chambers—the practice of the Court has been always so. The business done at chambers is become an immense load upon the judges, and is exceedingly troublesome to them: but it is the practice, the custom of the Court; and therefore, the law of

* Vide 6 Mod. 274, 282, 283. See it in this Collection, vol. 14, p. 1095.

† Contr. Vin. Amendment, (T. a.) 1. 3, which is not law, though small mistakes in the entries of proceedings on indictments are amendable, Com. Dig. title Amendment, 2 Car. 1.

the land. And what has been done by the judge at chambers, in the present case, has been rightly done: if it had not, I should have had no scruple in overturning it. But here is not the least colour for that: the order is justified by a vast number of precedents. I am glad, that it has been thus fully discussed; to convince the great number of persons that I see attending here, that judges have acted in this case, as they do in all others; and that there is no sort of ground for the scandalous imputations that have been industriously propagated, of their having been influenced by partial or improper motives.

Mr. Justice *Wilkes* concurred in both points.

He declared himself to be clearly of opinion, that during the vacancy of the office of the king's attorney-general (which was the present case), the power of the attorney-general devolves upon the solicitor-general for the time being. Consequently, this information was regularly and properly exhibited.

As to the order for the amendment of the information—he held it to be justified by an uninterrupted series of precedents, from the time of W. 3, at least. And as the order was right, he saw no ground for the obloquy that had been thrown upon the noble person who made it. It makes no alteration in the charge: it makes no alteration in the defence. No objection was made to it: no advantage was taken of it. It was acquiesced in: and the cause went on to trial. It is authorized by several cases, and by a great number of precedents for many years backward. He grounded his opinion, he said, upon the chain and series of precedents for near a century past.*

He concurred therefore with his lordship and his brothers, that both rules be discharged.

The Court unanimously ordered both these Rules to be discharged.

Serjeant Glynn thereupon moved, That the present proceedings might be entered upon record, that the defendant might have opportunity of applying to another jurisdiction.

The Court told him, they could not go out of the usual and ordinary method and course of

* See in this Collection, vol. 7, pp. 1365 *et seq.* a curious instance of an alteration in an information after plea pleaded, and apparently without any judicial order.

In *Steel v. Sowerby*, 6 Term Rep. 171, lord Kenyon said, "That the Court has the power to amend as long as the proceedings are in paper, in criminal as well as civil proceedings, has not been doubted since the case of *R. v. Wilkes*. That was not the first time in which such an amendment was made; and though that proceeding was considered by some persons as influenced by improper motives, I have great reason to believe that those, who objected to the amendment, thought in their private rooms, that there was no pretence for the objection."

proceeding: every thing must be done in this case, in the same manner as in all other proceedings of the like kind.

Mr. Attorney-General then moved for lord Mansfield's Report of the evidence (the causes having been tried before his lordship, at Nisi Prius).

Whereupon, after the records of the convictions had been read, lord Mansfield reported the evidence in each cause.

The Attorney-General and the Serjeant made their respective observations upon the evidence reported.

Mr. Wilkes then applied for the sentence of the Court.

The Court told him, it was necessary to take some time to consider of it: the constant course is so. They promised to do it without delay; and to give Mr. Wilkes notice, when they were ready: but, at present, they had not had the least conference together about the punishment; nor could they, without great impropriety, have had any, before they had heard all the arguments.

Serjeant Glynn then hinted at his client's being bailed in the mean time.

But the Court told him, he knew that could not be.

The defendant was remanded to the custody of the Marshal.

Friday, June 17, 1768.

The Court declared their intention of giving final judgment to-morrow; and ordered that the defendant should be brought up accordingly.

Saturday, June 18.

Mr. Justice Yates (as second judge) pronounced the sentence of the Court in each cause; viz.

'On the Information for the North Briton, N° 45, a fine of 500*l.* and imprisonment for ten calendar months, and till the fine be paid: on the other Information, 500*l.* fine; and imprisonment for twelve calendar months after the expiration of the former ten; and to find security for his good behaviour for seven years, himself in 1,000*l.* and two sureties in 500*l.* each; and to be remanded, till the fine should be paid and such security given.'

Mr. Wilkes desired, that his former imprisonment might be considered in the punishment now inflicted upon him.

The Court assured him 'that it had been so; and that they had fully considered all circumstances, both for him and against him.'

Serjeant Glynn then desired, that Mr. Wilkes might have the benefit of a Writ of Error to the House of Lords.

Lord Mansfield answered, that this Court could not give any particular directions about that matter: he must apply to the Attorney-General. And he added, that if Mr. Attorney-General would take his advice, he should grant it the moment it was applied for.

Mr. Attorney-General said, he certainly should grant it immediately.

Mr. Wilkes then desired, that it might be put into such a method, as that he might have the advantage of objecting, in the House of Lords, to the alterations made in the record by lord Mansfield at his lordship's own house.

Lord Mansfield told him, that the Court could not alter the law.

Mr. Wilkes replied, that he did not wish the law to be altered.

Lord Mansfield.—It is impossible to alter it in any particular case: the same course must be taken in this case as is usual in others of the like kind. The defendant's counsel would advise him, his lordship said, what were the proper steps for him to take, in order to have the opinion of the House of Lords.

The defendant was remanded.

The Rules were drawn up in these words:

"Saturday next after fifteen days from the day of the Holy Trinity, in the eighth year of king George the third." [18th June, 1768.]

Middlesex,
the King
against John
Wilkes, Esq.

"The defendant being brought here into court in custody of the Marshal of the Marshalsea of this Court, by virtue of a rule of this Court, and being convicted of certain trespasses contempts and grand misdemeanors, in printing and publishing a seditious and scandalous libel, intituled 'The North Briton, N^o 45,' whereof he is impeached, it is ordered that he the said defendant, for his offences aforesaid, do pay a fine to our sovereign lord the king, of five hundred pounds of lawful money of Great Britain: and it is further ordered, that he the said defendant be imprisoned in the custody of the said marshal for the space of ten calendar months now next ensuing. And it is lastly ordered, that the said defendant be now remanded to the custody of the said marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall have paid the said fine.—On the motion of Mr. Attorney-General.—By the Court.

The same
against the
same.

"The defendant being brought here into court, in custody of the Marshal of the Marshalsea of this Court, by virtue of a rule of this Court; and being convicted of certain trespasses contempts and grand misdemeanors, in printing and publishing an obscene and impious libel, intituled 'An Essay on Woman,' and other impious libels in the information in that behalf specified, whereof he is impeached; and having also been convicted of certain other trespasses contempts and misdemeanors, for printing and publishing a certain other libel, intituled 'The North Briton, N^o 45,' for which he hath this day been sentenced, and ordered by this Court to pay a fine of five hundred pounds, and to be imprisoned in the custody of the said marshal for the space of ten calendar months; it is now ordered by this Court, that the said

defendant, for his trespasses contempts and misdemeanors first abovementioned, in printing and publishing the said obscene and impious libels, do pay a further fine to our sovereign lord the king, of five hundred pounds of lawful money of Great Britain; and that the said defendant be further imprisoned in the custody of the said marshal, for the space of twelve calendar months, to be computed from and after the determination of his aforesaid imprisonment for printing and publishing the said other libel intituled 'The North Briton, N^o 45.' And it is further ordered, that he the said defendant shall give security for his good behaviour, for the space of seven years, to be computed from and after the end and expiration of the said twelve calendar months to be computed as aforesaid; to wit, himself, the said defendant, in the sum of one thousand pounds, with two sufficient sureties, in five hundred pounds each. And it is lastly ordered, that he the said defendant be now remanded to the custody of the said marshal, to be by him kept in safe custody, in execution of this judgment, and until he shall have paid the said fine and given such security as aforesaid.—On the motion of Mr. Attorney-General.—By the Court."

Afterwards a writ of error* was brought, re-

* As to the right to a writ of error in criminal cases, see in this Collection the Case of Nairne and Ogilvie, A. D. 1765: and those of sir Thomas Armstrong, and Ashby and White, as there referred to: see also more particularly Mr. Hargrave's Collection on the subject, (Juridical Arguments and Collections, vol. 1, p. 403,) wherein that most learned lawyer deduces from a review of the cases and authorities on the question, whether a writ of error in criminal cases is a writ of right or of favor, these conclusions, viz.

1. "That long previously to the reign of queen Anne, there were opinions in favor of considering writs of error, even in treason and felony, as writs of right; particularly the opinion of lord chief justice Wray, in the King's-bench in the reign of queen Elizabeth, an approbation of that opinion by lord Coke, with a resolution of the House of Commons in 1689, declaratory of their sense of the law accordingly.

2. "That, consequently the idea of its previously being a perfect novelty, to consider writs of error in any criminal case as writs of right, seems to be a mistake founded on not having sufficiently attended to the history of the subject.

3. "That, in the reign of queen Anne, there is a resolution of ten judges out of twelve delivered in parliament, declaratory of the absolute right to a writ of error in all criminal cases, except treason and felony.

4. "That in the same reign, there is a resolution of the Lords after hearing the judges, declaring the absolute right of the subject to

turnable in parliament, upon each judgment: and both judgments were affirmed, as follows—

Die Luna, 16^o Januarii, 1769.

Counsel having been fully heard to argue the errors assigned in these causes, the following Questions were put to the Judges—

‘Whether an information filed by the king’s solicitor-general, during the vacancy of the office of the king’s attorney-general, is good in law?’

‘Whether, in such a case, it is necessary in point of law, to aver upon the record, that the attorney-general’s office was vacant?’

Upon the second record—

‘Whether a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law?’

Whereupon the lord chief justice of the court of Common Pleas, (sir John Eardley Wilmot) having conferred with the rest of the judges present, delivered their unanimous Opinion upon the said Questions, with their Reasons as follows :

As to the first Question:

We think this information, so filed, is good in law.

a writ of error in all criminal cases, without so much as one exception.

5. “That, since the reign of queen Anne, the right of the subject to a writ of error, in criminal cases under treason and felony, has been recognized in Westminster-hall by some judges, without contradiction from the rest.

6. “That lord Mansfield qualifies the right to a writ of a error in misdemeanors, by explaining the writ to be not *absolutely* of course, but only claimable as a right on *probable* error shewn.

7. “That whether lord Mansfield’s qualification of the right to a writ of error in misdemeanors is adopted by other judges, or is his lordship’s particular opinion, is not discoverable at present.”

It is to be hoped that ere long the world will be favored with a more copious investigation of the subject in Mr. Hargrave’s “*Jurisconsult Exercitation*,” as I shall have occasion to mention in a note to the case of *Nairne and Ogilvie*.

Note. In a letter from sir Constantine Phipps, (see concerning him, vol. 15, p. 223) to Dean Swift, dated January 14, 1730-21, the writer says, “The last term I spoke to Mr. Attorney General, [sir Robert Raymond, afterwards lord chief justice] about it,” [the case of *Waters*, the dean’s printer, who it appears had been convicted upon a prosecution, for publishing the ‘Proposal for the universal Use of Irish Manufactures’] “but he told me he could not grant a writ of error in a criminal case without direction from the king.” See Swift’s Works, vol. 16, p. 233, 12mo edition of 1803.

By our constitution, the king is entrusted with the prosecution of all crimes which disturb the peace and order of society. He sustains the person of the whole community, for the resenting and punishing of all offences which affect the community; and for that reason, all proceedings ‘*ad vindictam et pacem*’ are called in the law, the pleas or suits of the crown; and in capital crimes, these suits of the crown must be founded upon the accusation of a grand jury; but in all inferior crimes, an information by the king, or the crown, directed by the King’s-bench, is equivalent to the accusation of a grand jury, and the proceedings upon it are as legally founded; this is solemnly settled and admitted. As indictments and informations, granted by the King’s-bench, are the king’s suits, and under his controul; informations, filed by his attorney-general are most emphatically his suits, because they are the immediate emanations of his will and pleasure. They are no more the suits of the attorney general than indictments are the suits of the grand jury.

Indictments and informations are both the voices of those entrusted by the constitution to awaken criminal jurisdiction, and to put it into motion. Who are those persons entrusted? A grand jury for all crimes; the King’s-bench, as well as a grand jury, for misdemeanors of magnitude.

An information, brought by the attorney general for a misdemeanor, is as much the suit of the king, as actions, brought by attornies, are the actions of their clients, and not of the attornies who bring them.

‘The king sues by his attorney,’ or ‘the attorney sues for the king,’ are only different forms of expressing the same thing. It is equally good either way, as appears by the cases in 2 Lev. 82, and 3 Keb. 127; and no legal reason, but good manners and decency, as lord Hale calls it, have given the preference of one form to another. It is the king, who, by his attorney, gives the Court to understand and be informed of the fact complained of.

Before the statute, 4 and 5 W. and M. c. 18, every private man might lay his complaint before the court as the king’s complainant; this was abused, and was checked by the statute; but it left all other informations as they were. What were then the king’s informations? His right, of ‘informing’ the Court, was not subjected to the check which the act set upon the right of individuals.

The legislature trusted the king as the great constitutional guardian of the peace of the society. The mere suggestion of an individual was too slight; he was under no oath. The king is under the most solemn sanction in every part of his great office; and it is wise not to controul it: he is not to be put on a level with the meanest of his subjects:

The arguing that the attorney general only, and no other officer, was entrusted by the constitution to sue for the king, either civilly or criminally, is a fundamental mistake. The

attorney general is entrusted by the king, and not by the constitution; it is the king who is entrusted by the constitution.

The great abilities of the persons appointed to this office have made it figure 'high' in the imagination, and annexed ideas to it which do not belong to it; for he is but an attorney, though to the king, and in no other or different relation to him than every other attorney is to his employer; and it is by degrees that he hath attained to that rank which he now holds in the law.

I find no traces of such an officer for centuries after the conquest; and that great antiquarian, Spelman, under the word '*Serviens ad Legem*,' considers him, upon the authority of passages cited out of Bracton, as the great officer for pleas of the crown, and thinks the king had a serjeant in every county for that purpose; and in the proclamations made even at this day, before any criminal trial begins, the king's serjeant is mentioned, even before the attorney; and the 5th Edward 3, c. 13, which gives an averment against the sheriff's return of imprisonment in cases of outlawry at the king's suit, mentions the king's serjeant before the attorney, and subjoins 'or any that will sue for the king;' which is a strong indication that the king's suits were not considered as then appropriated to his attorney; and he had not then so much as the name of 'attorney general,' which means no more than the person generally employed to sue and defend for the king, exactly in the same manner as the person generally employed by your lordships, in your suits, is called your lordships' attorney, without putting the addition of 'general' to it; and the suits instituted by the king's attorney, or by your lordships' attorney, are both instituted, either by special and particular directions, or under a general authority, which is equivalent to a particular direction for every particular suit: and a suit instituted by the attorney-general, is entitled the King and —, and the jury are sworn between the King and —, in the same manner as in suits between private individuals. Whether the king, when there is an attorney or solicitor-general, might, by one of his serjeants, or by his solicitor, when there is an attorney, now file either a civil or criminal information, it is not necessary to determine; but the passage, cited out of the Harleian manuscript, does not decide in the negative; for the first part, in Henry the eighth's time, orders the king's solicitor to stop one prosecution and commence another. The office of attorney general was either vacant or full at that time. If vacant, it proves the solicitor stands in his place: if full, it proves that by particular order, the king's suit is not inseparably attached to the office of the king's attorney.

The latter part of the passage, containing the resolution of the 1st and 3d James 1, is only the adjustment of a dispute between the attorney general and the king's serjeant, whether the king's serjeant could institute a suit so

as to privilege it with respect to fees, &c. in the ordinary course of proceeding; and it was determined to belong to the attorney general, in opposition to the serjeant's claim: but it does not follow from thence, that the king, if he had pleased, might not have empowered one of his own serjeants to have commenced it: and a special antecedent direction could not be necessary; for if the king afterwards avows the suit, and pursues it, it is a principle and maxim that '*omnis rati-habitio mandato æquiparatur*;' but there is no occasion in this case to have any recourse to such a ratification; for the solicitor general is the '*secundarius attornatus*;' and as the courts take notice judicially of the attorney general, when there is one, they take notice of the solicitor general, as standing in his place, when there is none. He is a known and sworn officer of the crown, as much as the attorney; and, in the vacancy of that office, does every act, and executes every branch of it. But, whether it be the one or the other, they only echo the king's complaint, and his application to the court to act upon it. When the attorney dies or is removed, must the great criminal jurisdiction of this kingdom, in his department, be suspended, till another is appointed? It is said the king may appoint one. But it is a matter of great deliberation and infinite consequence to have a person possessed of all the qualities necessary for that office. Where is it to be found, that, in that interval, the noblest branch of the king's regal office becomes inactive, and the subject's right to protection is in abeyance? There is no such absurdity to be found in the law; and an hiatus in government is so detested and abhorred, that the law says, 'the king never dies,' that there may never be a 'cesser' of regal functions for a moment; but if this whimsical conceit were to take place, the death, or removal of the attorney general, would suspend one of those functions, though there was no demise at all. That the office of attorney general devolves upon the solicitor, is proved by such a chain of authorities, as can leave no doubt in any man's mind upon this question.

A course of precedents and judicial proceedings in courts of justice, make the law: it would be endless to cite cases upon it. A course of practice for a few years has been held to controul an act of parliament. The case of *Bewdley corporation*, in the 12th queen Anne, 1 P. Williams, 207. Before the 4th and 5th of queen Anne, juries were to come out of the hundred of that place where the action arose. This was attended with many inconveniences. That law directed that the jury should come out of the body of the county; but a practice had prevailed in the Crown-office, to award the '*Venire de Vicineto*,' as before the act. It was referred to all the judges. Their unanimous opinion was delivered by Parker, chief justice. The constant practice and precedents both in the Crown-office and Exchequer, being

'de Vicineto;' they established the practice, and said, 'to make a contrary resolution in this Case, would be, in some measure, to overturn the justice of the nation for several years past.' There was an interval of five or six years in that case—but here there is near a century.

The King and the earl of Devon, Easter, 3 Ja. 2.* Though the information was filed by the attorney general, it was taken up by the solicitor general, and shews the same powers. Proceedings were brought up into this court, to found a complaint upon; but there was no writ of error. The judgment was never reversed. There was not the least complaint. This House acted upon it. This is a recognition of his authority.

[Here the Chief Justice stated many cases in the Exchequer, Chancery, and King's-bench; and particularly, the Queen and Lawson, Easter, 7th of queen Anne, which was an information exhibited in the Exchequer by sir James Montague, 'solicitor general,' and where the judgment was affirmed by lord Cowper, Holt and Treby.]

The attorney general is no more a sworn officer of the King's-bench than the solicitor general.

As to the 3d Question:

The inserting the vacancy of the office of attorney general in the record sometimes, and at other times omitting it, shews it was thought a matter of indifference. There are more criminal informations in the Exchequer, without those words than with them. At most it could be only an irregularity, which would not make the information void; because it is the king's suit, and the Court is well founded in opening their jurisdiction upon it; all irregularities must be challenged in time, and if not challenged, are waived; and the pleading and going to trial are clearly a waiver, if there had been any weight at all in this objection; but we think there is none. In this case, the in-

* Middlesex.—Information filed by sir Robert Sawyer, 'attorney general,' against William earl of Devon, states, that he on the 24th April, 3 J. 2, *vi et armis*, at the city of Westminster, in Middlesex, within the palace of our lord the king there, to wit, in Whitehall, (the king being then abiding in the said palace) one Thomas Colepepper, esq., then and there in the peace of God, and our said lord the king, did provoke and challenge to fight with him the said William earl of Devon, with intention to kill and murder him the said Thomas, &c.

Plea.—And now (that is to say) on Friday, next after the morrow of the Ascension of our Lord, in this same term, before our lord the king at Westminster, comes as well sir Thomas Powis, knight, 'solicitor general' of the said king, who, for our said lord the king, now prosecutes in his proper person, as the said William earl of Devon, in his proper person; and the said earl says, &c.

formation, though filed by the solicitor, is brought into court by the attorney, who was the same person who filed it. By so doing, he has adopted it; and it is become his information to every intent and purpose whatsoever.

When filed—process—when brought into Court—read over and charged with it. It is now done by the officer—but it is for the attorney. If there was any foundation—it should have been objected to then. If not, it must be considered as waived.

On the 3d Question:

We are of opinion that the defendant, being convicted of two offences, it was necessary that two judgments should be pronounced, one upon each information.

Fine and imprisonment, or other corporal punishment, may be awarded for such offences as are contained in these informations.

The kind, and the quantity, are left by the law to the discretion of the Court, which passes the sentence; and that discretion is regulated by the nature of the offence, and the circumstances which aggravate and extenuate it; by the state and condition of the delinquent, and the imprisonment he has already suffered: and that discretion is always exercised with that lenity and compassion which do so eminently distinguish the administration of criminal justice in this kingdom.

That sound discretion led the Court to fine and imprisonment, as the proper and adequate punishment for these offences. A very large fine might have amounted to perpetual imprisonment: a very small fine must necessarily have produced a prolongation of the imprisonment. By mixing them together, the keen edge of each is taken off, and the consequence of a large fine, or a very long imprisonment, carefully avoided.

A fine of 500*l.* and ten months imprisonment, is the punishment for the treasonable libel; a fine of 500*l.* and twelve months imprisonment, to commence from the determination of the former imprisonment, is the punishment for the blasphemous libel. The objection is, that the sentence for the blasphemous libel is erroneous, because the punishment is not to take place till another punishment is ended, either by effluxion of time or other sooner determination of it; which may be by a reversal of that judgment, or the king's pardon; and that all judgments are to take immediate effect, and not to commence 'in futuro.' In general, the language of all judgments for offences, respects the time of giving the judgment; though the punishment, directed to be inflicted, is in no case inflicted immediately; and in many cases, the judgment directs the punishment to be 'in futuro,' and must be so according to the nature of the punishment.

In petit larceny—to be whipt three market days successively—to set a man in the pillory three times, at a week's or a month's distance—to find security for good behaviour from the

end of a certain imprisonment, or an uncertain one, as those imprisonments are, where a fine is to be paid.

In treasons and felonies—a certain known judgment, which cannot be departed from, viz. in the present tense of the subjunctive passive: but in misdemeanors, where punishment is discretionary, the limitation, as to time, seems only to be, that the punishment shall take place before a total dismissal of the party: a punishment shall not hang over a man's head when he has been once discharged; that is properly a punishment 'in futuro.' But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former, or immediately after the end of it. And every case of this kind must depend upon the peculiar circumstances which attend it.

In this case, it must be assumed, that fine and imprisonment were the proper kind of punishment to be inflicted for these offences; because the Court intrusted by the constitution with deciding upon the punishment, has said so. The facts and circumstances which guided their judgment, in that respect, are not before your lordships. They hear a report of the trial, and affidavits of every fact which aggravates or alleviates the offence; and therefore your lordships must now proceed upon a supposition, that fine and imprisonment were the adequate punishments to be inflicted for each offence. You will be disposed to say and to think so, because they are the mildest and gentlest punishments.

The punishment might have been inflicted different ways.

1st, By imprisonment for twelve months; but as he was already sentenced to ten months, it would have been only an imprisonment for two.

2d, By imprisonment for twenty-two months; which would, in effect, have been for twelve.

But this would have been most grossly unjust, because if the first judgment should be reversed, or he had been pardoned, he would have been imprisoned twenty-two months, when the Court only intended an imprisonment of twelve.

3d, The Court might have laid a fine of 1,000*l.* with a short imprisonment for one offence; and a small fine, with an imprisonment for twenty-two months for the other.

This would have been equally unjust—for the offences are different, and have no relation to one another. The prosecutions are distinct, and the records as separate from one another as if there had been two separate delinquents; and the offences on each record, must be as separately and distinctly estimated; and though judgment happened to be passed at the same time for both offences, yet the rule of admeasurement must be the same as if the judgment had been pronounced at different times.

The punishment must be proportioned to the specific offence contained in the record, upon which the judgment is then to be pronounced; and must be neither longer nor shorter, wider nor narrower, than that specific offence deserves. The balance is to be held with a steady even hand; and the crime and the punishment are to counterpoise each other; and a judgment given, or to be given against the same person for a distinct offence, is not to be thrown into either scale, to add an atom to either.

To lay a fine of 1,000*l.* for one offence, and twenty-two months imprisonment for the other, when the Court thought a fine of 500*l.* and an imprisonment of ten months, was the proper and adequate punishment for one offence, and a fine of 500*l.* and an imprisonment of twelve months for the other, would have been twisting the two offences and their punishments together, and a departure from the first principle of distributive justice, which commands all judges to inflict that punishment, and that punishment only, which they think commensurate to the specific crime before them; and it might have been productive of the same injustice I have already mentioned, viz. the judgment in one might be reversed or pardoned; and the delinquent would then be subject to a larger fine or a longer imprisonment, than the Court intended to subject him to for one of the offences only.

We cannot explore any mode of sentencing a man to imprisonment, who is imprisoned already, but by tacking one imprisonment to the other, as is done in the present case.

It is not letting the judgment for the first offence vary the punishment, or influence the quantum of it in the other; but only providing, from the situation of the delinquent, to effectuate the punishment the Court thought his crime deserved. It is shaping the judgment to the peculiar circumstances of the case; and the necessity of postponing the commencement of the imprisonment, under the second judgment, arises from the party's own guilt, which had subjected him to a present imprisonment; and therefore the question really is, Whether a man under a sentence of imprisonment for one offence, can be sentenced to be imprisoned again for another offence? If he can, this is the only form by which it can be done consistent with justice. If it cannot be done, then in all offences which are punishable only by fine and imprisonment, if a man has committed twenty, and has been sentenced to imprisonment for one of them, he must be fined for all the rest, which will amount to perpetual imprisonment with nine parts in ten of the people most likely to commit such offences: or an imprisonment must be directed for every offence after the first, inadequate and disproportionate to it.

For suppose twenty offences of the same malignity, and meriting exactly the same punishments—if six months imprisonment were the punishment directed for the first offence;

the second must be twelve months: and, proceeding progressively, the twentieth must be ten years: and thus six months and ten years will be the punishment for offences which ought to have been punished exactly alike. Or, if it be an offence where whipping or pillory might be inflicted, the alternative of a moderate imprisonment will not be in the power of the Court to inflict; but they will be under the necessity of laying a large fine, or directing one of the other severe corporal punishments.

In Dr. Bonham's case, 8 Co. 107. The charter granted by king Henry 8, confirmed by an act of 14 Hen. 8, c. 5, gives the censors of the College of Physicians a power to punish physicians for a mal and insufficient administration of physic, by amercement, imprisonment, &c.

Dr. Bonham was convened, examined, and found insufficient by the censors. He was amerced 5*l*. to be paid at their next meeting: and 'deinceps abstineret, etc. quousque inventus fuerit sufficiens sub poena conjiendi in carcerem, si in premissis delinqueret.'

He persevered to practise, and they summoned him again. He made default. The censors ordered him to be arrested, and afterwards he came before them, and being asked to submit to their authority, he refused: and they committed him, and awarded that he should continue in gaol till they released him.

It appears from this case, 1st, That he was under no prior sentence of imprisonment, as here.

2dly, That after the judgment of his insufficiency, he was dismissed, with a threat of imprisonment only; and was afterwards committed to prison for not submitting to their authority.

Whereas the delinquent here was never dismissed, nor out of custody, for a moment.

3dly, It was a special power and authority of a very singular and despotic nature, committed to private persons, and therefore to be executed strictly: and when they are empowered to imprison, if they find a person insufficient, the punishment must immediately follow the judgment; because, if suspended a day, it might be suspended a year. If totally dismissed, and the party is at liberty, the power over him is determined.

So in the case of the 27th of Henry 7. Y. B. on the statute of Westminster 2d, 13 Edward 1, c. 11.; if bailiffs, &c. are found in arrears, 'arrestentur corpora eorum, et per testimonium auditorum ejusdem compoti, mittantur et liberentur proximæ Goalæ Domini Regis in partibus illis.'

No time was limited; they must commit immediately.—In that case, it was contended on the plea, that he had bren at large; and then their power over him was determined, and so that what they did after, was *tortius*. It was a special power and authority, to be exercised strictly; and therefore held that the commitment must be to the next gaol, whether in the county or not: and if false imprison-

ment was brought against auditors, they must shew that they pursued their power. And the same answer applies to the other cases upon the statutes of forcible entries.

[He then cited various other precedents, particularly the case of the King and Dalton, 3 Geo. 1, 1716, in which the first judgment was given in July preceding, upon an indictment for seditious words against the king: and the punishment was a fine of twenty-five marks and commitment for one year, and to find sureties for three years. There was a second conviction, in July, of a like offence, and judgment of a fine of twenty-five marks and commitment 'pro spacio unius anni integri post expirationem prior. Judic. imprisonment. versus eum nuper adjudicatum.']*]

In Answer to the Questions therefore proposed by your lordships, our unanimous Opinion is:

1st, That an information filed by the king's solicitor general, during the vacancy of the office of attorney general, is good in law.

2dly, That in such a case, it is not necessary, in point of law, to aver upon the record that the attorney general's office was vacant.

3dly, That a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law.*

Whereupon it was ordered and adjudged, That the Judgments of the Court of King's-bench be affirmed.†

On Wednesday the 7th of February, 1770,

Mr. Davenport moved that the defendant might be brought up, either into court within this term, or before a judge at chambers after the end of it, to enter into the recognizance required of him by the abovementioned rule of court: for, his imprisonment will end upon a day which does not fall within any term; namely, upon Easter Tuesday next.

The Court told him, they had thought of this already; and they conceived the best method would be, to make a rule for his entering into the recognizance before the marshal, or some other justice of the peace for the county of Surrey.

And accordingly, they ordered such a rule to be drawn up: which was done, in these words:

Ordered, That at the expiration of the imprisonment of the defendant, by virtue of the judgment of this Court pronounced against him in this cause on Saturday next after fifteen days from the day of the Holy Trinity in the eighth

* Concerning a judgment of imprisonment to commence upon the determination of an imprisonment awarded for another offence, see the Case of lord George Gordon, Term Rep.

† Vide Journals of the House of Lords, vol. 32, p. 222.

year of the reign of his present majesty, the security required by the said judgment to be given by him the said defendant for his good behaviour for the space of seven years, to wit,

himself the said defendant in the sum of 1,000*l.* with two sufficient sureties in 500*l.* each, may be taken by and before any justice of the peace of and for the county of Surrey.

543. The Case of BRASS CROSBY, esq. Lord-Mayor of London, on a Commitment by the House of Commons. Court of Common-Pleas, Easter Term: 11 GEORGE III. A. D. 1771.*

[This Case is from Mr. Serjeant Wilson's Reports, 3 Wils. 188. The history of the transactions of which this Case was a branch, with the proceedings of the House of Commons, the reader may possess himself of, by resorting to the Annual Register for 1771, and the New Parliamentary History for the same year. Upon refusal of the Court of Common Pleas to discharge the Lord Mayor, the Court of Exchequer was moved for a Habeas Corpus; and the Case was argued by counsel on a like return to that Court: but the application there also failed of success, and the Lord Mayor was remanded.]†

THE lieutenant of the Tower of London was commanded to have before the justices of the bench here, the body of Brass Crosby, esq. lord mayor of London, by him detained in the king's prison, in the Tower of London, by whatsoever name he was called, together with the day, and cause of his caption and detention, on Monday next, after three weeks from Easter-day; that the said justices seeing the cause, might do that which of right, and according to the law and custom of England, ought to be done; and further to do and receive what the same justices here should then consider in that behalf. And now here, at this day, (to wit) Monday next, April 22, 1771, after three weeks from Easter-day, in this term cometh the said Brass Crosby, in his proper person, under the custody of Charles Rainesford, esq. deputy-lieutenant of the Tower of London, brought to the bar here; and the said deputy-lieutenant then here returneth, that before the coming of the said writ, (to wit) on the

27th day of March last, the said Brass Crosby was committed to the Tower of London, by virtue of a certain warrant under the hand of sir Fletcher Norton, knight, Speaker of the House of Commons, which follows in these words: "Whereas the House of Commons have this day adjudged, that Brass Crosby, esq. lord-mayor of London, a member of this House, having signed a warrant for the commitment of the messenger of the House, for having executed the warrant of the Speaker, issued under the order of the House, and held the said messenger to bail, is guilty of a breach of privilege of the House; and whereas the said House hath this day ordered, that the said Brass Crosby, esq. lord mayor of London, and a member of this House, be for his said offence committed to the Tower of London: these are therefore to require you to receive into your custody the body of the said Brass Crosby, esq. and him safely keep during the pleasure of the said House, for which this shall be your sufficient warrant. Given under my hand, the 25th day of March, 1771." And that this was the cause of the caption and detention of the said Brass Crosby, in the prison aforesaid: the body of which said Brass Crosby he hath here ready, as by the said writ he was commanded, &c. Whereupon, the premises being seen, and fully examined and understood by the justices here, it seemeth to the said justices here, that the aforesaid cause of commitment of the said Brass Crosby, esq. to the king's prison of the Tower of London aforesaid, in the return above specified, is good and sufficient in law to detain the said Brass Crosby, esq. in the prison aforesaid: therefore the said Brass Crosby, esq. is by the Court here remanded to the Tower of London, &c.

The Argument for the discharge of the Prisoner.

Serjeants Glynn and Jephson argued, that it appeared by the return of this Habeas Corpus, that the cause of commitment of the lord-mayor to the Tower of London was insufficient in law for the detention of him there; and therefore this Court ought to discharge him out of the custody of the lieutenant of the Tower of London.

Here follows the substance of serjeant Glynn's Argument, after the writ and return were filed.

4 B

* See 2 Blackst. 754.

† See the proceedings against Richard Thompson, clerk, for a high misdemeanor against the privilege of parliament, vol. 8, p. 1, and the matter subjoined to that Case: see also Mr. Hargrave's learned opinions concerning the cases of the commitments of the honourable Simon Butler and Mr. Oliver Bond by the Irish House of Lords in 1793, and of Mr. Perry by the British House of Lords in 1798, published in his *Juridical Arguments and Collections*, vol. 1, p. 1, vol. 2, p. 183.

Serj. *Glynn*. The question now before the Court, is, whether it does not appear by the return of this writ, that the lord-mayor ought to be discharged; and it is a very important and constitutional question indeed.

The return states, that the imprisonment of his lordship is by virtue of a certain warrant under the hand of sir Fletcher Norton, knight, Speaker of the House of Commons, reciting, that whereas the House had adjudged, that his lordship having signed a warrant for the commitment of a messenger of the House, for having executed the warrant of the Speaker, issued under the order of the House; and held that messenger to bail, is guilty of a breach of privilege of the House; and also reciting, that the House had ordered, that his lordship, a member of the House, should for his said offence be committed. So that it appears what that breach of privilege is.

When any person is brought to this bar by the king's writ of Habeas Corpus, the judges must look into, see and consider the cause of his detention, and are bound to do that which of right, and according to the law and custom of England, ought to be done.

Acts done by the highest authority are subject to the inquiry of the courts in Westminster-hall; whose jurisdiction extends not only to inquire into, controul and correct the acts of inferior, but also of co-ordinate and superior powers.

A breach of privilege of the House of Commons is stated, and also in what manner, and by what fact their privilege was broken; therefore this Court must determine, whether the fact charged is by law a contempt or breach of privilege. When it is returned, that a person was committed by any other court in this hall, for a contempt generally, without specifying the fact or nature of the contempt, this Court cannot inquire in the matter, but must remand the prisoner. Every court of justice of record in the Hall, must necessarily have absolute power to enforce obedience to their own orders, or justice could not possibly be administered to the king's subjects. The House of Commons is not a court of justice of record, for it cannot administer an oath: it has a certain limited jurisdiction; and this Court must judge, whether it has not transgressed, and gone beyond the bounds of its jurisdiction, and must pronounce upon it. If the king doth exercise any power which is not conformable to law, this Court will remedy it. The old writ *De Homine Replegiando* did not comprehend the mandates of the king; but the Habeas Corpus extends to them, and to all acts of power not conformable to law. If the Court of Chancery, which is a superior court in civil causes, should exceed its jurisdiction, and interfere by injunction in criminal cases, the inferior court would determine against the Court of Chancery, and would discharge any one from imprisonment whom that Court should commit for disobedience to such injunction.

This Court must enquire, whether the House of Commons has not exceeded its lawful jurisdiction. The lord mayor is charged with a contempt. The question is, whether he is guilty of a contempt; that is to say, whether the fact charged upon him amounts by law to a contempt. The House of Commons makes an order for committing a printer, and that order expresses who shall take him into custody, namely, the serjeant, or deputy serjeant at arms of the House. The printer is taken into custody by a messenger, within the city of London; he complains to the lord mayor; who examines into his complaint, proceeds judicially, and according to law; and after such examination, according to the best of his judgment, is of opinion, that the warrant of sir Fletcher Norton does not justify the taking the printer into custody by a messenger of the House, in the city of London. How does this interfere with the lawful jurisdiction of the House of Commons; and how does it exceed the lawful jurisdiction of the lord-mayor, within the city of London? The jurisdiction of the House must be limited to some particular objects: the claim of an unlimited power in this country is absurd, and destroys itself. In the great question, in *Ashby and White*,* about the *Aylesbury* men, we find, that in a conference between the Lords and Commons, it was agreed, that the Commons cannot, by any vote or resolution of their own, assume or acquire any new jurisdiction or privilege. Here is a warrant under the hand of sir Fletcher Norton, speaker. Sir Fletcher Norton has no personal authority to commit whom he pleases. The Speaker, as such, has no official authority. Whatever authority he can have, must be merely as the instrument of the House of Commons: his act can be valid only by the order of the House. But that the warrant is made contrary to the order of the House, appears to this Court by the return of the Habeas Corpus; consequently, the Speaker having no authority of his own, and the warrant being contrary to the order, the same is invalid. The messenger executed the warrant in the city: the Speaker had no authority to empower him to execute it in the city of London. The House of Commons have not an unlimited jurisdiction; the lord mayor was therefore obliged to examine, whether the act of power exerted by them within the city, was within their jurisdiction. The printer had been charged with printing the speeches of some members of the House, for which he was ordered to be taken into custody. The lord-mayor thought the House of Commons had no right to order the printer to be taken into custody by their messenger in the city of London, and that the printer ought not to be committed for the act with which he was charged. There is nothing to be pretended in favour of this proceeding of the House of Commons, but their assumed transcendent power. Now it would totally destroy all the

* See the Case, vol. 14, p. 695.

benefit, and the very end of the Habeas Corpus, if the transcendancy of any power whatever could blind the eyes of a court of justice, and prevent their enquiry into its acts. Such a decision by judges sworn to administer faithfully the laws, would be fatal to every thing that is worth preserving in our boasted constitution, and would leave the unhappy subjects of this country in a state much worse than a state of savage nature. The great chief justice Holt was clearly of opinion, and held it for good law, that if it appeared upon the face of the return of a Habeas Corpus, that what the House of Commons called a contempt, was not by law a contempt, the person committed for it must be discharged: that the privileges of the House of Commons are part of the law of the land, and therefore the courts here must take notice of them incidentally: and though this was the opinion of a single judge against three others, yet it was agreed to and supported by the House of Lords, who, in those days, remembered that they were the hereditary guardians of the people.* Again—Holt held, that the order of the House of Commons forbidding any one to seek or pursue a legal remedy against their orders, was illegal and naught; and boldly said so: and accordingly he was of opinion, that the persons committed for contempt of that order ought to have been discharged; though the three other judges were of a contrary opinion; and the persons were remanded to Newgate.† Upon petition to the queen, a writ of error was allowed, and brought; and before it was argued, the parliament for good reasons was dissolved: but I will venture to say, if it had been argued, there would have been judgment given by the House of Lords according to Holt's opinion. If the *lex et consuetudo parliamenti*, of which we hear so much and know so little, be indeed a part of the law of the land, the judges are bound to take notice of it, and to decide upon it, as they do upon every other part of the law. It has been said, that lord chief justice Holt was single in his opinion; nevertheless, I may venture to say, that his opinion, in the judgment of every honest and unprejudiced mind, will not be found light in the scale, against that of the three other judges. He was single: but he had truth and integrity with him, as well as the strongest arguments on his side, which the conference with the Lords demonstrated; arguments which have never yet been, and which cannot now be answered. The other three judges differing in opinion from him, there was a writ of error (as I said before) granted, returnable in parliament; and if the temper of the times would have permitted it to have been proceeded in, and the parliament had not been then dissolved, it may easily be collected, from the arguments above referred to, that it would have had from the Lords a most solemn and just decision.

L. C. J. *De Grey*. Brother Glynn, that

* 2 *Ld. Raym.* 958.

† *Ibid.* 1119.

writ of error, you mention, was never brought before the Lords.

Serjeant Glynn. It is true, my lord, it was never brought directly in question before them; because doubts were started, whether it was a writ of right or of favour, which might be refused by the particular officer. This occasioned a petition to the queen, who in answer to the petition said, she was come to a resolution to grant a writ of error, because she was desirous to have the matter of law settled, for the good of her subjects: but unhappily for us, the particular circumstances of those times prevented it; and the parliament was dissolved.

L. C. J. *De Grey*. In all cases, except treason and felony, I think a writ of error is grantable of right. The two Houses addressed the queen for different purposes. The Lords said, it was time enough to decide upon the writ of error, when it came before them.

Serjeant Glynn. My lord, it is for that reason I said, I collect it from other arguments which make it very reasonable to suppose, that the subject would have had satisfaction and redress from the decision of the House of Lords.

The question at present is, whether this Court has not power to examine into the jurisdiction of the House of Commons? I submit it, with deference to the Court, that you have lawful power to enquire, whether the House of Commons had any jurisdiction in this case, and that their privileges are not to be supposed so transcendent and mystical, as to exclude all enquiry. My lord, I deny that the mayor's act is a breach of privilege of the House of Commons. The lord-mayor was in full possession of jurisdiction in the case; he was obliged to decide upon the question before him; he was obliged to form an opinion upon a case within his jurisdiction. Shall his opinion be adjudged a contempt? Is this the law of the land; that when different courts, having jurisdiction of the same nature, differ in their decisions, they are guilty of contempts one against the other, and may be punished for such contempts? It is no contempt in me, a private man, to have an opinion different from the greatest authorities in this kingdom. It was the lord-mayor's opinion upon the case before him; he was bound by his oath to act pursuant to that opinion; it was his bounden duty to act accordingly: he would have been perjured, if, out of respect for any persons, he had not obeyed the call of his conscience. It was no crime for him to entertain the opinion. Entertaining it, he was bound to declare it, and it was his duty to act in consequence of it. The conscientious act of a magistrate, within the limits of his jurisdiction, can never be a contempt, or punishable. Unless a magistrate acts wrong from corrupt motives, he cannot be punished. But suppose for a moment, the lord-mayor did not act from his opinion, but from some corrupt motive, it is not the House of

Commons, but a jury, that must judge of it. The duty of a magistrate differs widely from that of an officer. From the latter, a full and ready obedience is required to be paid to the orders of the Court whose officer and minister he is; and such orders, rightly pursued and executed by him, are his sufficient justification: but the magistrate is bound by his oath, and has an opinion and judgment of his own which he must follow; and he is answerable to the law, and cannot be justified for the breach of his oath and the law, by any order or resolution of the greatest authority.

Your lordships are now called upon to say, whether the lord-mayor of London, in a case where he had indisputable jurisdiction, acting by his opinion, and according to his oath, is guilty of a contempt of the House of Commons, and can by law be imprisoned.

Serjeant Jephson. My lords, as I shall not have an opportunity of answering any argument from the bench, nor can possibly know the objections your lordships may have to discharging the lord-mayor out of custody, I shall endeavour to anticipate and answer such objections against discharging him, as occur to me, and may possibly be made by the Court.

The question is, whether sufficient cause appears to the Court upon the return of this writ, to imprison the lord-mayor? If no legal cause appears for detaining him in custody, he must be discharged.

I shall consider the nature, the return, and the consequence of the writ of Habeas Corpus. It is a prerogative writ of right, to inquire into the cause of the imprisonment of any of the king's subjects. If a legal cause of detention doth not appear upon the return of the writ, the subject must be discharged, and set at liberty: therefore, if a legal cause does not appear upon the return of this writ, the lord-mayor must be discharged out of custody. This position cannot be denied.

It appears from the cases of sir William Thicknesse, 4 Inst. 434. Sir William Chauncey, 12 Rep. 83, and from Bushel's case, Vaugh. 135, &c. that the cause of imprisonment ought to be as specifically returned to those who judge upon the writ of Habeas Corpus, as it did to those who first committed the party. Again, Bethell's case, 1 Salk. 348, where the commitment is not to the legal and immediate officer, it is naught.

Again, Search's case, 1 Leon. 70, where the queen had taken a person into her protection, who, notwithstanding, was arrested, and the person arresting committed, and on a Habeas Corpus was discharged. See again Doctor Alphonso's case, 2 Bulst. 259, where the return was bad, no cause being therein shewed; also Thomas Barkham's case, Cro. Car. 507. the like case, *ibid.* 579. 1 Roll. Rep. 192, 218, Apsley's case, and Ruswell's case, *ibid.* 245, Codde's case. The determination in all the cases the same: if the legal charge is not returned, the person must be discharged.

The Court must judge of the cause of commitment returned: if not, why should the writ command the return of the cause? The cause is returned, that the Court may judge, whether the person is intitled to his liberty, or not. It is no objection in this case, to say, that the House of Commons having a power to commit, therefore this Court must not judge of the cause of commitment returned; for this would prove too much; because it would go to every other court having jurisdiction to commit. Suppose the Court of King's-bench, which is equal, and perhaps superior in some respect to this court, should commit a person; and the person committed should be brought here by Habeas Corpus; this Court would certainly take notice, and inquire into the cause returned; and if this Court thought it not a sufficient cause, would discharge the person; otherwise, how would the end of bringing the writ of Habeas Corpus be answered?

It is no objection in this case, to say, that the Court cannot examine the cause as stated in the return, because the Court would then determine upon the privileges of the House of Commons: the Court must, and doth frequently determine upon the privileges of parliament, when they come incidentally before them. See the earl of Banbury's case, 2 Id. Raym. 1247. Salk. 512. 2 Stra. 987-8. This Court made no sort of hesitation to determine in Wilkes's case, upon the privilege of parliament. 3 Wilson 151. Why then should they not now enter into this question, touching the privilege of parliament? In lord Shaftesbury's and Mr. Murray's cases, the returns were general, for contempts of the House, without stating the particular facts; but the facts of the supposed contempt in this case appear, which we contend cannot by any legal construction amount to a contempt, and therefore that the lord mayor must be discharged. The House of Commons having determined it to be a contempt, does not alter the case: a fact does not become a contempt by being recited to be such. The Court must consider, whether the warrant for my lord mayor's commitment is the warrant of the Speaker as speaker of the House of Commons, as sir Fletcher Norton may act in a double capacity. (Here it seems there was laughter.)

L. C. J. De Grey.—Sir Fletcher Norton signs himself Speaker.

Serj. Jephson.—His signing himself Speaker will not help the warrant, if the cause is not sufficient; and the Court may rather suppose the mistake committed by sir Fletcher Norton in his private capacity, than by the House of Commons. Suppose some future speaker, of some future House of Commons, should recite in his warrant, that the House of Commons had adjudged it a breach of privilege, and contempt, to sue out a statute of bankrupt against one of their members, which by act of parliament any one is permitted to do; and should in consequence commit a person for such legal

act: if the person was brought by writ of Habeas Corpus before this Court, would not the Court take cognizance of the commitment? Would they not determine it no breach of privilege? Are acts of parliament of less force than such a recital in a speaker's warrant? Suppose a person is committed by a similar warrant, for proceeding according to act of parliament against a member of the House in an action of debt; shall he have no remedy from the law, which led him into the supposed transgression? Suppose a justice of peace should commit a member of the House of Commons for treason, felony, or breach of the peace, and the speaker's warrant should recite it to be a contempt; will this Court say, they can take no cognizance of such a commitment by the House of Commons? Suppose all the officers of this Court should be recited in the speaker's warrant to be in contempt, for executing the process of this Court, will this Court give no remedy; and must this and every other court of justice be annihilated, whenever the speaker's warrant declares all its officers in contempt? How is it possible to distinguish the present case from those I have mentioned, if you must not examine the cause returned, but say it is sufficient if a contempt is charged? Serjeant Hawkins, in his 2d vol. 110, gives us clear enough his thoughts upon this subject. He says there, (among other things) that if a subject should be committed by either of the Houses of parliament, it cannot be imagined that the law, which favours nothing more than the liberty of the subject, should give us a remedy against commitments by the king himself, appearing to be illegal, and give us no manner of redress against a commitment by our fellow-subjects, equally appearing to be unwarranted.

I think I have now sufficiently cleared this case from all the objections that can be brought against its being inquired into. The question therefore is, whether on the return there appears sufficient cause of detention? Three causes are mentioned, and all urged as breaches of privilege. 1. For discharging a printer; 2. for having signed a warrant for the commitment of the messenger; and, 3, for holding him to bail.

To make the lord mayor guilty of the first supposed contempt, it ought surely to appear to the Court; that Miller the printer was in the legal custody of the messenger. Now, Miller never was in the legal custody of the messenger; for the warrant to take up Miller was directed to the Serjeant at Arms of the House of Commons, or his deputy, and not to the messenger; so that Miller was in the illegal custody of the messenger, therefore the lord mayor did right.—Miller was ordered into the custody of the Serjeant at Arms, or his deputy; but the contrary appears upon the return, in the recital of the order: for that intimates, that he was taken into custody by the messenger, by virtue of the warrant of the Speaker of the House, issued under the order of the House, Miller

was taken into custody by the messenger in the city of London, neither the Serjeant at Arms or his deputy being present. The messenger, I say, was guilty of false imprisonment, having no warrant directed to himself, nor acting in aid and assistance of the Serjeant at Arms, or his deputy, to whom the warrant to take up Miller was directed, for neither of them were present; so that if an action of false imprisonment was to be brought against the messenger, he could not justify what he has done: and if he cannot justify in an action of false imprisonment, how could he justify before the lord mayor? As for the other supposed contempt, of signing a warrant against the messenger, and holding him to bail; the messenger had been guilty of an assault and false imprisonment, in taking Miller the printer into custody, in the city of London, without any legal warrant or authority: what contempt is it to sign a warrant against the messenger?

Mr. Just. Gould.—The messenger was committed for having executed a warrant of the Speaker.

Serjeant Jephson.—That does not appear; your lordships cannot know that; for the return only says, for signing a warrant against the messenger. For these reasons, I pray the lord mayor may be discharged out of the custody of the lieutenant of the Tower of London.

In the return, it is a warrant for the commitment of the messenger.

L. C. J. De Grey.—If either myself or any of my brothers on the bench, had any doubt in this case, we should certainly have taken some time to consider, before we had given our opinions; but the case seems so very clear to us all, that we have no reason for delay.

Opinion of the court.

The writ by which the lord mayor is now brought before us, is a Habeas Corpus at common law, for it is not signed *per statutum*. It is called a prerogative writ for the king; or a remedial writ: and this writ was properly advised by the counsel for his lordship, because all the judges (including Holt) agreed, that such a writ as the present case required, is not within the statute. This is a writ by which the subject has a right of remedy to be discharged out of custody, if he hath been committed, and is detained contrary to law; therefore the Court must consider, whether the authority committing, is a legal authority. If the commitment is made by those who have authority to commit, this Court cannot discharge or bail the party committed; nor can this Court admit to bail, one charged or committed in execution. Whether the authority committing the lord mayor, is a legal authority or not, must be adjudged by the return of the writ now before the Court. The return states the commitment to be by the House of Commons, for a breach of privilege, which is also stated in the return; and this breach of privilege or contempt is, as the counsel has truly

described it, threefold; discharging a printer in custody of a messenger by order of the House of Commons; signing a warrant for the commitment of the messenger, and holding him to bail; that is, treating a messenger of the House of Commons as acting criminally in the execution of the orders of that House. In order to see whether that House has authority to commit, see Co. 4 Inst. 23. Such an assembly must certainly have such authority; and it is legal, because necessary. Lord Coke says they have a judicial power; each member has a judicial seat in the House: he speaks of matters of judicature of the House of Commons, 4 Inst. 23. The House of Commons, without doubt, have power to commit persons examined at their bar touching elections, when they prevaricate or speak falsely; so they have for breaches of privilege; so they have in many other cases. Thomas Long gave the mayor of Westbury 4*l.* to be elected a Burgess: he was elected, and the mayor was fined and imprisoned, and Long removed.* Arthur Hall, a member, was sent to the Tower, for publishing the conferences of the House. 4 Inst. 23. This power of committing must be inherent in the House of Commons, from the very nature of its institution, and therefore is part of the law of the land. They certainly always could commit in many cases. In matters of elections, they can commit sheriffs, mayors, officers, witnesses, &c. and it is now agreed that they can commit generally for all contempts. All contempts are either punishable in the Court contemned, or in some higher court. Now the parliament has no superior court; therefore the contempts against either house can only be punished by themselves. The stat. 1 Jac. 1, cap. 13. sect. 3, sufficiently proves that they have power to punish: it is in these words: viz. 'Provided always, that this act, or any thing therein contained, shall not extend to the diminishing of any punishment to be hereafter by censure in parliament inflicted upon any person which hereafter shall make, or procure to be made, any such arrest as is aforesaid.' So that it is most clear, the legislature have recognized this power of the House of Commons.

In the case of the Aylesbury men, the counsel admitted, lord chief justice Holt owned, and the House of Lords acknowledged, that the House of Commons had power to commit for contempt and breach of privilege. Indeed, it seems, they must have power to commit for any crime, because they have power to impeach for any crime. When the House of Commons adjudge any thing to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment in consequence, is execution; and no court can discharge or bail a person that is in execution by the judgment of any other court. The House of Commons therefore having an authority to commit, and that commitment being an execution, the

question is, what can this court do? It can do nothing when a person is in execution by the judgment of a court having a competent jurisdiction: in such case, this court is not a court of appeal.

It is objected, 1. That the House of Commons are mistaken, for that they have not this power, this authority; 2. That supposing they have, yet in this case they have not used it rightly and properly; and, 3. That the execution of their orders was irregular. In order to judge, I will consider the practice of the courts in common and ordinary cases. I do not find any case where the courts have taken cognizance of such execution, or of commitments of this kind: there is no precedent of Westminster-hall interfering in such a case. In sir J. Paston's case, 13 Rep. there is a case cited from the year-book, where it is held that every court shall determine of the privilege of that court: besides, the rule is, that the court of remedy must judge by the same as the court which commits. Now this court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the Commons judge of their privileges is unknown to us. If the court of Common-Pleas should commit a person for a contempt, the court of King's-bench would not inquire into the legality or particular cause of commitment, if a contempt was returned; yet in some cases the court of King's-bench is a court of inquiry, but in this case is only co-ordinate with this court. In the case of Chambers, [Cro. Car. 168, and vol. 3, p. 373, of this Collection,] Chambers was brought up by Habeas Corpus out of the Fleet; and it was returned, that he was committed by virtue of a decree in the Star-Chamber, by reason of certain words he used at the council-table, &c. for which he was censured to be committed to the Fleet, till he made his submission at the council-table, and paid a fine of 2,000*l.* and at the bar he prayed to be delivered, because the sentence was not warranted by any law or statute: for the statute 3 Hen. 7, which is the foundation of the court of Star-Chamber, doth not give them any authority to punish for words only. But all the court informed him, that the court of Star-Chamber was not erected by the stat. 3 Hen. 7, but was a court many years before, and one of the most high and honourable courts of justice; and to deliver one who was committed by the decree of one of the courts of justice, was not the usage of this court; and therefore he was remanded. The courts of B. R. or C. B. never discharged any person committed for contempt, in not answering in the court of Chancery, if the return was for a contempt. If the Admiralty court commits for a contempt, or one be taken up and committed on an *Excommunicato Capiendo*, this court never discharges the persons committed. Formerly, when many abuses were committed, and the people could not obtain a remedy, the subject was not contented with the ancient Habeas Corpus, but did not complain

* See vol. 6, p. 1131.

of the courts for refusing them what they could not by law grant them; instead of that, they sought redress by petition to the throne. In chief justice Wilmut's time, a person was brought by Habeas Corpus before this court, who had been committed by the court of Chancery of Durham. That court being competent, and having jurisdiction, the man was not discharged, but recommitted. How then can we do any thing in the present case, when the law by which the lord-mayor is committed, is different from the law by which he seeks to be relieved? He is committed by the law of parliament, and yet he would have redress from the common law. The law of parliament is only known to parliament-men, by experience in the House. Lord Coke says, every man looks for it, but few can find it. The House of Commons only know how to act within their own limits. We are not a court of appeal. We do not know certainly the jurisdiction of the House of Commons. We cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges. We cannot judge of the contempts thereof: we cannot judge of the punishment thereof.

I wish we had some code of the law of parliament; but till we have such a code, it is impossible we should be able to judge of it. Perhaps a contempt in the House of Commons, in the Chancery, in this court, and in the court of Durham, may be very different; therefore we cannot judge of it, but every court must be sole judge of its own contempts. Besides, as the court cannot go out of the return of this writ, how can we inquire into the truth of the fact, as to the nature of the contempt? We have no means of trying whether the lord-mayor did right or wrong. This court cannot summon a jury to try the matter. We cannot examine into the fact. Here are no parties in litigation before the court. We cannot call in any body. We cannot hear any witnesses, or depositions of witnesses. We cannot issue any process. We are even now hearing *ex parte*, and without any counsel on the contrary side. Again, if we could determine upon the contempts of any other court, so might the other courts of Westminster-hall; and what confusion would then ensue! none of us knowing the law by which persons are committed by the House of Commons. If three persons were committed for the same breach of privilege, and applied severally to different courts, one court perhaps would bail, another court discharge, a third re-commit.

Two objections have been made, which I own have great weight; because they hold forth, if pursued to all possible cases, consequences of most important mischief. 1st, It is said, that if the rights and privileges of parliament are legal rights, for that very reason the Court must take notice of them, because they are legal. And 2dly, If the law of parliament is part of the law of the land, the judges must take cognizance of one part of the law of

the land, as well as of the other. But these objections will not prevail. There are two sorts of privileges which ought never to be confounded; personal privilege, and the privilege belonging to the whole collective body of that assembly. For instance, it is the privilege of every individual member, not to be arrested. If he was arrested, before the stat. 12 & 13 W. 3, the method in Westminster-hall was, to discharge him by writ of privilege under the great seal, which was in the nature of a Supersedeas to the proceedings; and as soon as it came into the court of B. R. and was pleaded there, then it became a record, and the pleading concluded, 'si curia domini regis placitum prædictum cognoscere velit aut debeat.' The stat. 11 & 12 W. 3, has altered this, and there is now no occasion to plead the privilege of a member of parliament. 2 Stran. 985. *Holiday et al' versus colonel Pitt*. There is a great difference between matters of privilege coming incidentally before the Court, and being the point itself directly before the Court. In the first case, the Court will take notice of them, because it is necessary, in order to prevent a failure of justice. As in lord Banbury's case, where the court of King's-bench determined against the determination of the House of Lords: but in that case they considered the legality and validity of the letters patent, without regarding the other right of a seat in the House of Lords, with which the Court did not concern themselves. The counsel at the bar have not cited one case where any court of this hall ever determined a matter of privilege which did not come incidentally before them. If a question is to be determined in this court touching a descent, whereby property is to be determined, and which depends upon legitimacy; that is, whether the father and mother were married lawfully; this court must determine by the bishop's certificate. But in some cases, where legitimacy of marriage does not come in question, but cohabitation only for a great length of time, which is evidence of a marriage, comes in question, this Court will determine according to the verdict of a jury, although the courts of Westminster-hall go by a different rule from the spiritual courts. But the present case differs much from those which the Court will determine; because it does not come incidentally before us, but is brought before us directly, and is the whole point in question; and to determine it, we must supersede the judgment and determination of the House of Commons, and a commitment in execution of that judgment.

Another objection has been made, which likewise holds out to us, if pursued in all its possible cases, some dreadful consequences; and that is, the abuses which may be made by jurisdictions from which there is no appeal, and for which abuses there is no remedy: but this is unavoidable; and it is better to leave some courts to the obligation of their oaths. In the case of a commitment by this Court or the King's-bench, there is no appeal. Suppose the Court of B. R. sets an excessive fine upon

a man for a misdemeanor, there is no remedy, no appeal to any other court. We must depend upon the discretion of some courts. A man not long ago was sentenced to stand in the pillory, by this court of Common Pleas, for a contempt. Some may think this very hard, to be done without a trial by jury; but it is necessary. Suppose the courts should abuse their jurisdiction, there can be no remedy for this: it would be a public grievance; and redress must be sought from the legislature. The laws can never be a prohibition to the houses of parliament; because, by law, there is nothing superior to them. Suppose they also, as well as the courts of law, should abuse the powers which the constitution has given them, there is no redress; it would be a public grievance. The constitution has provided checks to prevent its happening; it must be left at large; it was wise to leave it at large: some persons, some courts, must be trusted with discretionary powers; and though it is possible, it is in the highest degree improbable, that such abuses should ever happen; and the very supposal is answered by serjeant Hawkins, in the place cited at the bar. As for the case of the Chancery committing for crimes, that is a different thing, because the Chancery has no criminal jurisdiction; but if that court commits for contempts, the persons committed will not be discharged by any other court. Many authorities may be drawn from the reign of Charles, but those were in times of contest. At present, when the House of Commons commits for contempt, it is very necessary to state what is the particular breach of privilege; but it would be a sufficient return, to state the breach of privilege generally. This doctrine is fortified by the opinion of all the judges, in the case of lord Shaftesbury, and I never heard this decision complained of till 1704. Though they were times of heat, the judges could have no motive in their decision, but a regard to the laws. The houses disputed about jurisdiction, but the judges were not concerned in the dispute. As for the present case, I am perfectly satisfied, that if lord Holt himself were to have

determined it, the lord-mayor would be remanded. In the case of Mr. Murray, the judges could not hesitate concerning the contempt by a man who refused to receive his sentence in a proper posture. All the judges agreed, that he must be remanded, because he was committed by a court having competent jurisdiction. Courts of justice have no cognizance of the acts of the houses of parliament, because they belong 'ad aliud examen.' I have the most perfect satisfaction in my own mind in that determination. Sir Martin Wright, who felt a generous and distinguished warmth for the liberty of the subject; Mr. Justice Denison, who was so free from connexions and ambition of every kind; and Mr. Justice Foster, who may be truly called the Magna Charta of liberty of persons, as well as fortunes; all these revered judges concurred in this point: I am therefore clearly and with full satisfaction of opinion, that the lord-mayor must be remanded.

Just. Narcs.* I shall ever entertain a most anxious concern for whatever regards the liberty of the subject. I have not the vanity to think I can add any thing to the weight of the arguments used by my Lord Chief Justice and my brothers. I have attended with the utmost industry to every case and argument that has been produced, and most heartily and readily concur with my Lord Chief Justice and my brothers.

The Lord-Mayor was remanded to the Tower.

* The Judgments of Mr. Justice Gould and Mr. Justice Blackstone being inserted at large in vol. 8, pp. 33 *et seq.* are not here repeated. Note, in p. 38, l. 54, by an accident of the press, was omitted the following clause, viz. "that lord chief justice Scroggs thought he might be safely entrusted with the power of prohibiting and suppressing such publications as might give him offence." See the Case of Henry Carr, vol. 7, p. 1111; and also vol. 8, p. 187.

544. The Case of JOHN WILKES, esq. against ROBERT WOOD, esq. in an Action of Trespass. Before Lord Chief Justice Pratt, in the Court of Common Pleas, Michaelmas Term : 3 GEORGE III. A. D. 1763. [Lofft's Reports.]

JOHN WILKES, esq. against WOOD.

THE CASE OF GENERAL WARRANTS.

Middlesex to wit, Dec. 6, 1763.

AT the court of Common-Pleas, at Westminster. Sittings after Michaelmas term, before lord chief justice Pratt : John Wilkes, esq. plaintiff; Robert Wood, esq. defendant.

In an action of trespass, for entering the plaintiff's house, breaking his locks, and seizing his papers, &c.

The plaintiff's counsel were, serjeant Glynn, Mr. Recorder Eyre, Mr. Stow, Mr. Wallace, Mr. Dunning, Mr. Gardiner.

The defendant's counsel were, solicitor-general Norton, serjeant Nares, serjeant Davy, serjeant Yeates.

Attorney for the plaintiff, Mr. Phillips of Cecil-street.

For the defendant, Philip Carteret Webb, esq. solicitor to the treasury, and Mr. Secondary Barnes.

THE SPECIAL JURY.

Plukenet Woodroffe, esq. of Chiswick ;
William Baker, esq. of Isleworth ;
William Clarke, esq. of Edmonton ;
James Gould, esq. of Edmonton ;
Stephen Pitt, esq. of Kensington ;
Nathaniel Turner, esq. of Hampstead ;
Jonathan Richardson, esq. of Queen-Square ;
John Weston, esq. of Hatton-Garden ;
Harry Blunt, esq. of Hatton-Garden ;
Henry Bostock, esq. of Hatton-Garden ;
John Boldero, esq. of Hatton-Garden ;
John Egerton, esq. of St. John's-street.

Mr. Gardener opened the case, with declaring the foundation, that on the 30th of April last, Mr. Wood, with several of the king's messengers, and a constable, entered Mr. Wilkes's house ; that Mr. Wood was aiding and assisting to the messengers, and gave directions concerning breaking open Mr. Wilkes's locks, and seizing his papers, &c. for which Mr. Wilkes laid his damages at five thousand pounds.

Serjeant Glynn then enlarged fully, on the particular circumstances of the case, but remarked that the case extended far beyond Mr. Wilkes personally, that it touched the liberty of every subject of this country, and, if found to be legal, would shake that most precious inheritance of Englishmen. In vain has our house been declared, by the law, our asylum and defence, if it is capable of being entered, upon

VOL. XIX.

any frivolous or no pretence at all, by a secretary of state. Mr. Wilkes, unconvicted of any offence, has undergone the punishment. That of all offences that of a seizure of papers was the least capable of reparation ; that, for other offences, an acknowledgment might make amends ; but that for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation whatsoever could be made. That the law never admits of a general search-warrant. That in France, or Spain, even in the Inquisition itself, they never delegate an infinite [qu. indefinite] power to search, and that no magistrate is capable of delegating any such power. That some papers, quite innocent in themselves, might, by the slightest alteration, be converted to criminal action. Mr. Wilkes, as a member of parliament, demanded the more caution to be used, with regard to the seizure of his papers, as it might have been naturally supposed, that one of the legislative body might have papers of a national concern, not proper to be exposed to every eye. When we consider the persons concerned in this affair, it ceases to be an outrage to Mr. Wilkes personally, it is an outrage to the constitution itself. That Mr. Wood had talked highly of the power of a secretary of state ; but he hoped by the verdict he would be brought to think more meanly of it. That if the warrants were once found to be legal, it would sling our liberties into a very unequal balance. That the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of Englishmen. That their resentment against such proceedings was to be expressed by large and exemplary damages ; that trifling damages would put no stop at all to such proceedings : which would plainly appear, when they would consider the persons concerned in the present prosecution, persons, who by their duty and office should have been the protectors of the constitution, instead of the violaters of it.

Mr. Eyre, the Recorder of London, then stood up : he apologized to the bench for appearing in the present cause, considering the office he bore, but that he thought it was a cause which affected the liberty of every individual. [Lord Chief Justice desired he would make no apology.] He then observed, that the present cause chiefly turned upon the general question, whether a secretary of state has a power to force persons houses, break open their locks, seize their papers, &c. upon a bare suspicion of a libel by a general warrant, without name of the person charged. A strange question, to be agitated in these days, when

the constitution is so well fixed, when we have a prince upon the throne, whose virtues are so great and amiable, and whose regard for the subject is such, that he must frown at every encroachment upon their liberty. Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom. No legal authority, in the present case, to justify the action. No precedents, no legal determinations, not an act of parliament itself, is sufficient to warrant any proceeding contrary to the spirit of the constitution.

Secretary Williamson, in Charles the 2d's time, for backing an illegal warrant, was sent to the Tower by the House of Commons. The jury, he observed, had no such power to commit; he knew it well; but, for his part, he wished they had, as he was persuaded they would exercise it, in the present case, as it ought to be.

On the famous certificate in queen Elizabeth's time, how far a man might be detained by a warrant of a privy counsellor, the answer of the judges, even in those days, confined it to high treason only, and the power to arrest to be derived from the personal command of the king, or a privy counsellor. He then congratulated the jury, that they had now in their power the present cause, which had been by so much art and chicanery so long postponed. Seventy years had now elapsed, since the Revolution, without any occasion to enquire into this power of the secretary of state, and he made no doubt but the jury would effectually prevent the question from being ever revived again. He therefore recommends it to them to embrace this opportunity (least another should not offer, in haste) of instructing those great officers in their duty, and that they (the jury) would now erect a great sea mark, by which our state pilots might avoid, for the future, those rocks upon which they now lay shipwrecked.*

The first witness on the prosecution was *Matthew Brown*.—Says, that he is butler to Mr. Wilkes. That on the 30th of April last, about nine o'clock in the morning, Watson, Blackmore, Money, and Mann, king's messengers, and Chisholm, a constable, came to Mr. Wilkes's house. That Watson followed Mr. Wilkes into the house, and Money came next; Blackmore and Mann followed after. That this witness never heard them, or either of them, declare their business, or the purpose of their coming. That as soon as Mr. Wilkes was carried away, which was about noon, Mr. Wood and Mr. Stanhope came: that Mr. Wood asked Mr. Watson, "Have you locked up all the rooms where Mr. Wilkes's papers are?" He answered, "Yes; I have got the key of the study." That Mr. Wood and Mr. Stanhope then went into the parlour; the messengers continued waiting in the passage. That

soon after Mr. Webb knocked at the door; upon its being opened this witness attempted to stop him, but he rushed in. That Mr. Wood staid that time about half an hour; that when he went away he gave orders to the messengers, that no one should come in or go out till he returned, but bade them lock up all the doors. That he came back again in about an hour. That in the mean time several of Mr. Wilkes's friends came, viz. Humphry Cotes, Gardiner, Phillips, Hopkins, &c. and were denied admittance by the constable: that Watson, the messenger, upon being called upon by these gentlemen to produce his orders for refusing them admittance, said he had only a verbal order from Mr. Wood. That the messengers, however, did at last permit the gentlemen to come in. That soon after lord Temple came; that in a short time after Mr. Wood returned, and appeared to be very angry that the gentlemen had been admitted, "Who let these men in?" That the messengers answered, "They would come in." Mr. Wood then asked, "Who would come in?" Mr. Gardiner answered, "It was I, Sir." That soon after that Mr. Wilkes's friends went away; that Mr. Wood then called for a candle, which was brought him, and he and Mr. Stanhope then went up stairs, with Money and Blackmore, the messengers, who appeared to take their orders from Mr. Wood and Mr. Stanhope. That they rummaged all the papers together they could find, in and about the room; that they (the messengers) fetched a sack, and filled it with papers. That Blackmore then went down stairs, and fetched a smith to open the locks. That Mann, a messenger, then came, and would whisper Mr. Wood, who bade him speak out; he then said he brought orders from lord Halifax to seize all manuscripts. That the smith then came, and, by the direction of Blackmore, the messenger, opened four locks of the lower drawers of a bureau; that they took out all the papers in those drawers, and a pocket-book of Mr. Wilkes's, and put them all into the sack together, and then sealed up the sack. That this witness was present during all this time; that the messengers were obedient, and paid an entire regard to the directions of Mr. Wood and Mr. Stanhope. That when Mr. Wood went away it was near two o'clock in the afternoon; that Mr. Wood, upon the whole, might be near two hours and a half in Mr. Wilkes's house. That no kind of inventory was made of the papers which were put into the sack. That Mr. Stanhope appeared all along to be favourable, and frequently bade the messengers be cautious and careful.

Upon his being cross-examined, he said, That Mr. Wilkes was carried away about noon. That Mr. Wilkes went out in the morning about six, and returned home about nine o'clock. That Mr. Hopkins had been there that morning before. That Mr. Wood did absolutely and positively (this witness avers it) order, upon his going out, that all the doors should be locked up, particularly the street

* "N. B. The Recorder shone extremely." Left.

door: that Mr. Wood told the messengers they knew their orders, and bade them execute them. That he remembers Mr. Stanhope bid them be careful in rummaging, but don't recollect Mr. Wood said so. That Chisholm, the constable, held the sack, whilst the messengers filled it with papers. That Mr. Wood was not there when the locks were opened: he now says, that Mr. Wood had before declared that the locks must be opened. That Mr. Stanhope said, to be sure, the locks must be opened. That Mr. Wood he now says, was at one time above an hour in Mr. Wilkes's study. That Mr. Stanhope was there with Mr. Wood at the time the papers were carried away. That Mr. Webb was gone away some time before.

Richard Schofield says, that he is a livery servant to Mr. Wilkes: that he let Mr. Wood in at the door on the 30th of April, about eleven o'clock in the morning, as he thinks, to the best of his remembrance; that Mr. Wood staid the first time about a quarter of an hour. He confirms in general the last witness. That Wood went away, and returned in about an hour. That the messenger, upon being asked by Mr. Gardiner for his orders, said he had only verbal ones, from Mr. Wood. That he can give no account of what passed up stairs, as he remained all that time in the passage below. He confirms the last witness on that circumstance of the messenger, Mann's, coming from lord Halifax, with fresh orders. That a post-letter came, in the mean time, directed to Mr. Wilkes, which the messenger, Watson, received, and would not deliver till Mr. Wood returned, who immediately delivered it, unopened, into this witness's hands. That Mr. Wood, when he went away, ordered the doors to be kept fast locked, particularly the street-door. That Blackmore came down stairs, and asked this witness where Mr. Wilkes's smith lived, and he answered him he believed in Cheapside.

Upon his being cross-examined, he said, That Mr. Wood came about a quarter of an hour after Mr. Wilkes was carried away to lord Halifax. That Mr. Wood, Mr. Stanhope, the four messengers, with the constable, together with another gentleman, whom he did not know, were the persons who came into the house.

Humphry Cotes says, that he was at Mr. Wilkes's the 30th of April last, in the morning, about eleven o'clock, being sent for by Mr. Wilkes. That Mr. Wood came in between twelve and one: that he (this witness) had been down to the court of Common Pleas, to apply for a Habeas Corpus, and, upon his return to Mr. Wilkes's house, was told that Mr. Wilkes was not at home, and that he, Cotes, must not come in; this was between twelve and one o'clock. He demanded the reason why he must not come in, and by whose authority the door was locked. The man at the door answered, by the secretary of state's. [The Solicitor General disputed this evidence,

as Mr. Cotes did not declare the man's name.] But Cotes then said, that the door-keeper called Watson, the messenger, to him; who said he had the secretary's verbal order only, but not a written one. That this witness did then insist upon being admitted, and did accordingly enter the house. That Mr. Wood presently after came in, and said with anger, "What do these men do here?" That this witness then said, "What business have you here, Sir?" Mr. Wood answered, that he was the secretary of state's secretary. That this witness then said, he had nothing to do with the secretary of state, nor his secretary neither; that his name was Humphry Cotes, and was to be spoken with at any time. That he (this witness) staid at Mr. Wilkes's house till past two o'clock. That he was desired by Mr. Wood to be present when Mr. Wilkes's papers were sealed up, which he refused to do.

The Solicitor-General did not cross-examine him.

Richard Hopkins, esq. says, that he went to Mr. Wilkes on the 30th of April last, at half an hour past nine o'clock in the morning, and staid two hours; found then no kind of obstruction. That Mr. Wood was not there at this time, as this witness verily believes; but that, when he returned, Mr. Wood had been there. Confirms the last witness's account, of the obstructions to his entering the house, at this his last coming. That he was desired to be present at the sealing up Mr. Wilkes's papers, which he declined doing.

Arthur Beardmore says, that he was in Westminster-hall on the 30th of April last, and, hearing of Mr. Wilkes's arrest, he went directly to his house, and, with some difficulty, gained admittance. That when he gained admittance, and came into the parlour, Mr. Wood was there, altercation with the last witness, Mr. Hopkins. That Mr. Gardiner and Mr. Cotes were then there. That lord Temple was likewise there. That he (this witness) observing much confusion, demanded of Mr. Wood to shew his authority, and that much wrangling then ensued. That Mr. Wood and Mr. Webb were both there at this time. That Mr. Wood intreated the company to believe, that the secretaries had acted entirely pursuant to the advice and direction of the attorney and solicitor generals; to which this witness answered, that he very much doubted it. That this witness, coming into the parlour again through the passage, saw Mr. Webb standing at the foot of the stairs, with some keys in his hand, which this witness did presume, and verily did believe, to be some of Mr. Wilkes's keys to his private excheroires and drawers. That Mr. Wood did desire him (this witness) to be present at the sealing up Mr. Wilkes's papers, which he utterly refused to do. The counsel for the prosecution declined examining Mr. Gardiner and Mr. Phillips, (who had both been present) on account of their being employed in the cause; and therefore rest here.

The Solicitor General then stood up to make

the defence, which he divided into two parts; and first, he maintained the plea of not guilty; but if the jury should be of opinion that would not stand good, and that the evidence he should bring would not be capable of setting aside the evidence already produced in court on the other side; he then, secondly, relied on the special justification. He was at a loss, he said, to understand what Mr. Wilkes meant by bringing an action against Mr. Wood, as he was neither the issuer of the warrant, nor the executioner of it. If the constitution had been in such an egregious manner attacked, why not bring the secretaries of state, themselves, into court? Why should Mr. Wilkes commence separate actions against each person? Is Mr. Wilkes, at any event, entitled to tenfold damages? This was the first time he ever knew a private action represented as the cause of all the good people of England. If the constitution has, in any instance, been violated, the crown must be the prosecutor, as it is in all criminal cases. The constitution does not consist in any one particular part of the law; the whole law is the constitution of the country, and a breach in one part of the law is as much a violation of the constitution as of another. Though so much has been said on the other side, with regard to the injury that might result from the promulgation of secrets, no proof had been brought of anything being promulgated that was not proper to be so. The arguments which had been used against seizing of papers, to procure proof, were *j'lo de se*, unless the major was denied to include the minor. He then went upon the argument touching the warrant, and observed that these warrants had been issued as far back as the courts of justice could lead them. That the late act of parliament of George the second for taking up vagrants was a general search-warrant, and he never knew it was ever esteemed an infringement of our constitution. That these warrants had existed before, at, and since the Revolution, and had been till this case unimpeached; that if so contradictory to the constitution of this country, they could never have remained to this time.

He then made a general observation to the jury, that it was their duty to hear the cause coolly and dispassionately, without any bias to one side or the other. He then went on to make remarks on the evidence which had been given by the plaintiff; remarked that the question of liberty had nothing to do with the present cause, which only respected the seizure of papers. That the messengers went bunglingly about their business; Mr. Wood was only sent to see they did their duty.

He then went on to make remarks on the North Briton, N° 45. That it was a libel on the three branches of the legislative body, King, Lords and Commons; that it was a libel of such a nature, that when it was before the two Houses of Parliament not one single person, in either house, ever uttered one single word in defence of it. That the whole of the North Britons were of such a nature, that it astonished

most considerate persons how they should have passed so long unnoticed; that it had attacked private persons, persons in public stations, with their names written in full length; which had already produced bloodshed, in an instance which they all well knew: and what farther fatal consequences might result from those publications, who would be answerable! if Mr. Wilkes should be proved to be the author of these papers, and of that libel of libels, N° 45, (an equal to which he defied this or any other age to produce) if he should be proved to be the author of that paper, which he was confident he should be able to prove, to the full satisfaction of the court and jury; in that case, so far from thinking him worthy of exemplary damages, he was certain they would view him in his true and native colours, as a most vile and wicked incendiary, and a sower of dissension amongst his majesty's subjects. He then observed, that the freedom of this country consists, that there is no man so high, that he is out of the reach of the law, nor any man so low, that he is beneath the protection of it.

That the warrant was legal in itself: that the authority of a secretary of state was sufficiently established. That damages should always be reckoned according to the injury received: a jury that ever acted on any other principles certainly forswore themselves.

Lord *Hulifax* then came into court, and being sworn, said, that he did receive information concerning N° 45. That he did issue warrants in consequence of such information. That he did desire Mr. Weston, his secretary, to go to Mr. Wilkes's, and see that the messengers did their duty: that Mr. Weston declined it, beseeching his lordship to excuse him, on account of his weak nerves, and ill state of health; that he then did desire Mr. Wood to go, who accordingly went. That he had reason to believe that Mr. Wilkes was the author of N° 45. That he had information previous to the apprehending Mr. Wilkes, and his lordship believes, to the best of his remembrance, it was on the very day the warrant was put in execution. That this information tended to prove Mr. Wilkes the author of N° 45; but he cannot pretend to charge his memory with the entire contents of the information. That orders were given by his lordship to the messengers, but he declares that he cannot, at this time, pretend to recollect either their names or their persons. That these orders were given by his lordship previous to the apprehension of Mr. Wilkes.

Upon the Lord Chief Justice expressing a desire to be informed by his lordship concerning the nature of the information said to be received at his office, and about which his lordship appeared rather shy, and cautious of entering upon, the solicitor-general then produced an affidavit of Walter Balf, a printer in the Old Bailey, which was read, in order to prove Mr. Wilkes the author of N° 45. [I cannot recollect the whole of this affidavit, but it had in general a tendency to prove

Wilkes the author and this Balf the printer of N° 45.]

Upon lord Halifax's being cross-examined, he said, that Mr. Weston is his own secretary, and that Mr. Wood was lord Egremont's secretary. His lordship was asked, whether he should think himself then authorized to command the secretary of lord Egremont to do any thing. After some hesitation, his lordship answered, not without consulting lord Egremont. Said, that the offices are carried on in separate departments, but form only one complete secretaries office. He owns, however, that each secretary has the entire choosing and appointing his own officers. That the warrant for the apprehension of Mr. Wilkes was issued (as he calls it, which, being explained, signifies made out) on the 26th of April last, and the information he now fixes to have been received on the 29th of April, and the arresting Wilkes's person on the 30th day of April. [N. B. His lordship here fairly acknowledges that he issued the warrant three whole days before he received any information at all; and that during these three days the warrant lay dormant, whilst they were upon the hunt for intelligence.]

The king's speech at the close of the last session of parliament was then read.]

The North Briton, N° 45, was afterwards read.

Some strictures of the solicitor-general then ensued, upon the heinousness of the author's crime.

Thomas Cadell says, That he is apprentice to Andrew Millar, a bookseller in the Strand; that he is nearly out of his apprenticeship. That Mr. Wilkes called there in the summer of 1762, and left word with him, (this witness) that his master should advertise a new paper, shortly to come out, entitled the North Briton, and to be published by him (Millar): that his master did, in consequence, advertise it, and was paid by Mr. Wilkes the sum of one pound eight shillings, for advertisements. [N. B. The receipt was produced in court.] That his master did afterwards, upon considering the affair, decline publishing the North Briton; saying he would publish no political matters.

Serjeant Glynn then objected to their going into the evidence, to prove Mr. Wilkes the author of other papers, which had no respect to the paper in question; but

The Lord Chief Justice allowed it to be a good corroborating chain: but observed, if they failed in the last link, the whole would fall to the ground.

William Johnston says, that he is a bookseller in Ludgate-street. That Mr. Wilkes applied to him to publish the North Briton, previous to it's appearing: that Mr. Wilkes did explain to him the general design; that he said he must have a publisher who would not stand in fear of the censures of justice. That he never met Mr. Wilkes any where on this account; but that Mr. Wilkes always came to him. That he, (this witness) upon considera-

tion of the matter, declined publishing the North Briton. That Mr. Wilkes then desired him to recommend a publisher: that he recommended Mr. Kearsley to him. That he (this witness) had a correspondence with Mr. Wilkes, concerning the North Britons, and revising them for the press; but that, after three or four numbers of the paper were published, he (this witness) did, upon considering the affair, decline that also.

Jonathan Scott says, that he knows Mr. Wilkes's hand-writing, and proves a number of letters shewn him to be Mr. Wilkes's hand-writing, viz.

N° 1, dated Westminster, 26 July 1762; 2, ditto, 29 July; 3, ditto, 8 August; 4, Aylesbury, 15 August; 5, ditto, 25 August; 6, Great George-street, 7 October; 7, Winchester, 14 October; 8, ditto, 31 October; 9, Great George-street, Friday morning; 10, ditto, 27 November; 11, ditto, 12 December; 12, ditto, 17 December. All these were read; they are to Kearsley, and relate to North Britons, then sent to be published. [N. B. Between twenty and thirty letters were produced, but these only were read.]

Walter Balf says, in the first place, that he is under a recognizance, and therefore prays he may be excused from answering any question which may tend to affect or injure himself.

A debate ensued for near an hour, whether he may or may not be allowed the privilege.

The Solicitor-General very strenuously asserts, that in the present case he may not be allowed it.

Serjeant Glynn, and the Recorder, reply to him.

The Lord Chief Justice gives it as his opinion, that the man is not bound to answer to any matter which may tend to accuse himself.*

Balf then says, that he is a printer in the Old Bailey, and that he knows Mr. Wilkes.

Q. Did you receive this letter? [One being shewn to him.]-A. Yes.

A letter of the 22d of April was then read of Mr. Wilkes to Walter Balf, which, from the purport of it, has a strong tendency to prove Wilkes the author of N° 45. This letter of Wilkes refers to an enclosed paper (which paper does not appear) which he directs Balf to bring in, in the form of a letter, betwixt the conclusion of the next North Briton, and his proposals. This letter likewise directs Balf to print the North Briton spoken of, in the compass of two sheets.

Charles Shaw says, that he is an apprentice to Walter Balf the last witness. That the North Briton, N° 45, was printed at his master's house. That he knows Mr. Wilkes, and has seen him often at his master's house, but that he does not know the business upon which he came there.

George Kearsley sworn, but not suffered to

* 'Nemo tenetur seipsum accusare.' Loft.

be examined, being under a prosecution at this time.

Michael Curry says, that he is a journeyman printer, that he was employed by Mr. Wilkes to work at the press in Great George-street; that Mr. Wilkes gave them the whole set of the North Britons to be printed, and called them at that time his North Britons.

The Counsel for the Prosecution objected to this last being a proper evidence at all to the questions; as Mr. Wilkes or any other person's republishing a work, against which there was no judicial determination, could never affect them, as the original author and publisher of it. They then went into the legality of the warrant, and many precedents of the same kinds of warrants were produced in court, to prove such warrants the constant uninterrupted course of the secretaries office from the Revolution. The warrants from lord Halifax, for apprehending the authors, printers and publishers of the North Briton, N° 45, were likewise read.

Lovell Stanhope, esq. says, that he came to Mr. Wilkes's house immediately after he was carried away to lord Halifax's; that he went with Mr. Wood, and stayed there half an hour; that he was there but once, and stayed till the papers were sealed up; that he never went out of the study; that Mr. Wood was in the study but part of the time, and did nothing at all but observe what past; that he (Mr. Wood), gave no orders to break locks by any kind of means, nor gave the messengers any orders or directions at all, but only bade them do their duty, and use civility! That Mr. Wood was not in the room when the smith was sent for, nor gave any orders for that purpose, as Mr. Stanhope observed; that Mr. Wood was not present when the locks were opened. But that it was Blackmore, the messenger, who broke open the locks, (in this circumstance Mr. Stanhope exactly confirms Matthew Brown's evidence.) That Mr. Wood went to Mr. Wilkes, merely at the instance of lord Halifax, in order to enforce a due and proper obedience to and execution of the warrant, and to prevent the messengers from committing any blunders. That a debate arising, whether a table with a locked drawer should be removed entire or be opened, Mr. Mann was sent to lord Halifax for directions, and brought word that the drawers must be opened.

Upon his being cross-examined, said that the messengers were to take manuscript papers only, and not meddle with improper matters, such as printed books, papers, &c. That he did think it incumbent upon him (this witness) to see that all the proper papers should be removed.

Robert Chisholm says that he was the constable called upon to attend the messengers to Mr. Wilkes; that it was on the 30th of April last, at six o'clock in the morning, that he was called upon; that Mr. Wood came immediately after Mr. Wilkes was carried away; that he (this witness) heard Mr. Wood give no kind of

orders at all; in short, that his opinion is, Mr. Wood only came to take care that the messengers did nothing that was wrong or improper.

Mr. Dunning asked this witness, whether he then imagined, that Mr. Wood appeared there merely on behalf of Mr. Wilkes, as his friend—he answered 'not so neither.' This witness shuffled and prevaricated very much, and contradicted his own evidence more than once.

Philip Carteret Webb, esq. says, that Mr. Wood was sent by the secretaries, merely to see that the messengers executed their warrants in due form and order; that he (this witness) was only once at Mr. Wilkes's, and then not more than half an hour; that he went because the secretary of state was uneasy, and anxious to know what was doing at Mr. Wilkes's; that he (this witness) was never up stairs at Mr. Wilkes's; that he had a conversation with lord Temple in the parlour. That he denies he had ever any keys of Mr. Wilkes in his hands; that he verily believes he had no keys at all in his hands; but that if he had any, they were his own and not Mr. Wilkes's. Upon being cross-examined by Mr. Dunning, Philip Carteret Webb then said, that upon recollection he was absolutely certain, that he had no keys at that time in his hands. That Mr. Weston was desired by lord Halifax to go, but that he excused himself on account of his weak nerves, and ill state of health, and that upon his (Mr. Weston) declining it, Mr. Wood was desired by my lord to go, which he accordingly did.

Richard Watson says, that he is a king's messenger, that he was at Mr. Wilkes's on the 30th of April last, that Mr. Wood was there, and did nothing at all as this witness observed, but only gave them directions how to act.

The Solicitor General observed, when Balf and Kearsley's evidence were set aside, that he placed little dependance on their evidence, as to the proof of Mr. Wilkes being the author of N° 45, and indeed he said it was not very material, for that the letter from Mr. Wilkes to Balf the printer which had been read, see page 26, and which he then held in his hand, was conclusive evidence against him. Norton expatiated long upon the circumstance of this letter: he observed that it was a lucky circumstance for them that N° 45 was the only number of the North Briton which was printed on two sheets of paper, that it was the only number that had a letter at the end of it, with the proposals following. He enlarged very fully on all these corresponding circumstances.

L. C. J. Pratt asked for the letter which was enclosed, that he might compare it with the letter at the end of the North Briton, N° 45.

But the Solicitor General answered, he had it not.

Serjeant Glynn in his reply observed, that the manner of defence that had been set up would necessarily make his reply longer than it otherwise would have been. What he had to remark he should divide under two heads, 1st, as to the defence which had been set up of

not guilty; and *adly*, make observations on the special justification that had been pleaded.

The evidence proved, uncontroverted, that Mr. Wood was the prime actor in the whole affair. He then observed that the three witnesses on the side of the defendant gave different evidences of the business Mr. Wood came about: Mr. Philip Carteret Webb's account was quite inconsistent: was it possible to suppose that a man of Mr. Wood's character and known abilities should be sent only with a message that any menial servant could have delivered as well; and that he should have nothing else to do with the affair. He then observed that all the witnesses called to oppose the evidence on their side were all parties, and against whom prosecutions of a like nature were at present depending. He then went upon the point of justification, and observed, that as to Mr. Wilkes being the author of N° 45, they had totally failed in any kind of proof whatsoever; or if they had produced the appearance of a proof, it was quite aside to the present question, and to which he should not at any event have made any reply, as there was at present depending a prosecution, as to that particular point, in his defence of which he made no doubt he should be able fully to prove, that Mr. Wilkes was not the author.— That Mr. Wilkes could not be supposed or even suspected of any design against the present establishment; that he was educated in and had always adopted Whig principles; that he was known to be attached to and to have the highest opinion of the present prince on the throne, which he had often and upon many occasions declared; and his conduct had always been answerable to these declarations. When crimes have been exaggerated, and so much declamation made use of as there has been on the present occasion, one would naturally have expected that some proof would have followed; but that in reality could never have been the case, as the sole design was to blacken Mr. Wilkes's character, without any foundation in fact. He then observed that various hands were commonly employed in most periodical works; that Mr. Wilkes was not denied to be the author of some of the North Britons; but that it was not likely he was the author of N° 45, and that indeed the republication of the work in volumes, in which was N° 45, so far from being a presumption against him, certainly affords the strongest reason to think he was not the author; for if he had been so, it is not likely he would have been concerned in a publication, whilst a criminal process was depending. He then observed as to the warrant, that it was destitute of those things necessary to make it legal: that a previous information was always necessary. That the defendants had nothing to entitle them to a verdict; that the evidence they had set up was perfectly declamatory and unfair: possibly Mr. Solicitor General's office, might demand from him what he had said; but that he was well satisfied, from that gentleman's known

good character and great abilities, that he would have refused to plead in a cause of a similar nature, which he was not forced to do *ex officio*. He was satisfied the jury would not view Mr. Wilkes as not entitled to a verdict, because loaded with calumny: that the case was a wound given to the constitution, and demanded damages accordingly: that Mr. Wilkes's papers had undergone the inspection of very improper persons to examine his private concerns, and called for an increase of damages on that score. The evidence brought of precedents of these kind of warrants only shew how easy things may creep into our constitution, subversive of its very foundation. He then closed with telling the jury he made no doubt but they would find a verdict for the plaintiff, with large and exemplary damages.

The Lord Chief Justice then summed up the evidence of the whole, and observed it was an action of trespass, to which the defendant had pleaded first Not Guilty, and then a special justification. He then went through the particulars relating to the justification, the king's speech, the libel N° 45.

Information given, that such a libel was published,

Lord Halifax granting a warrant; messengers entering Mr. Wilkes house; Mr. Wood directed to go thither only with a message, and remaining altogether inactive in the affair.

If the jury should be of opinion, that every step was properly taken as represented in the justification, and should esteem it fully proved, they must find a verdict for the defendant. But if on the other hand they should view Mr. Wood as a party in the affair, they must find a verdict for the plaintiff, with damages. This was a general direction his lordship gave the jury, and he then went into the particulars of the evidence. The chief part of the justification, he observed, consisted in proving Mr. Wilkes the author, and the evidence given, together with the letters to Kearsley, plainly shew, that Mr. Wilkes was generally so. Then as to N° 45, the evidence was of two sorts, first a letter to fix it upon him, and the other general: as to the proof of the republication of the North Britons given by Currie, supposing it of itself sufficient, of which there was a doubt, it did not extend to the present case, to justify a warrant issued several weeks previous to that period. As to the letter, the gentlemen must take that out with them, together with the North Briton, N° 45, and allow all the weight to the circumstance they think it will admit of.

If upon the whole they should esteem Mr. Wilkes to be the author and publisher, the justification would be fully proved. But that, to do this, it was essentially necessary to have the enclosed paper in the letter to Balf, as, without that, all the rest was but inference, and not the proof positive which the law required. As to Mr. Wood, he was described on

one side as very active in the affair, and on the other side as quite inoffensive. Aiders and abettors are always esteemed parties; but if a person present remains only a spectator, he cannot be affected. The evidence on the one side had been positive, and on the other side only negative. Mr. Wood might have said and done as represented on the one side, when the evidences on the other side were not present: if upon the whole they should be of opinion, that Mr. Wood was active in the affair, they must find a verdict for the plaintiff with damages. His lordship then went upon the warrant, which he declared was a point of the greatest consequence he had ever met with in his whole practice. The defendants claimed a right, under precedents, to force persons' houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicious may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.

And as for the precedents, will that be esteemed law in a secretary of state which is not law in any other magistrate of this kingdom? If they should be found to be legal, they are certainly of the most dangerous consequences; if not legal, must aggravate damages. Notwithstanding what Mr. Solicitor General has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.*

As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lays upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the office precedents, which had been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution; though its having been the constant practice of the office, might fairly be pleaded in mitigation of damages.†

* *Vita reipublicæ pax, et animus libertas, et libertatis, firmissimum propugnaculum sua cuique domus legibus munita. Lofft.*

† *Ut pœna ad paucos, metus ad omnes pertingat.*

Indicandum est legibus non exemplis. Lofft.

He then told the jury they had a very material affair to determine upon, and recommended it to them to be particularly cautious in bringing in their verdict. Observed, that if the jury found Mr. Wilkes the author or publisher of N° 45, it would be filed, and stand upon record in the court of Common-Pleas, and of course be produced as proof, upon the criminal cause depending, in bar of any future more ample discussion of that matter on both sides; that on the other side they should be equally careful to do justice, according to the evidence; he therefore left it to their consideration.

The Jury, after withdrawing for near half an hour, returned, and found a general verdict upon both issues for the plaintiff, with a thousand pounds damages.

After the Verdict was recorded, the Solicitor-General offered to prefer a Bill of Exceptions, which the Lord Chief Justice refused to accept, saying it was out of time.

The Court sat at nine o'clock in the morning, and the Verdict was brought in at twenty minutes past eleven o'clock at night.

It appears, that it was usual in the commissions of governors of the American provinces to insert a clause referring to such farther powers, instructions and authorities, as should at any time thereafter be granted or appointed to such governors under the king's signet and sign manual, and occasionally so to grant to such governors powers which had not been specified in their commissions.

The learned and constitutional author of the 'Canadian Freeholder,' (Dialogue 21, p. 212) after animadverting on this practice, observes:

"The dangers, attending the abuse of the great seal, make it difficult for the crown to do illegal acts under that sanction: because the lord chancellor, from his knowledge of law and history, his habits of examining matters of state with care and caution, and surveying all their relations and consequences, will not easily be brought to use the great seal for such purposes. But the case is otherwise with respect to the king's signet. The instruments executed under the king's signet are countersigned by the king's secretaries of state, without ever undergoing the lord chancellor's examination, or that of the privy council, or even of the attorney-general, or any other person who, from his education and station in life, may be supposed to be acquainted with the law. For as to the secretaries of state, they are usually men of high rank, born to titles and great estates, and bred in habits of ease and luxury, and but little acquainted, or inclined to become acquainted, with so dry a subject as the law. Persons of this description, when they are placed in stations of authority, are much more likely to advise their sovereign to do acts of an irregular, or doubtful nature, without inquiring

how far the law allows of them, than a learned and grave lord chancellor, if it were but through mere ignorance, and though their intentions were very pure: but it often happens that to this ignorance of the law they add a contempt for it, and a disposition to disregard its restraints, and overleap the limits it prescribes to their authority, which they are apt to consider as narrow pedantic rules which it is below their dignity to submit to, and, like Achilles in the character given of him by Horace, 'Jura negant sibi nata, nihil non arrogant armis.' They are therefore fond of the doctrines of 'reason of state, and state necessity, and the impossibility of providing for great emergencies and extraordinary cases, without a discretionary power in the crown to proceed sometimes by uncommon methods not agreeable to the known forms of law,' and the like dangerous and detestable positions, which have ever been the pretence and foundation for arbitrary power. I do not mean that all secretaries of state are of this way of thinking: for undoubtedly some of those ministers have been men of a different character: but there have been, as I believe, enough of that disposition to warrant me in saying that it is the general spirit and complexion of the office. Nor would it be difficult to find proofs of this extra-legal, or rather supra-legal, disposition in the powers they have assumed to themselves without any clear warrant of law for so doing, and in the manner they have exercised those powers thus unwarrantably assumed: of which I will mention to you one remarkable instance, which, in the case of the celebrated Mr. Wilkes, some years ago engaged the attention of all England. That gentleman had written, (or I should rather say, was supposed to have written; for it was never proved upon him;) a political paper called the *North Briton*, N^o 45, in the month of April, 1763, soon after the conclusion of the late definitive treaty of peace, by which this province of Canada was ceded to the crown of Great Britain, in which paper there was a passage that gave offence to the Court, and was considered as in a high degree seditious. Upon this a resolution was taken by the king's ministers of state to arrest Mr. Wilkes, and prosecute him in the court of King's-bench for writing and publishing the said seditious paper, or libel; and he was accordingly arrested, and all his papers of every kind were seized, by virtue of a warrant issued to one of the king's messengers by the late earl of Halifax, who was at that time one of his majesty's secretaries of state. And this warrant was a general warrant, which did not mention Mr. Wilkes's name, but empowered the messenger to arrest the persons (whoever they might be) who had been concerned in writing and publishing the said seditious paper, called the *North Briton*, N^o 45. This omission of Mr. Wilkes's name made the warrant utterly illegal, because it required the king's messenger (who was a mere ministerial officer, or rather who acted as such) to do that which was the business of a judicial

officer, or magistrate, that is, to exercise an act of judgment of an high nature by determining who were, and who were not concerned in the commission of the offence in question. This was an act of judgment of so important a kind that even a magistrate ought not, according to the maxims of the English law, to have ventured to do it without having received an information upon oath from some credible witness, that such or such a person had committed the offence in question, to be a ground for his ordering him to be arrested; because, if magistrates had a power of arresting men without such previous information, and merely upon their own suspicions, or pretended suspicions, they might cause any person how innocent soever, to be thrown into prison whenever they thought fit. And much less can a magistrate delegate such a power of determining who is the person that has committed a particular offence, to a mere ministerial officer of justice, such as the king's messenger, which is done whenever a general warrant is issued. This general warrant therefore issued by lord Halifax was clearly illegal, and consequently the arrest and imprisonment of Mr. Wilkes in pursuance of it were illegal likewise, and became a just ground for an action at law at the suit of Mr. Wilkes against lord Halifax, the secretary of state, for a false, or wrongful imprisonment of him: and Mr. Wilkes did afterwards accordingly bring such an action against him in the court of Common Pleas in England, and did recover, by the verdict of a jury, a large sum of money as a compensation for the damage he had wrongfully sustained by such imprisonment. It must nevertheless be acknowledged, in justice to the late lord Halifax, that, though he issued the said general warrant, he was not incited to do so by the haughty spirit which I have been just now describing as too apt to influence the great men who fill those offices, but was himself rather inclined, (from his own natural good sense, and, as we may suppose, the moderation of his temper,) to insert Mr. Wilkes's name in the warrant, but was overpersuaded to the contrary by Mr. Philip Carteret Webb, who was at that time solicitor to the treasury, and who urged him to make the warrant general, because, he said, it had been the constant usage of former secretaries of state to frame their warrants in that manner, as indeed he afterwards proved to the world that it had been, by publishing a collection of warrants issued by different secretaries of state on various occasions in almost every reign for the preceding hundred years, or from the year 1662, if my memory does not deceive me, of which the greater part were drawn up in that vague and general manner. This may, perhaps, be sufficient to exculpate the late lord Halifax; but it serves strongly to prove the violent spirit which has usually prevailed in the persons who have held the office of secretary of state, since it shews that for a hundred years together they have taken upon them to act, in the business of arresting state offenders, in a

manner that bids open defiance to the first principles of law and justice. And this they have done too, without ever having been clearly invested by any statute of the kingdom, with any power of arresting men at all, even by warrants that name, or describe exactly, the persons who are to be arrested by them, and that are grounded upon previous informations of credible witnesses upon oath; and certainly without having any such authority by virtue of the old common law, or general usage of England from time immemorial, because the office of secretary of state itself has not existed long enough for that purpose, being no older than the reign of Henry the 8th, which began in the year 1509, whereas, in order to be possessed of such an authority by ancient custom from time immemorial, it ought to have been possessed of it before the time of king Richard the 1st, or about the year 1189. But the truth is, that the king's secretaries of state are his clerks, or letter-writers, whose business it is to make known his majesty's pleasure, to his ambassadors in foreign courts, or to ambassadors of foreign courts at his majesty's court, or to his majesty's subjects in his own dominions on various occasions, but are not, or, at least, were not originally, his majesty's magistrates, or the delegates of his judicial power for the purpose of administering justice in his name and behalf in any respect, and therefore ought not to arrest state offenders, any more than any other offenders, or any more than they ought to try them for their offences and condemn them to punishment as is done by real magistrates. For the arresting, trying, and condemning men for offences against the laws are, all of them, branches of the judicial power of the crown, and ought therefore to be exercised only by the known magistrates of the kingdom, to wit, the judges and justices of Oyer and Terminer, and justices of the peace, who are regularly invested with competent authority for that purpose by commissions under the great seal. And, as to the king's messengers, they are not the proper ministerial officers of justice, like sheriffs and constables, but are only (as their name imports) servants kept in the king's pay for the purpose of carrying messages for him with fidelity and expedition, either within the kingdom or without, as, for instance, to carry dispatches to his majesty's ambassadors in foreign countries: so that it seems doubtful whether even a legal warrant to arrest a man, issued by a known magistrate, as a justice of the peace or a judge of the Court of King's-bench, can be legally executed by one of these messengers, unless it be in those cases, (if there are such,) in which it may be executed by any person whatsoever as well as by a sheriff or constable, or other known ministerial officer of justice. You see therefore that there is a threefold irregularity grown up in the secretary of state's office with respect to this practice of arresting men for state offences. In the first place they have erected themselves into judicial officers, or

magistrates, for this purpose; in the second place they have made use of king's messengers, instead of sheriffs, or constables, or other known ministerial officers of justice, to execute their warrants; and in the third place they have framed their warrants in a general manner, without naming the particular persons they meant to have arrested, and confining the warrants to them only, but leaving a liberty to the messengers, who are to execute the warrants, to arrest any persons whom they, the messengers, shall think, or say that they think, to have been guilty of the offences in question. These are strange licenses that have crept into the practice of the secretary of state's office, and they sufficiently shew the violent spirit that has prevailed in it."

For the evidence which Mr. Philip Carteret Webb gave in this Case, an indictment for perjury was instituted against him; of the proceedings upon which my excellent friend, Mr. Baron Maseres, has furnished me with the following Note taken by himself:

Easter Term, May 10, 1764.

A Motion was made in the King's-bench to quash an indictment for perjury, against Mr. Webb, the solicitor of the Treasury, upon account of its insufficiency. The case was as follows. In the action of trespass brought by Mr. Wilkes against Mr. Wood, the under secretary of state, for forcibly entering his house and seizing his papers, Mr. Beardmore had been a principal witness on behalf of Mr. Wilkes to prove the trespass; and in giving his evidence, he had said that Mr. Webb was present there aiding and assisting in seizing Mr. Wilkes's papers, and that he (Beardmore) had seen him (Webb) with a key in his hand. Afterwards Mr. Webb was examined as a witness on behalf of the defendant Mr. Wood; and amongst other things he then declared, with a particular reference to Mr. Beardmore's evidence above-mentioned, that he never had had a key at all of any kind, or belonging to any person, in his hand on that occasion, notwithstanding what that man, meaning Beardmore, had sworn. This assertion of Mr. Webb's that he had no key in his hand on that occasion was intended to be the subject of an indictment of perjury. And accordingly at the Epiphany general sessions of the peace at Hicks's-hall, about Jan. 7, 1764; a bill of indictment was preferred against him, for wilful and corrupt perjury, in swearing that he had no key in his hand, and this indictment was supported by four witnesses whose names were indorsed upon the back of it, and was found by the grand jury. But soon after the finding of this indictment, the counsel for the prosecutor of it took notice that it was not accurately drawn, the person who drew it (who was Mr. Wallis) having barely stated the words

sworn by Mr. Webb, without sufficiently setting forth that they had a material relation to the issue in the cause in which they were spoken, which might and ought to have been done by stating that Mr. Beardmore was a material witness in the cause, that he had sworn that he had seen Webb with a key of Mr. Wilkes's drawers in his hand, and that Webb was examined after Beardmore, and swore, with a particular reference to Beardmore's evidence, and with a view to discredit the whole of his testimony and render it of no weight with the jury, that he had no key at all in his hand, notwithstanding what that man, Beardmore, had sworn. The counsel for the prosecution having observed this defect in the indictment, neglected to take out process upon it, intending to prefer a more correct indictment at the next sessions of the peace, which they accordingly did prefer, and the grand jury found it. And Mr. Webb had, probably for the same reason, hurried on the process upon the first indictment as fast as possible, and endeavoured to bring it to a trial, in hopes to forestall and prevent any proceedings against him upon the second and more accurate indictment. And as the time for trial upon the first indictment was now appointed, the counsel for the prosecution this day moved the Court to quash the first indictment upon the ground of the fore-mentioned insufficiency, to prevent the trial being had upon it, and offered to proceed with all expedition to trial upon the second indictment. And the Court, after a good many difficulties, did grant the motion, and ordered the first indictment to be quashed, upon condition that the second indictment should stand in the place of the first to all intents and purposes, so that it should be tried at the same time, and by the same special jury that were already struck to try the first indictment. [In relation to this, see *Perry's Case*, A. D. 1793.] They said unanimously, that a motion to quash an indictment made by the prosecutor of the indictment was by no means a motion of course; for that, if it were, it would be in the power of a prosecutor purposely to make his indictments defective in some small particular, and then to move to quash them, and prefer new ones twenty times over, and thereby to keep the person prosecuted in continual suspense and under the terror of a prosecution without ever bringing him to a trial, which would be a very great oppression; that therefore the Court would always exercise their discretion in relation to it, and either quash, or refuse to quash the indictment at the motion of the prosecutor as they should think proper upon consideration of the circumstances. A case much relied on in this motion by the counsel for the prosecution was that of the *King and Snow*, in *Foster's Reports of the Crown Law*; and *Judge Wilmot* mentioned on the other side, to shew that this was not a motion of course, the *Case of the King and Moore* in *Strange's Reports*.

May 21, Mr. Webb was tried on the second

indictment at the sittings at Westminster before lord Mansfield. And it was proved on the part of the crown that Mr. Webb had had a key in his hand in Mr. Wilkes's house on the fore-said occasion. This was clearly proved by three or four credible witnesses, who all swore positively to it; and some of them said that one of the persons then present in Mr. Wilkes's house had observed it to the rest at the very time, and desired them to take notice of it that they might remember and testify it clearly if occasion should require it; and that he had used some such words as these: "I suppose if any action should be brought against Mr. Wood or Mr. Webb for this trespass, they will pretend that they had no hand in it, but were mere lookers on, and that the messengers were the only actors in it. Therefore, pray, gentlemen, observe and remember that Mr. Webb had a key in his hand;" meaning that Mr. Webb had either been opening or was going to open, Mr. Wilkes's study with it, it being, as they all declared, a large key of the size of a chamber-key. This fact therefore of Mr. Webb's having had a key in his hand on that occasion seems to have been sufficiently proved, though the defendant afterwards brought three or four persons, king's messengers and others, who were present at Mr. Wilkes's house on that occasion, who swore that they did not see any key in Mr. Webb's hand, though they were there the whole time, and probably must have seen in it. But in the hurry of that transaction it is possible they might not observe it; and therefore their evidence can never be supposed to countervail and destroy the clear and positive and circumstantial testimony of the witnesses on the affirmative side of the question.

The evidence concerning Mr. Webb's swearing at the former trial was as follows: it was proved that Mr. Beardmore had been the last witness examined on the side of Wilkes in that trial; and that, after relating many important particulars relating to the trespass committed in Mr. Wilkes's house, he had said that he saw Mr. Webb there with a key in his hand. That afterwards Mr. Webb, voluntarily offering himself to be a witness on the side of Mr. Wood, had sworn as follows:

"One of the witnesses has sworn that he saw me with a key in my hand. Now this is absolutely false; for I am positive I had no key in my hand any part of the time." That upon this Mr. Dunning, one of Mr. Wilkes's counsel, had bid Mr. Webb reflect seriously on what he was swearing; for that they were well assured that he had been seen with a key in his hand. That thereupon Mr. Webb somewhat softened his denial, and said, "If I had a key in my hand, I am sure it was not Mr. Wilkes's key: but I am almost sure I had no key." That upon this Mr. Dunning had said that that answer was not sufficiently direct, and that he required a direct and positive answer from him whether he had a key in his hand on that occasion or not. That upon this

manner that bids open defiance to the first principles of law and justice. And this they have done too, without ever having been clearly invested by any statute of the kingdom, with any power of arresting men at all, even by warrants that name, or describe exactly, the persons who are to be arrested by them, and that are grounded upon previous informations of credible witnesses upon oath; and certainly without having any such authority by virtue of the old common law, or general usage of England from time immemorial, because the office of secretary of state itself has not existed long enough for that purpose, being no older than the reign of Henry the 8th, which began in the year 1509, whereas, in order to be possessed of such an authority by ancient custom from time immemorial, it ought to have been possessed of it before the time of king Richard the 1st, or about the year 1189. But the truth is, that the king's secretaries of state are his clerks, or letter-writers, whose business it is to make known his majesty's pleasure, to his ambassadors in foreign courts, or to ambassadors of foreign courts at his majesty's court, or to his majesty's subjects in his own dominions on various occasions, but are not, or, at least, were not originally, his majesty's magistrates, or the delegates of his judicial power for the purpose of administering justice in his name and behalf in any respect, and therefore ought not to arrest state offenders, any more than any other offenders, or any more than they ought to try them for their offences and condemn them to punishment as is done by real magistrates. For the arresting, trying, and condemning men for offences against the laws are, all of them, branches of the judicial power of the crown, and ought therefore to be exercised only by the known magistrates of the kingdom, to wit, the judges and justices of Oyer and Terminer, and justices of the peace, who are regularly invested with competent authority for that purpose by commissions under the great seal. And, as to the king's messengers, they are not the proper ministerial officers of justice, like sheriffs and constables, but are only (as their name imports) servants kept in the king's pay for the purpose of carrying messages for him with fidelity and expedition, either within the kingdom or without, as, for instance, to carry dispatches to his majesty's ambassadors in foreign countries: so that it seems doubtful whether even a legal warrant to arrest a man, issued by a known magistrate, as a justice of the peace or a judge of the Court of King's-bench, can be legally executed by one of these messengers, unless it be in those cases, (if there are such,) in which it may be executed by any person whatsoever as well as by a sheriff or constable, or other known ministerial officer of justice. You see therefore that there is a threefold irregularity grown up in the secretary of state's office with respect to this practice of arresting men for state offences. In the first place they have erected themselves into judicial officers, or

magistrates, for this purpose; in the second place they have made use of king's messengers, instead of sheriffs, or constables, or other known ministerial officers of justice, to execute their warrants; and in the third place they have framed their warrants in a general manner, without naming the particular persons they meant to have arrested, and confining the warrants to them only, but leaving a liberty to the messengers, who are to execute the warrants, to arrest any persons whom they, the messengers, shall think, or say that they think, to have been guilty of the offences in question. These are strange licenses that have crept into the practice of the secretary of state's office, and they sufficiently shew the violent spirit that has prevailed in it."

For the evidence which Mr. Philip Carteret Webb gave in this Case, an indictment for perjury was instituted against him; of the proceedings upon which my excellent friend, Mr. Baron Maseres, has furnished me with the following Note taken by himself:

Easter Term, May 10, 1764.

A Motion was made in the King's-bench to quash an indictment for perjury, against Mr. Webb, the solicitor of the Treasury, upon account of its insufficiency. The case was as follows. In the action of trespass brought by Mr. Wilkes against Mr. Wood, the under secretary of state, for forcibly entering his house and seizing his papers, Mr. Beardmore had been a principal witness on behalf of Mr. Wilkes to prove the trespass; and in giving his evidence, he had said that Mr. Webb was present there aiding and assisting in seizing Mr. Wilkes's papers, and that he (Beardmore) had seen him (Webb) with a key in his hand. Afterwards Mr. Webb was examined as a witness on behalf of the defendant Mr. Wood; and amongst other things he then declared, with a particular reference to Mr. Beardmore's evidence above-mentioned, that he never had had a key at all of any kind, or belonging to any person, in his hand on that occasion, notwithstanding what that man, meaning Beardmore, had sworn. This assertion of Mr. Webb's that he had no key in his hand on that occasion was intended to be the subject of an indictment of perjury. And accordingly at the Epiphany general sessions of the peace at Hicks's-hall, about Jan. 7, 1764; a bill of indictment was preferred against him, for wilful and corrupt perjury, in swearing that he had no key in his hand, and this indictment was supported by four witnesses whose names were indorsed upon the back of it, and was found by the grand jury. But soon after the finding of this indictment, the counsel for the prosecutor of it took notice that it was not accurately drawn, the person who drew it (who was Mr. Wallis) having barely stated the words

sworn by Mr. Webb, without sufficiently setting forth that they had a material relation to the issue in the cause in which they were spoken, which might and ought to have been done by stating that Mr. Beardmore was a material witness in the cause, that he had sworn that he had seen Webb with a key of Mr. Wilkes's drawers in his hand, and that Webb was examined after Beardmore, and swore, with a particular reference to Beardmore's evidence, and with a view to discredit the whole of his testimony and render it of no weight with the jury, that he had no key at all in his hand, notwithstanding what that man, Beardmore, had sworn. The counsel for the prosecution having observed this defect in the indictment, neglected to take out process upon it, intending to prefer a more correct indictment at the next sessions of the peace, which they accordingly did prefer, and the grand jury found it. And Mr. Webb had, probably for the same reason, hurried on the process upon the first indictment as fast as possible, and endeavoured to bring it to a trial, in hopes to forestall and prevent any proceedings against him upon the second and more accurate indictment. And as the time for trial upon the first indictment was now appointed, the counsel for the prosecution this day moved the Court to quash the first indictment upon the ground of the fore-mentioned insufficiency, to prevent the trial being had upon it, and offered to proceed with all expedition to trial upon the second indictment. And the Court, after a good many difficulties, did grant the motion, and ordered the first indictment to be quashed, upon condition that the second indictment should stand in the place of the first to all intents and purposes, so that it should be tried at the same time, and by the same special jury that were already struck to try the first indictment. [In relation to this, see *Perry's Case*, A. D. 1793.] They said unanimously, that a motion to quash an indictment made by the prosecutor of the indictment was by no means a motion of course; for that, if it were, it would be in the power of a prosecutor purposely to make his indictments defective in some small particular, and then to move to quash them, and prefer new ones twenty times over, and thereby to keep the person prosecuted in continual suspense and under the terror of a prosecution without ever bringing him to a trial, which would be a very great oppression; that therefore the Court would always exercise their discretion in relation to it, and either quash, or refuse to quash the indictment at the motion of the prosecutor as they should think proper upon consideration of the circumstances. A case much relied on in this motion by the counsel for the prosecution was that of the King and Snow, in *Foster's Reports of the Crown Law*; and Judge Wilmot mentioned on the other side, to shew that this was not a motion of course, the Case of the King and Moore in *Strange's Reports*.

May 21. Mr. Webb was tried on the second

indictment at the sittings at Westminster before lord Mansfield. And it was proved on the part of the crown that Mr. Webb had had a key in his hand in Mr. Wilkes's house on the foresaid occasion. This was clearly proved by three or four credible witnesses, who all swore positively to it; and some of them said that one of the persons then present in Mr. Wilkes's house had observed it to the rest at the very time, and desired them to take notice of it that they might remember and testify it clearly if occasion should require it; and that he had used some such words as these: "I suppose if any action should be brought against Mr. Wood or Mr. Webb for this trespass, they will pretend that they had no hand in it, but were mere lookers on, and that the messengers were the only actors in it. Therefore, pray, gentlemen, observe and remember that Mr. Webb had a key in his hand;" meaning that Mr. Webb had either been opening or was going to open, Mr. Wilkes's study with it, it being, as they all declared, a large key of the size of a chamber-key. This fact therefore of Mr. Webb's having had a key in his hand on that occasion seems to have been sufficiently proved, though the defendant afterwards brought three or four persons, king's messengers and others, who were present at Mr. Wilkes's house on that occasion, who swore that they did not see any key in Mr. Webb's hand, though they were there the whole time, and probably must have seen in it. But in the hurry of that transaction it is possible they might not observe it; and therefore their evidence can never be supposed to countervail and destroy the clear and positive and circumstantial testimony of the witnesses on the affirmative side of the question.

The evidence concerning Mr. Webb's swearing at the former trial was as follows: it was proved that Mr. Beardmore had been the last witness examined on the side of Wilkes in that trial; and that, after relating many important particulars relating to the trespass committed in Mr. Wilkes's house, he had said that he saw Mr. Webb there with a key in his hand. That afterwards Mr. Webb, voluntarily offering himself to be a witness on the side of Mr. Wood, had sworn as follows:

"One of the witnesses has sworn that he saw me with a key in my hand. Now this is absolutely false; for I am positive I had no key in my hand any part of the time." That upon this Mr. Dunning, one of Mr. Wilkes's counsel, had bid Mr. Webb reflect seriously on what he was swearing; for that they were well assured that he had been seen with a key in his hand. That thereupon Mr. Webb somewhat softened his denial, and said, "If I had a key in my hand, I am sure it was not Mr. Wilkes's key: but I am almost sure I had no key." That upon this Mr. Dunning had said that that answer was not sufficiently direct, and that he required a direct and positive answer from him whether he had a key in his hand on that occasion or not. That upon this

required) is now vacant (as we are informed;) we, very much confiding in your fidelity, prudence, provident circumspection, and industry, have, for this cause, ordained and constituted you Steward of Great Britain, to bear, execute, and exercise, for this time, the said office, with all things due and belonging to the same office in this behalf: and therefore we command you, that you diligently set about the premises, and, for this time, do exercise and execute, with effect, all those things which belong to the office of Steward of Great Britain, and which are required in this behalf. In witness whereof, we have caused these our letters to be made patent. Witness ourself at Westminster, the fifteenth day of April, in the fifth year of our reign.

"By the king himself, signed with his own hand. **YORKE and YORKE.**"

Serjeant at Arms. God save the king.

Then Garter, and the gentleman usher of the Black Rod, after three reverences, kneeling, jointly presented the white staff to his grace the Lord High Steward: and then his grace, attended by Garter, Black Rod, and the Purse-Bearer (making his proper reverences towards the throne) removed from the woolpack to an armed chair, which was placed on the uppermost step but one of the throne, as it was prepared for that purpose; and then seated himself in the chair, and delivered the staff to the gentleman usher of the Black Rod on his right hand, the Purse-Bearer holding the purse on his left.

Clerk of the Crown. Serjeant at Arms, make proclamation.

Serjeant at Arms. Oyez, Oyez, Oyez! Our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Clerk of the Crown, by direction of the Lord High Steward, read the Certiorari, and the Return thereof, together with the Caption of the Indictment, and the Indictment certified thereupon, against William lord Byron; in *hac verba*:

"George the third, by the grace of God, of Great-Britain, France, and Ireland, king, defender of the faith, and so forth, to our right trusty and well-beloved William lord Mansfield, our chief justice appointed to hold pleas before us, greeting; we being willing, for certain reasons, that all and singular indictments of whatsoever felonies and murders whereof William Byron, baron Byron of Rochdale, late of the parish of St. James, within the liberty of Westminster, in our county of Middlesex, is indicted before you (as is said) be determined before us, and not elsewhere; do command you, that you do send under your seal before us, in our parliament, immediately after the receipt of this our writ, all and singular the indictments aforesaid, with all things touching the same, by whatsoever name the said William

Byron, baron Byron of Rochdale, is called in the same; together with this writ, that we may cause further to be done thereon, what of right, and according to the law and custom of England we shall see fit to be done. Witness ourself at Westminster, the twenty-eighth day of February, in the fifth year of our reign.

"**YORKE and YORKE.**"

Label.—"To the right honourable William lord Mansfield, chief justice appointed to hold pleas before the king himself, a writ of Certiorari, to certify into the upper House of Parliament the indictment found against William Byron, baron Byron of Rochdale, for murder, returnable immediately, before the king in parliament.

YORKE and YORKE."

Indorsed. "By order of the Lords spiritual and temporal, in parliament assembled, by virtue of the within writ to me directed, I send to our sovereign lord the king, in this present parliament under my seal, the indictment within mentioned, with all things touching the same, in certain schedules hereunto annexed, as I am within commanded. **MANSFIELD.**"

"*Middlesex.* Be it remembered, that on Tuesday next after the octave of the Purification of the blessed Virgin Mary, in the 5th year of the reign of our sovereign lord George the 3d, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, in the court of our lord the king, before the king himself at Westminster, in the county of Middlesex, upon the oath of Philip Dyott of Dyott-street, esq. John Chace of Great Russel-street, esq. Henry Raper of John-street, esq. Robert Hucks of Great Russel-street, esq. Oliver Coghill of the same, esq. Anthony Chapman of Great Ormond-street, esq. Charles Sheppard of Muswell-hill, esq. Thomas Singleton of Finchley, esq. George Mertins of Hatton Garden, esq. Gideon Arbouin of the same, esq. John French of the same, esq. William Clarke of Clapton, esq. Abraham Ogier of Clapton, esq. Edward Nourse of Hammersmith, esq. John Anderson of Henrietta-street, esq. George Mercer of Bolsover-street, esq. Isaac Lefevre of Stepney-green, esq. Henry Mason of Great Russel-street, esq. George Wright of Baldwin's-gardens, esq. Liscombe Price of Islington, esq. Charles Digby of Mile-end, esq. Richard Tidswell of Edmonton, esq. and John Duvall of Portugal-street, gentleman, good and lawful men of the county of Middlesex, then and there sworn and charged to enquire for our said lord the king, for the body of the said county of Middlesex.

"It is presented that the Bill of Indictment hereto annexed is a true bill. **BURROW.**"

"*Middlesex.* The jurors for our lord the king, upon their oath, present, that the right honourable William Byron, baron Byron of Rochdale, late of the parish of Saint James, within the liberty of Westminster, in the county of Middlesex, not having the fear of God before his eyes, but being moved and seduced by the in-

545. The Trial of WILLIAM Lord BYRON, Baron BYRON of Rochdale, for the Murder of William Chaworth, esq.: Before the Right Hon. House of Peers, in Westminster-hall, in full Parliament, on Tuesday the 16th, and Wednesday the 17th of April: 5 GEORGE III. A. D. 1765.

Tuesday, April 16, 1765.

In the Court erected in Westminster-Hall, for the Trial of William lord Byron, for the Murder of William Chaworth, esquire.

ABOUT eleven of the clock the Lords came from their own house into the court erected in Westminster-hall, for the Trial of William lord Byron, in the manner following:

The Lord High Steward's gentlemen attendants, two and two.

The clerks assistant to the House of Lords, and the clerk of the parliament.

Clerk of the crown in Chancery, bearing the king's Commission to the Lord High Steward, and the clerk of the crown in the King's-bench.

The masters in chancery, two and two.

The judges, two and two.

The peers eldest sons, two and two.

Peers minors, two and two.

Chester and Somerset heralds.

Four serjeants at arms with their maces, two and two.

The yeoman usher of the House.

The barons, two and two, beginning with the youngest baron.

The bishops, two and two.

The viscounts and other peers, two and two.

The lord privy seal and lord president.

The archbishop of York and the archbishop of Canterbury.

Four serjeants at arms with their maces, two and two.

The serjeant at arms attending the great seal, and purse-bearer.

Then Garter king at arms, and the gentleman usher of the Black Rod carrying the white staff before the Lord High Steward.

Robert earl of Northington, chancellor of Great-Britain, Lord High Steward, alone, his train borne.

His royal highness the duke of Gloucester, his train borne.

His royal highness the duke of York, his train borne.

The Lords being placed in their proper seats, and the Lord High Steward upon the woolpack, the House was resumed.

The clerk of the crown in Chancery, having his majesty's Commission to the Lord High Steward in his hand, and the clerk of the crown in the King's-bench, standing before the clerk's table with their faces towards the state, made three reverences; the first at the table, the second in the midway, and the third near the

woolpack; then kneeled down; and the clerk of the crown in Chancery, on his knee, presented the Commission to the Lord High Steward, who delivered the same to the clerk of the crown in the King's-bench to read: then rising, they made three reverences, and returned to the table. And then proclamation was made for silence, in this manner:

Serjeant at Arms. Oyez, Oyez, Oyez! Our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Lord High Steward stood up, and spoke to the Peers.

Lord High Steward. His majesty's Commission is about to be read: your lordships are desired to attend to it in the usual manner; and all others are likewise to stand up uncovered, while the Commission is reading.

All the Peers uncovered themselves; and they, and all others, stood up uncovered, while the Commission was read.

"GEORGE R.

"George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to our right trusty and right well-beloved cousin and counsellor Robert earl of Northington, our chancellor of Great Britain, greeting; Know ye, That whereas William Byron, baron Byron of Rochdale, late of the parish of St. James, within the liberty of Westminster, in our county of Middlesex, in our court at Westminster, in the said county of Middlesex, before our justices assigned to hold pleas before us, stands indicted upon the oath of twelve jurors, good and lawful men of the said county of Middlesex, then and there sworn and charged to enquire for us for the body of the said county, of felony and murder, by him the said William Byron, baron Byron of Rochdale, done and committed; We, considering that justice is an excellent virtue, and pleasing to the Most High; and being willing that the said William Byron, baron Byron of Rochdale, of and for the felony and murder whereof he is indicted as aforesaid before us, in our present parliament, according to the law and custom of our kingdom of Great Britain, may be heard, examined, sentenced, and adjudged; and that all other things which are necessary on this occasion may be duly exercised and executed; and for that the office of High Steward of Great Britain (whose presence upon this occasion is

Cl. of the Cr. How say you, William lord Byron; are you guilty of the felony and murder whereof you stand indicted, or not guilty?—Lord Byron. Not Guilty, my lords.

Cl. of the Cr. Culpit, how will your lordship be tried?—Lord Byron. By God and my peers.

Cl. of the Cr. God send your lordship a good deliverance.

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. Oyez! Oyez! Oyez! All manner of persons that will give evidence, on behalf of our sovereign lord the king, against William lord Byron, the prisoner at the bar, let them come forth and they shall be heard; for now he stands at the bar upon his deliverance.

L. H. S. My lords, the distance of this place from the bar is so great, that I must desire your lordships' leave to go down to the table for the convenience of hearing.—*Lords.* Ay, ay.

Then his grace removed to the table.

Mr. Cornwall. May it please your lordships; William lord Byron stands indicted by the grand jury of the county of Middlesex, for murder; and the indictment sets forth, that William lord Byron, on the 26th day of January, in the 5th year of his present majesty's reign, with force and arms, at the parish of St. James, in the county of Middlesex, feloniously, wilfully, and of his malice aforethought, did make an assault in and upon one William Chaworth, esq. and with a sword drawn, then in his right hand, in and upon the left side of the belly of the said William Chaworth, did strike and stab, giving to the said William Chaworth a mortal wound, of the depth of six inches, and of the breadth of half an inch; of which wound the said William Chaworth, at the parish of St. James aforesaid, and also at the parish of St. George, Hanover-square, languished from the 26th day of January aforesaid, till the 27th day of the same month, in the year aforesaid, and then and there of the said mortal wound died; and the jurors aforesaid upon their oath, say, that the said William lord Byron, the said William Chaworth, in manner aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder.

To this indictment the noble prisoner at the bar has pleaded Not Guilty, and hath put himself upon your lordships his peers for trial.

It is our duty to produce to your lordships the evidence we have to offer in support of this charge; your lordships will determine upon that evidence, and give such judgment as your lordships shall think the justice of the case requires.

Mr. Attorney General, (Sir Fletcher Nor-

ton,* knight.) May it please your lordships, I am likewise of counsel for this prosecution; and by the indictment which has been opened, your lordships have heard that the noble prisoner at the bar is charged with one of the highest offences that human nature is capable of committing, nothing less than shedding the blood of a fellow-creature.

My lords, I need not enlarge upon this subject, the crime itself is incapable of aggravation; it is my province to lay before your lordships the state of the evidence which will be produced in support of the charge; and as it is not my duty, so neither is it my inclination to exaggerate any thing upon this occasion; but public justice requires, that the whole proof should be brought fully and fairly before your lordships.

I hope it will neither be thought impertinent or improper for me to make some general observations upon the law, which may respect the offence now under consideration; the utility and application of which your lordships will see in the course of the evidence.

My lords, as it will be proved beyond a doubt, in the course of these proceedings, that the deceased fell by the hands of the noble prisoner at the bar, I shall therefore take that fact for granted; and if so, every presumption in law arises against him; and it will be incumbent upon the prisoner to exculpate himself in the best manner he is able; for though every homicide is not murder, yet every homicide, *prima facie*, is so, and it is required of the prisoner to make out, that the fact of killing in this case was not committed under circumstances which will make it murder: and I admit the law will allow the prisoner to shew the homicide justifiable, excusable, or done under such circumstances of extenuation, as to induce your lordships to think it was not done with malice aforethought, and then it will be manslaughter, and not murder.

It is clear in point of law, if there be a quarrel, and the parties afterwards have time to cool, and after that they fight, and one falls, he who survives has been guilty of murder; or if the manner in which the fact was done speaks a depravity of mind, and a wickedness of intention, that will make it murder.

My lords, as this case must depend upon a very nice and strict enquiry into all the circumstances that accompanied the fact, in order to mark the offence with one or other of these denominations (for an offence manslaughter is in the eye of the law), so I am persuaded your lordships will attend carefully to the evidence which may be produced; and I am convinced we shall hear such a judgment from your lord-

* In 1770 he was elected Speaker of the House of Commons, which office he filled until the dissolution in July, 1780, of the parliament which had been called in the year 1774. At the meeting of the parliament which was called in 1780, he was proposed to be Speaker, but rejected.

ships, as, under all the circumstances of the case, justice shall require: and this must afford matter of the greatest consolation to the noble prisoner at the bar (if he is innocent), because your lordships' understanding cannot be deceived, nor your judgment biassed: but, on the other hand, if his lordship is guilty of the offence laid to his charge, he must know that no art, no subterfuge, no management will avail him; innocence, and innocence alone can be his support and defence.

Having said this, give me leave to observe to your lordships the happiness of this constitution under so gracious a prince as his present majesty, who aims at no other rule of government than that which the law prescribes, and has no other wish than that in all cases, and overall persons indiscriminately, the law should be impartially administered; and when the laws are thus administered, and allowed their due force, such is the excellency of the English constitution, that the meanest subject is not beneath their protection, nor the highest beyond their reach. Thus to be governed is the full perfection of civil liberty.

On the 26th of January last, the noble prisoner at the bar, the deceased, and many more gentlemen of rank and fortune of the county of Nottingham met, as they usually did once a week, to dine together at the Star and Garter tavern, in Pall-mall: in the course of the dinner there was nothing but good-humour. About seven at night the conversation turned upon the subject of game: upon this occasion, Mr. Chaworth had something of a dispute with the gentleman who sat next him, about the best method of preserving the game. The prisoner at the bar interfered upon that subject, and said, in his opinion, the way to have game was to take no care of it. Mr. Chaworth happened to be of a different opinion, and thought the best way was to be strict with poachers, and thereby preserve the game: this drew on some altercation. Mr. Chaworth added, that he believed there was not a hare in that part of the country, but what was preserved by himself or sir Charles Sedley; upon which lord Byron offered a wager of 100*l.* that he had more game in a manor or manors of his, than Mr. Chaworth had upon any that belonged to him. Your lordships will find a little difference in the account given by the witnesses, touching the terms of the wager; but you will have them from the witnesses themselves, who are all gentlemen of character, and as they have most of them been already examined before the coroner, and again before the grand jury, they did not choose to be examined by those concerned in the prosecution; but said, when they were called and examined before your lordships, they should speak the truth, as doubtless they will; and I only mention this circumstance as an excuse for myself, if I should not happen to open the evidence exactly as it may come out from the witnesses.

My lords, Mr. Chaworth having said he was willing to accept the wager, said it would be

VOL. XIX.

proper to make a memorandum of it, and called for pen, ink, and paper. After that, it happened that sir Charles Sedley's manors were mentioned; upon which the noble prisoner at the bar said, with some degree of heat, Sir Charles Sedley's manors! where are his manors? To which Mr. Chaworth replied, Why Hucknel and Nuttall: his lordship then said, I know no manors of sir Charles Sedley's; to which Mr. Chaworth replied, sir Charles Sedley has a manor, the manor of Nuttall is his, and one of his ancestors bought it out of my family; and if your lordship wants any further information about his manors, sir Charles Sedley lives in Dean-street, and your lordship knows where to find me in Berkley-row.

My lords, whether this was a real dispute between lord Byron and Mr. Chaworth, about sir Charles Sedley's manors, or whether it was used only as a means of affronting and quarrelling with each other, it is impossible for me to say; however, after this quarrel, the parties stayed in company together for a considerable time, I believe near an hour, during which time, both the noble prisoner at the bar and Mr. Chaworth entered into conversation with the company that sat next to them upon indifferent subjects, and particularly lord Byron was observed to be in good humour.

The company thought there was an end of the quarrel, and that no more would be heard of it. About eight, an hour after the first quarrel, Mr. Chaworth went first out of the room, and it happened a gentleman went after him to the door, and he asked the gentleman, whether he had observed the dispute between him and lord Byron? He said, he had in part; upon which Mr. Chaworth asked him, if he thought he had gone far enough? To which, Mr. Donston (for that was the gentleman's name) said, he thought he had gone too far; it was a silly business, and neither of them should think of it again.

Mr. Chaworth going down stairs, Mr. Donston returned into the room, and, as he opened the door, he met lord Byron coming out. I must now state to your lordships the evidence as it arose from the declarations of the deceased, as well as the facts, which will be proved; for, both being legal evidence, they just stand under the same predicament, and the evidence being thus put, will come in proper order in point of time. The prisoner at the bar saw the deceased upon the stairs, and said to him, Sir, I want to speak with you. They then went down one pair of stairs, and one or other of them called out, Waiter; which of them it was I am not instructed to say. Upon the waiter's coming, the noble prisoner at the bar asked him, whether either of these two rooms (pointing to them) were empty? The waiter opened one of the doors, and went in, with a poor little tallow candle, which was all the light, except a dull fire, that was in the room: the waiter set the candle upon the table, and lord Byron and Mr. Chaworth went into the room. When they were there, the

prisoner asked Mr. Chaworth, whether he was to have recourse to sir Charles Sedley to account for the business of the game, or to him? The deceased said, To me, my lord; and if you have any thing to say, it would be best to shut the door, lest we should be overheard. Mr. Chaworth went to shut the door, and turning from the door he saw the noble prisoner just behind him, with his sword half-drawn, or nigh drawn, and at that instant lord Byron called out—Draw! The business was soon done. Mr. Chaworth finding his lordship in such a situation, had nothing left for it but to draw as quickly as he could: by his own account he has told, he gave the noble prisoner the first thrust, and entangled his sword in his waistcoat, and thought he had wounded him; after that, lord Byron shortened his sword, and stabbed Mr. Chaworth.

There was another circumstance, the bell rung; but by whom it was rung I know not. The waiter came up, and seeing the situation of the two gentlemen, was not a little frightened. He ran out again, and sent up the master of the tavern, who will tell your lordships how he found them. I think they were grasped in each other's arms, and Mr. Chaworth had his sword in his left-hand, and the noble prisoner at the bar had his in his right-hand. The deceased delivered his readily, but lord Byron quitted his with reluctance. One of them, I believe lord Byron, ordered him to send for relief: upon this Mr. Hawkins the surgeon was soon sent for, and as soon came; but before this, an alarm was given in the room above stairs. The company came down; they saw the terrible situation of the unfortunate gentleman. He told them, and your lordships will hear, the manner in which it happened, pretty nearly as I have stated it, at least I hope substantially so. When Mr. Hawkins came, it did not require a person of his skill and penetration to find out that the wound was mortal, for the sword had gone in at one side and out at the other. Mr. Hawkins ordered, no doubt, what was proper, and had him conveyed home. Mr. Chaworth had sent messengers for the worthy gentleman, who is the prosecutor upon this occasion. When he came, seeing so near a friend and relation in the condition in which the deceased then appeared, he immediately inquired what had brought him into that terrible situation. His evidence will be material; for Mr. Chaworth told Mr. Levinz the whole transaction: and when the deceased related to him the circumstance, that lord Byron had drawn, or nigh drawn, his sword, when the deceased was shutting the door, Mr. Levinz asked him, Was that fair, Billy? The deceased, who was one of the most benevolent, as well as one of the bravest of men, gave no answer to that question. Mr. Levinz followed him with some other questions, and the answers (which he will give you an account of) will amount in substance to this, That Mr. Chaworth did not think, when lord Byron carried him into the room, that he had any design of fighting him;

but afterwards he thought he had got him to an advantage, and that was the reason of his fighting him.

My lords, besides this, the deceased having made his will, the person who attended him upon that occasion thought it proper that some questions should be asked him, even though the deceased was then in great agonies (for he died soon afterwards); and the same person wished, that the answers might be reduced into writing, which was accordingly done; and the paper will be produced to your lordships, and will speak for itself; and it will need no comment.

It states, that Mr. Chaworth said, the noble prisoner's sword was half-drawn when he turned from the door; that, knowing his man, he immediately whipped out his own, and had the first lunge at his lordship, when lord Byron shortened his sword, and run him through; and then said, with an oath, I have as much courage as any man in England. This is the nature of the case in general; and I believe I have stated the evidence substantially, if not correctly true.

I cannot sit down without mentioning another circumstance, which further evinces his majesty's love of justice, and his inflexible resolution to do right, according to law, without favour or affection, however high and respectable the noble personage may be, who is concerned in this important cause. Your lordships all remember, upon another very solemn and melancholy occasion, as the event proved, the then noble prisoner* had killed a person of very inferior rank, who left neither a fortune nor relations equal to the expence of a prosecution of this sort. His majesty† from his love of justice, sustained the whole charge, and committed the care of that prosecution to his own servants. But in the present instance, the deceased having a large fortune, and the inheritor of it being both able and willing to carry on this prosecution, his majesty, from the same love of justice, and that there might not be the appearance of partiality to the noble prisoner at the bar, has left the prosecution, and the intire management of it, in the hands of the private prosecutor, who, actuated by no motive of revenge, only hopes, that there will be a fair, but a strict and full enquiry for the blood of his deceased relation; being thoroughly satisfied that your lordships will hear with patience, deliberate with caution, and determine with wisdom, justice, and truth.

Solicitor General, (William de Grey, esq.) My lords, we will now proceed to call our witnesses.—Call John Hewett, esquire. [Who came to the bar, and one of the clerks held the book to him, upon which he laid his hand.]

* Earl Ferrers. See his Case, p. 886 of this volume.

† I suppose that George the second is the king here intended. The trial of lord Ferrers took place in the last year of his reign.

Cl. of the Cr. Hearken to your oath, 'The evidence that you shall give on behalf of our sovereign lord the king's majesty, against William lord Byron, the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God.' [Then he kissed the book.]

Sol. Gen. My lords, I would ask Mr. Hewett if he was present at the Star and Garter in Pall-mall on the 26th of January last?—*Hewett.* I was: I dined there, my lords, the 26th of January.

L. H. S. I cannot at this distance hear one word of what is said by the witness.

Then one of the clerks was sent down to the bar to repeat the questions put to the witnesses, and their answers.

Examined by Mr. Solicitor General.

I desire that Mr. Hewett will tell your lordships if he was present at the Star and Garter tavern on the 26th of January last?—I was: I dined at the Star and Garter on the 26th of January last.

Was it any particular meeting?—It was: It was a county club.

Of what county?—The gentlemen of Nottinghamshire.

I desire you will name the gentlemen then present.—Lord Byron, Francis Molineux, esq. John Sherwin, esq. the honourable Thomas Willoughby, Frederick Montagu, esq. William Chaworth, esq. George Donston, esq. Charles Mellish junior, esq. sir Robert Burdett, and myself.

At what time did the company dine?—The dinner was upon the table precisely at a quarter after four o'clock.

Do you recollect any conversation relative to the game?—I do; it was some time after dinner before any such conversation arose.

You will please to recollect the time.—At or about the time the drawer brought in the first reckoning.

About what o'clock might that be?—It was about, or after seven o'clock. The rule of the club was to have the bill and a bottle brought at seven o'clock.

Do you recollect whether it was about seven, or long after seven o'clock?—I believe it could not be long after seven o'clock.

Had the company at that time drank much?—I think the company were all very sober when we parted.

Do you mean that all the company were very sober when they parted at seven o'clock?—I think so, my lords.

I wish Mr. Hewett would recollect the conversation that passed about the game.—What I heard relating to it was, a dispute in whose manor, or in what manor, there was the most game.

Do you recollect by whom the conversation was begun?—The conversation about the game began from myself.

In what manner?—By starting a proposition

for preserving the game, besides the present system of the game laws, which has very often, where I have been, produced agreeable conversation.

Who were the persons in particular who entered into that conversation?—I believe all the company, more or less.

Do you recollect what Mr. Chaworth said on that occasion?—I recollect hearing a bet proposed of 100*l.*

Was that the first time Mr. Chaworth had said any thing upon the subject?—I cannot take upon me to say that: I can describe the order in which we sat, and the persons I was in conversation with at the time the bet was proposed. Mr. Montagu sat next me on my right-hand, I sat at the head of the table, Mr. Willoughby sat next Mr. Montagu, Mr. Sherwin next him, Mr. Molineux next to him, lord Byron was the last person on the same side the table, and farthest from me on my right-hand, and on my left-hand Mr. Chaworth sat next me, Mr. Donston next, Mr. Mellish next, sir Robert Burdett next on that side.—I was engaged in some subject with Mr. Sherwin, and the gentlemen on my right-hand, at the time when the conversation passed between lord Byron and Mr. Chaworth.

Lord High Steward. Recollect yourself again.—*Hewett.* I was conversing with Mr. Sherwin, and the gentlemen on my right hand, when I heard the conversation about the bet between lord Byron and Mr. Chaworth.

Sol. Gen. Please to repeat exactly the conversation between lord Byron and Mr. Chaworth, in the order in which it passed.—*Hewett.* I cannot recollect any thing farther of the conversation than I have done.

Be so good as to repeat again what that conversation was.—It was a dispute in whose manor or manors there was the most game.

Whose manors were understood?—I heard none mentioned at all; I imagined, as lord Byron and Mr. Chaworth were neighbours in the country, it was their manors they were speaking of.

Lord Mansfield. Mr. Hewett won't speak as to imagination; they can only ask him as to facts.

Sol. Gen. After this bet was proposed, what passed?—*Hewett.* I did not perceive any other conversation between Mr. Chaworth and lord Byron, but what I have mentioned during the whole day.

At what time did the conversation close upon that subject?—Very soon, my lords.

What conversation followed upon that?—A great variety, I think.

Did Mr. Chaworth join in that conversation?—He did, my lords.

Did lord Byron join in any conversation afterwards?—Lord Byron being the farthest from me of any of the company, I did not hear any conversation of his afterwards; but I observed he was conversing with Mr. Molineux afterwards.

Did you observe whether lord Byron seemed

to be in or out of humour after the conversation about the game?—He seemed to be conversing with Mr. Molineux in good humour.

How long did this conversation last before Mr. Chaworth went out of the room?—It must be after eight o'clock before Mr. Chaworth went out of the room.

Did Mr. Chaworth, when he left the room, take any body with him?—Mr. Donston was out of the room at the same time; but whether he went with him, or followed him, I do not know.

How long did Mr. Donston stay out of the room?—A very short time, I think.

Did lord Byron leave the room?—Lord Byron left the room at the very instant Mr. Donston came in.

Mr. Hewett says, that Mr. Donston stayed out of the room but a very short time; I should be glad to know what he reckons a short time?—I am not able to judge of the time, but from the hour of paying the reckoning, and the time I went into the room where Mr. Chaworth was wounded.

What was the first account you had of any thing that passed after they quitted the room?—Almost at the instant of Mr. Donston's sitting down, a drawer came into the room, and told us, that lord Byron and Mr. Chaworth were fighting.

What was the drawer's name?—I don't know.

Did the company go down?—They went down as fast as they could.

Did you go into the room where Mr. Chaworth and lord Byron were?—I did.

Where was the room?—It was a back room, up one pair of stairs.

What did you observe in that room?—I was lame at that time; when I got into the room, Mr. Chaworth was sitting in an armed chair, with his left leg on another chair, and leaning his head against Mr. Donston.

Did you observe the condition in which Mr. Chaworth was?—I did. He was wounded in the belly, and had his hand upon it, and there was a good deal of blood under the chair.

Did Mr. Chaworth say any thing to you?—He did.

What was that?—He said he was a dying man, and gave me an account of the transaction, and of what had passed between my lord Byron and him: he said, lord Byron told him he wanted to speak to him; upon which they went into that room together; that he told lord Byron it was better to shut the door that they might not be heard; that while he was doing it, lord Byron bid him draw; that he saw his lordship's sword half-drawn, upon which he whipped out his own as quick as possible he could to give him the point, and he asked how lord Byron was, whether he was mortally wounded, as he thought he was about his breast; when his lordship shortened his sword, and stabbed him in the belly.

Were you in the room when Mr. Hawkins the surgeon was sent for?—I was not in the

room when Mr. Hawkins was sent for; Mr. Hawkins was in the room when I was there.

Was lord Byron in the room at that time?—Lord Byron came into the room, and went up to Mr. Chaworth, and asked him how he was.

What answer was given by Mr. Chaworth?—I don't recollect any.

Were you afterwards at Mr. Chaworth's house that night?—I was.

At what time was it you went, and what passed there?—I do not remember exactly. I was one of the subscribing witnesses to Mr. Chaworth's will. It might be about or after three o'clock in the morning.

How was your time employed, when you left the Star and Garter, till you went to Mr. Chaworth's house?—Mr. Chaworth at different times expressed himself as a dying man: he asked me twice after lord Byron and his wound. When I went from the Star and Garter, I went with Mr. Willoughby, in my own coach, to fetch Mr. Levinz, for whose coming Mr. Chaworth was extremely impatient.

What relation was Mr. Levinz to Mr. Chaworth?—His uncle.

Where did Mr. Levinz live?—At Kensington Gore.

Duke of Newcastle. Did not Mr. Chaworth tell you he had mortally wounded lord Byron; for I think you said, when you came into the room Mr. Chaworth asked how lord Byron did, for he thought he was wounded about his breast?

Hewett. Mr. Chaworth asked me how lord Byron was, whether mortally wounded or not, for he thought he was about his breast, when lord Byron stabbed him into the belly.

Earl of Morton. Did Mr. Chaworth mention that he had given lord Byron a wound? Or did you imagine it was his own wound he was speaking of?

Hewett. He enquired after a wound he supposed he had given lord Byron.

Lord Mansfield. My lords, I believe it would be much better if your lordships would forbear asking any questions of the witness till the counsel for the crown shall have done with the witness; then lord Byron will ask such questions as he may think proper, and afterwards your lordships will have an opportunity of asking any questions you please; otherwise I am afraid it will very much interrupt the regularity of your proceedings.

Sol. Gen. I was endeavouring to fix the time when Mr. Hewett came to Mr. Chaworth's house, by asking him, How he was employed after he left the Star and Garter? Mr. Hewett said, in seeking Mr. Levinz, who lived at Kensington Gore.—Hewett. I sent my coach for Mr. Levinz some time before, and it returned without finding him; upon that I sent to the duke of Leeds's house, to know if they knew any thing of him there; they returned for answer, that he dined there, and was gone home. I would ask you, if there was any conversa-

tion between Mr. Chaworth and you after the making his will, in the presence of Mr. Willoughby?—There was.

Did Mr. Chaworth make any declarations of what had passed at that time?—He did.

Were those declarations reduced into writing?—They were.

How long was it after they were made before they were reduced into writing?—We went down from the bed-chamber into the parlour.

There Mr. Partington delivered the will into Mr. Levinz's hands?—No, I gave the will into Mr. Levinz's hands in the parlour; then minutes were made, and some alterations made in them, till we were all agreed it was exactly what Mr. Chaworth had said.

Were the minutes transcribed again after those alterations were made?—I believe they were.

Should you know the paper writing again, if you saw it?—I should not; but I remember that the contents appeared to me exactly the same with the account I have given your lordships, except the omission of the particular term of Mr. Chaworth's whipping out his own sword, and lord Byron's shortening his.

Who wrote the paper?—Mr. Partington, an attorney.

What became of it after it was written?—I do not know.

Did you see Mr. Chaworth after that paper was written?—I did not.

Did Mr. Chaworth continue in his perfect understanding till the last time you saw him?—He did. I understood many of the questions put to him to be with a view of knowing that.

Sol. Gen. My lords, I shall ask this witness no farther questions.

Lord High Steward. Lord Byron, would you ask this witness any questions?

Lord Byron. Might not a great deal pass in company that you did not hear?—*Hewett.* Certainly there might.

Were not you toast-master?—I was.

Might not your attention to that office be the reason that you did not hear several things that passed?—It might; but my ears are not the best at any time.

Lord Byron. My lords, I have done with this witness.

Lord Mansfield. I would ask one single question of this witness, if he can answer it precisely. Mr. Chaworth, as I took it, told him, that lord Byron asked to speak to him; and when they went into the room, Mr. Chaworth said, they had better shut the door. Now I would ask, whether it was, Shut the door, or Bolt the door?—*Hewett.* I believe the word was, Shut the door.

Earl of Denbigh. I desire to know whether the paper writing was shewn to Mr. Chaworth after it was copied?

Hewett. Mr. Chaworth was in his bed-chamber above stairs, the paper was drawn up in the parlour below stairs; and I went away very soon after.

Earl Poulet. Were the alterations in the paper you mentioned material ones, or not?

Hewett. I thought it my duty to the public to make an exact minute of the circumstances of the day, which minute I have now in my hand, and it corresponds exactly with that paper, except in the circumstance I mentioned to your lordships.

Earl of Buckinghamshire. I desire Mr. Hewett may be asked, if he expected Mr. Chaworth would have come back again?

Hewett. I did imagine he would have come back.

Earl of Buckinghamshire. I desire to know, whether, when Mr. Chaworth went out of the room, he took his hat with him or not?

Hewett. I don't know; I did imagine he would come back immediately.

Lord High Steward. I do not remember any precise answer to the question, who it was that offered the bet?

Hewett. Lord Byron proposed the bet.

L. H. S. Are you sure it was lord Byron?

Hewett. I think I am sure it was; and Mr. Chaworth took it up, as I thought, in a joke, and called for a pen and ink.

L. H. S. Do you recollect how the conversation about the game finished?

Hewett. I cannot.

By the Earl of Dartmouth.

Do you remember the particular discourse on the game between lord Byron and Mr. Chaworth?—There were various discourses upon the subject by different people in company; I was talking about the best method for preserving game, and the discourse turned upon the proposition, that it might be a sensible way of preserving game to make it the property of the owner of the soil.

Was there any general debate on the subject of the game?—It might be as to the probable ways of preserving the game.

I think you said lord Byron left the room at the instant Mr. Donston returned?—I did.

I desire to know whether lord Byron sat so as to hear what passed between Mr. Chaworth and Mr. Donston on the stairs?—It was a mighty odd-shaped room that we were in; the door opened very inconveniently; Mr. Donston was scarcely sat down, when the waiter came into the room and told us lord Byron and Mr. Chaworth were fighting.

By the Duke of Richmond.

Where did Mr. Chaworth sit?—Mr. Chaworth sat next to me on my left-hand.

Could any thing remarkable pass at the table without your hearing it?—My ears are but indifferent at best; and at that instant of time I was talking to a gentleman that sat on my right-hand.

When my lord Byron asked Mr. Chaworth, Where is sir Charles Sedley's manor? did you understand it was in a friendly manner, or what other kind of stile?—I have given that part of my evidence precisely in Mr. Cha-

worth's words, and your lordships will interpret them as you think proper.

If I understood you right, when you went into the room, Mr. Chaworth was then with one leg upon a chair, and he enquired how lord Byron did?—He did, my lords, twice, and once at another time.

Lord *Le Despencer*. I should be glad to know, whether there was any considerable distance of time between lord Byron and Mr. Chaworth's going out of the room?

Mr. *Hewett*. I cannot resolve that question precisely.

Lord *Ravensworth*. You said the bill was called for about seven o'clock?

Hewett. It is the order of the club to the master of the house to bring a bill at seven o'clock.

Lord *Ravensworth*. You said you had no fixed guide to judge as to point of time, but by the bill's being brought at seven o'clock; I desire to know by what circumstances you guided yourself as to the time in general?

Mr. *Hewett*. In things of this kind one cannot be precise in every thing; but I made a minute, and I will tell you the time as near as I can. My watch was rather too fast. When I came into the room to Mr. Chaworth, the minute-hand of my watch was between eight and nine, and the hour-hand approaching nine: this was at the first time I saw Mr. Chaworth in that condition; the time of my being a witness to Mr. Chaworth's will was a little after three in the morning.

L. H. S. So you said before.

L. H. S. Whom do you call next, Mr. Solicitor General?

Sol. Gen. We desire to call Frederick Mountagu, esquire.

Frederick Mountagu, esq. sworn.

Examined by Serjeant *Glynn*.

I desire to ask Mr. Mountagu, if he was not present at the Star and Garter on the 26th of January last?—I was.

I desire to know what company was there?—There were lord Byron, Mr. Chaworth, Mr. Willoughby, Mr. Hewett, Mr. Molineux, Mr. Donston, Mr. Sherwin, Mr. Mellish, and sir Robert Burdett.

Upon what occasion were they met?—At a county club.

At what time might the company dine?—A little after four.

Do you remember any dispute in the company?—There arose a dispute some time after dinner.

At what hour?—As near as I can recollect, at seven o'clock.

Do you remember the subject of the dispute?—The dispute was upon game.

What disputed?—The game was lord Byron's.

Upon that subject it was bet-

ter for the preservation of game to be remiss, or to be severe.

Do you recollect particularly what Mr. Chaworth and lord Byron said?—Mr. Chaworth was of opinion that severity was best, and lord Byron that it was better to be remiss.

I should be glad if Mr. Mountagu would repeat the whole conversation that followed upon this.—The dispute was upon the respective manors of lord Byron and Mr. Chaworth, and upon sir Charles Sedley's manor; the conversation ended upon that point, with Mr. Chaworth's saying, and to the best of my recollection repeating, If you have any thing more to say, you will find sir Charles Sedley in Dean-street, and me in Berkeley-row.

Repeat what conversation passed before Mr. Chaworth said those words?—In general, the conversation was upon game.

Do you recollect any particulars of the conversation?—No more than what I have repeated.

Was this the whole? Recollect.—I can, upon my own recollection, speak to nothing more.

Mr. Mountagu will recollect, if he can, whether there was any dispute at all about the ownership of any manor or manors?—There was some mention made of a particular manor, of Hucknell manor.

By whom?—By Mr. Chaworth, I think.

Do you remember what was said about that manor?—I think lord Byron mentioned that manor being his.

Do you remember any answer Mr. Chaworth made to that?—No.

My question to Mr. Mountagu was, whether he recollects any conversation between lord Byron and Mr. Chaworth about manors?—Yes, there was a great deal of conversation upon that point.

Whether sir Charles Sedley was mentioned or not?—His name was mentioned.

How was sir Charles Sedley's name introduced?—I forget how it was first introduced.

Recollect what was said about sir Charles Sedley, when his name was mentioned.—It was mentioned that he was severe upon his manors.

By whom was that said?—Either by lord Byron or Mr. Chaworth, I forget which.

How long did the conversation about game continue?—About twenty minutes, I should guess; but I cannot speak positively.

Did the company then break up?—No.

How long might they continue afterwards together?—An hour.

Were the company, after this conversation, in good humour or not?—They appeared to be in good humour.

Did Mr. Chaworth join in the conversation?—He did.

Did lord Byron join in conversation?—He did, each with those that sat near.

Did lord Byron appear to be in good humour?—I saw nothing to the contrary.

At what time did Mr. Chaworth leave the company?—About eight.

Whether he left the company alone, or did any person go out with him?—I think Mr. Donston followed him.

Did Mr. Donston return to the company or not?—He did.

How soon after his going out with Mr. Chaworth?—A few minutes; I cannot speak exactly to the number.

Did lord Byron go out of the room at that time?—He did afterwards.

Did lord Byron go out of the room before or after the return of Mr. Donston?—About that time.

At what time of the night might that be?—A very little after eight.

Had the company drank moderately, or otherwise?—Moderately.

When did you first hear of Mr. Chaworth after this?—I went down stairs about that time myself, and as I was going out of the door of the tavern, the master of the tavern called me back, and told me that mischief had happened; and that Mr. Hawkins was sent for; I ran up stairs with one of the drawers.

Who was that drawer?—I do not recollect him in particular; I ordered him to fetch the company from above stairs, and went into the room immediately myself, where I found Mr. Chaworth in a chair bleeding, and lord Byron standing by him.

Was there any person in the room when you came except lord Byron and Mr. Chaworth?—No, I think not; the company above stairs came in soon after.

Give an account of what passed between Mr. Chaworth and the company, when they came in?—Mr. Chaworth first told me that he could not live five minutes; that he forgave lord Byron, and hoped the world would forgive him too; that he had rather be in his own situation than lord Byron's; he said the affair passed in the dark: upon my desiring an explanation, he pointed to a very small tallow candle, which stood upon the table in the room we were then in. Mr. Chaworth told me, that when lord Byron and he came into the room where they then were, lord Byron asked Mr. Chaworth, if he meant the conversation upon game to sir Charles Sedley or to him? Mr. Chaworth said, If you have any thing to say, we had better shut the door. After he had shut the door, he turned, and saw lord Byron drawing his sword. He drew his, and made the first pass, and in his pass he entangled his sword in the left side of lord Byron's waistcoat; upon which lord Byron shortened his sword, and ran him through the body.

Was this the whole of what Mr. Chaworth said?—I recollect nothing material besides.

Did Mr. Chaworth, from the manner of relating this affair, appear to be sensible or not?—Perfectly so.

L. H. S. Lord Byron, would your lordship ask this witness any questions?—[Lord Byron declined asking him any questions.]

By the Lord High Steward.

How soon might you leave the room after Mr. Donston returned?—About a minute.

You passed the room upon the first floor as you went down?—I did, my lords.

You heard no fighting?—None in the world.

When you went down, did you stop?—A few minutes in calling a chair.

Were you got into the chair?—I was not got into the chair; I was not out of the door.

Lord Berkeley. Was any provocation given by lord Byron, that might induce Mr. Chaworth to say to my lord, If you have any thing more to say to me or sir Charles Sedley, you will find sir Charles Sedley in Dean-street, and I live in Berkeley Row?—Moun. I do not recollect any particular provocation.

Lord Berkeley. Do you recollect any thing more than the general account you have given?—Moun. Nothing farther, my lords.

Duke of Richmond. Did you sit next lord Byron?—Moun. No, my lords, I did not sit next lord Byron.

Duke of Richmond. From the discourse that you heard, and what passed, did you expect a duel?—Moun. No, my lords, I did not.

Earl Temple. Did Mr. Chaworth say any thing expressing his imagination of his having wounded lord Byron about the breast?—Moun. I do not recollect any thing that Mr. Chaworth said as to that.

Earl Temple. From Mr. Chaworth's expressions, did any thing induce you to think he had wounded lord Byron?—Moun. No.

Earl Talbot. After lord Byron and Mr. Chaworth went out of the room, and were in the room where they fought, Mr. Chaworth said, he saw lord Byron's sword half-drawn when he turned from fastening the door; and the gentleman who spoke before, said lord Byron called to Mr. Chaworth, and bid him draw; do you recollect whether Mr. Chaworth said lord Byron bid him draw?—Moun. In the conversation that passed, I do not recollect that circumstance of lord Byron's bidding him draw.

By Earl Poulet.

Were you nearer seated to the door than lord Byron was?—No, I was not; I was at the upper end of the table.

Was the door at the upper or lower end of the room?—It was a very odd-shaped room.

Did lord Byron sit near the door?—No, he did not.

Do you think it was possible to hear what words passed between Mr. Donston and Mr. Chaworth upon the stairs? I should think it impossible; there was a great skreen before the door.

Earl of Morton. Did not Mr. Chaworth say, the best method of preserving game was by severity, and lord Byron by remissness?—Moun. Yes, my lords, it was so.

Mr. Stowe. My lords, I would call George Donston, esq.

*George Donston, esq. sworn.**Examined by Mr. Stowe.*

Were you, on the 26th of January, at dinner with lord Byron and other gentlemen at the Star and Garter?—I was.

Name the gentlemen that composed the company.—Lord Byron, Mr. Hewett, Mr. Willoughby, Mr. Chaworth, Mr. Sherwin, Mr. Mountagu, sir Robert Burdett, Mr. Charles Mellish, and myself.

Was there any discourse between lord Byron and Mr. Chaworth?—There was.

What was the subject of that discourse?—It was about their respective manors in the country, and the quantity of game upon them.

Do you recollect the manner of the conversation that passed between lord Byron and Mr. Chaworth?—In general it was upon the best method of preserving game.

What did lord Byron give as his opinion upon that discourse?—Lord Byron thought it was best not to be too strict.

What was Mr. Chaworth's opinion?—Mr. Chaworth was for being strict, and for putting the game-laws in execution.

Did any thing pass relating to any other gentlemen, or the estates of any other gentlemen?—Yes, sir Charles Sedley's manor was mentioned.

By whom was it mentioned?—By Mr. Chaworth.

What did Mr. Chaworth say upon the mentioning sir Charles Sedley's manor?—He was speaking of the quantity of game upon sir Charles Sedley's manor.

Was there any bet mentioned relative to this discourse concerning the game?—Yes, there was a bet proposed.

By whom proposed?—I am not very sure by whom it was proposed.

Was it proposed either by lord Byron or Mr. Chaworth?—Yes, by one of them.

Was any bet made or not?—There was no bet made.

At what time did this conversation pass?—I believe about seven o'clock.

Did lord Byron or Mr. Chaworth continue in that company any time after this discourse was over?—Yes, for some time after.

Whether after the bet proposed, there was any other conversation that passed between lord Byron and Mr. Chaworth?—Yes; I remember, upon sir Charles Sedley's manor being mentioned, lord Byron asked which was sir Charles Sedley's manor.

Of whom did lord Byron ask that?—Of Mr. Chaworth.

Did Mr. Chaworth make any answer?—He answered, Nuttall.

Did Mr. Chaworth mention any thing more upon that subject to lord Byron; and what?—He did, after lord Byron had repeated the same question.

What was farther mentioned by Mr. Chaworth?—Mr. Chaworth said, upon his looking him over again which was sir

Charles Sedley's manor; Surely, my lord, you will allow Nuttall to be sir Charles Sedley's.

Was any thing more said respecting sir Charles Sedley, or his manors, or where he lived?—Yes, Mr. Chaworth went on to say, sir Charles Sedley lives in such a place, and can best inform you relating to his manors; your lordship knows where to find me in Berkley Row.

Did this conclude the conversation on this subject, or was any thing more said at that time?—The conversation ended with the words I have last said.

Did you stay in the room till the time lord Byron and Mr. Chaworth went out?—I stayed till Mr. Chaworth went out.

What distance of time might there be from the end of the conversation to Mr. Chaworth's going out of the room?—I think it might be about an hour.

Did lord Byron and Mr. Chaworth, during that hour, enter into conversation with one another, or with the rest of the company?—I am not sure whether they did converse with each other; they did with the rest of the company.

At what distance from one another did they sit?—At a pretty considerable distance.

Do you recollect any subsequent conversation that lord Byron entered into, except what you have mentioned?—I do not; I was at a distance from lord Byron.

At what time was it that Mr. Chaworth went out of the room?—About eight o'clock; I am not quite sure as to the time.

Do you know the purpose of his going out of the room?—He was going down stairs; I believe into the yard.

Did he take his hat with him when he went out of the room?—I think he did not.

Did any body go along with Mr. Chaworth, or immediately follow him?—I went out with him.

How far did Mr. Chaworth and you go?—A little way without the room.

Was there any conversation between Mr. Chaworth and you, when you were out of the room?—There was.

Was there any other person besides Mr. Chaworth and you?—There was none.

Repeat what that conversation was that passed between Mr. Chaworth and you.—Mr. Chaworth asked me, if I attended to the discourse between him and lord Byron? I told him I did in part; he then asked me, If he had been short in what he last said upon that subject? I told him, No; I thought he said rather more than what was necessary upon so trifling an occasion, and that I did not believe that either lord Byron or the rest of the company would think any more about it.

Was there any other conversation between Mr. Chaworth and you at that time?—Yes; he asked me how long I stayed in town, and hoped we should meet often.

Was there any other conversation between Mr. Chaworth and you relative to the subject

of the discourse that had passed between my lord Byron and Mr. Chaworth?—No.

What became of Mr. Chaworth after his?—He turned to go down stairs.

Where did you go to?—Into the room again.

When you went into the room, did you see lord Byron, and where?—I stood with my back to the door, and upon turning round to go into the room I saw lord Byron.

What was he doing at that time?—He was coming out as I was going in.

What length of time might it be from your going out to Mr. Chaworth, to the time of your coming in again?—I cannot exactly tell, but I believe a very short time.

Can you form any judgment how long it might be?—I think it could not be five minutes.

When you met lord Byron going out of the door, was any thing said?—No.

Do you remember any thing more that passed in the house that gave you any alarm in regard to lord Byron and Mr. Chaworth?—Yes, when I was in the room, and saw that lord Byron was not there, I began to reflect that they possibly might meet and resume their discourse; by that time the bell was rung by some of the company, and the waiter came into the room. I met the waiter, and asked him if he saw Mr. Chaworth? and he said he believed he was below stairs; I desired he would go and see for him immediately, and tell him I must speak to him. I was then preparing to go down myself, and the waiter immediately came up with an account of Mr. Chaworth's being run through the body.

What did you and the rest of the company upon that?—We all hastened down to the room where Mr. Chaworth was.

Did you see Mr. Chaworth in the room, and who was there, and in what situation? Describe the particulars.—I saw him in a great chair in the corner of the room. Mr. Fynmore, the master of the tavern, was in the room.

How did Mr. Chaworth appear?—He sat in the chair, leaning his head back. I went to him, and asked him how he did? He said he was run through the body, and had not five minutes to live. Upon my asking how it happened? he said, he and lord Byron went into the room and fought. I then told him, I hoped his wound was not so bad as he apprehended; he said he was sure he was run through the body, for that my lord was very near him, and had shortened his sword.

Did you enquire any thing of Mr. Chaworth, how they came to go into that room and fight?—No, I did not particularly.

Did Mr. Chaworth relate any thing to you about his going into the room?—He did; and said, when he turned round from shutting the door, he saw lord Byron with his sword half-drawn, and calling upon him to defend himself.

What did Mr. Chaworth do when lord Byron so called upon him?—He drew, and they immediately engaged.

VOL. XIX.

Who said so?—Mr. Chaworth himself said so.

Was any thing more said by Mr. Chaworth to you at that time concerning this matter?—No; I do not recollect any thing else material.

L. H. S. Recollect yourself, whether any thing else material happened; or did Mr. Chaworth say upon what occasion they fought?—*Donston*. No, he did not to me; for I then got up, and he talked to other people who flocked about him.

Mr. Stowe. Did you hear Mr. Chaworth make any enquiry concerning lord Byron?—

Donston. I heard him say he thought he had wounded lord Byron.

Did Mr. Chaworth say to you any thing of the manner in which he apprehended he had wounded lord Byron?—No, he did not to me.

At the time you left the room at the Star and Garter, were all the company sober or not?—I think, perfectly so.

Mr. Stowe. My lords, this is all I shall examine Mr. Donston to.

L. H. S. Lord Byron, would your lordship ask this witness any questions?

Lord Byron. What reason had you to imagine, that if I and Mr. Chaworth should meet we should resume the discourse?—*Donston*. It was very likely that they should come together, as I met my lord so soon after I had parted with Mr. Chaworth.

Lord Byron. Was it not on account of the words which you heard repeated in the room, and what passed after Mr. Chaworth and you went out of the room together?—*Donston*. It was partly from the words I heard in the room, and partly from Mr. Chaworth's having questioned me about them.

Lord Montfort. Why did you follow Mr. Chaworth out of the room?—*Donston*. Mr. Chaworth took hold of my arm, and asked me to speak with him.

Lord Montfort. How came you not to follow lord Byron down stairs?—*Donston*. I was returning into the room, and was not sure it was lord Byron till I came into the room and saw that he was not there.

Earl of Buckinghamshire. Do you imagine lord Byron could overhear any part of the conversation you had with Mr. Chaworth upon the stairs?—*Donston*. I do not imagine lord Byron could overhear it at that distance.

By Lord Berkeley.

Do you know of any words spoken by lord Byron that could induce Mr. Chaworth to say, that if he wanted any thing with sir Charles Sedley, he lived in such a place, and that he, Mr. Chaworth, lived in Berkley-Row?—It arose from lord Byron's asking the question a second time about sir Charles Sedley's manor.

When Mr. Chaworth said to you, Do you think I have been short in what I said to lord Byron? do not you apprehend, that that referred to the words that Mr. Chaworth had said in the room?—I believe it did.

Did Mr. Chaworth leave his sword in the room as well as his hat?—I do not believe he did; I think he never took his sword off.

Lord Mansfield. Whether lord Byron took his hat with him when he went out?—Donston. I do not know at all.

Earl Talbot. When you reproved Mr. Chaworth for having gone too far in what he had said to lord Byron, by saying, I think he said rather more than was necessary on so trifling an occasion, did not you think the words he had said were of force enough to a man of strict honour, and nice sensibility, to require an explanation?—Donston. I did at first; but as they were spoke without much heat or passion, and no apparent notice taken either by lord Byron, or the rest of the company, I thought they might admit of a different construction.

Lord Cathcart. Did any thing pass between you further than what you have acquainted the lords with?—Donston. Nothing more.

Lord Viscount Weymouth. Did Mr. Chaworth say any thing that led you to imagine that lord Byron would take notice of it?—Donston. Nothing more than his asking me that question.

Earl Poulet. Do you apprehend that at the time those words were spoke about sir Charles Sedley's manors, they were said in a manner reflecting upon sir Charles Sedley, or Mr. Chaworth?—Donston. No, I do not: it seemed to me to be rather questioning the bounds of their manors, as I understood it.

Mr. Cornwall. My lords, we desire Mr. Molyneux may be sworn.

Francis Molyneux, esq. sworn.

Mr. Cornwall. Mr. Molyneux will inform your lordships if he dined at the Star and Garter on the 26th of January last.

Lord Mansfield. I should think it unnecessary to ask this question of every witness.

Examined by Mr. Cornwall.

Were you in company with lord Byron and Mr. Chaworth on the 26th of January last?—I was.

Do you recollect any discourse upon the subject of game?—I do.

Were lord Byron and Mr. Chaworth engaged in that discourse?—They were.

At what time of the day might that discourse begin?—About seven of the clock, I think.

Was there any difference of opinion between lord Byron and Mr. Chaworth upon that subject?—There was.

Please to tell their lordships how that was expressed.—Mr. Chaworth said, he had always been strict in preserving his game, and that that was the best method of preserving them: lord Byron said, he had never been strict, and that he had more game about Newstead than any body else.

Was any bet proposed by any of the company?—There was.

By whom?—By lord Byron.

What were the terms of the bet?—He offered to lay 100*l.* that he had more game about Newstead than sir Charles Sedley or Mr. Chaworth.

Did Mr. Chaworth take the bet?—Mr. Chaworth said, if he would call for pen, ink, and paper, he would lay him the wager.

Was nothing more said upon that subject?—Lord Byron said, he should be glad to know where sir Charles Sedley's manor was.

What answer was made to that question?—Mr. Chaworth said, Nuttall; but if your lordship should have any thing to say to sir Charles Sedley, he lives at one Mr. Cooper's in Dean-street.

Was any thing further said by any person, or was that the whole?—Lord Byron asked again where sir Charles Sedley's manor laid.

And what answer was given to lord Byron?—Mr. Chaworth said, he had already informed lord Byron where sir Charles Sedley lived; and his lordship knew where he lived, if he had any thing to say to him.

Was there any more conversation?—No more upon that subject.

How long did lord Byron continue in company after this conversation ceased?—I believe he continued in company about an hour.

Did he join in any part of that time in any future conversation?—He conversed with me.

Were you near him?—I sat next to him.

On what subject did lord Byron converse with you?—About the duke of York's house.

Upon any other subject?—Upon no other.

Did he appear to be in good humour?—I thought he did; I did not see any thing to the contrary.

Do you recollect at what time Mr. Chaworth quitted the room?—I think it was about eight of the clock.

Did any body go out with Mr. Chaworth, and who?—Mr. Donston, I think, went out with him. I do not know whether he went out with him, or followed him.

Do you recollect lord Byron's quitting the room?—I do.

At what time?—About seven or eight minutes after Mr. Chaworth.

Where did you next see Mr. Chaworth?—In a room up one pair of stairs.

How soon after lord Byron quitted the room?—I cannot justly say; but I think it might be about five or six minutes.

In what condition did you find Mr. Chaworth?—He was sitting in a great chair, and lord Byron standing by him.

Did you hear Mr. Chaworth declare any thing, and what?—Mr. Chaworth said, he had very few hours to live; that lord Byron had shortened his sword and stabbed him into the belly; that he should be glad to say something to a particular friend before he died; I left the room soon afterwards.

Did you hear Mr. Chaworth declare any thing, and what, after that?—I heard him say again, that he had but a very few hours to live.

Did you hear Mr. Chaworth declare any thing else at that time?—I did not.

Mr. Cornwall. My lords, we have done with this witness.

J. H. S. Lord Byron, will your lordship ask any questions of this witness?

Lord Byron. Was not the conversation between you and me very short?—*Molyneux*. It was not of long duration.

Lord Byron. My lords, I shall ask this witness no more questions.

Earl of Morton. I understood that lord Byron said, he had more game upon his manor than any body, and that he would lay one hundred pounds of that; was that what you said?—*Molyneux*. It was.

Att. Gen. I understand Mr. Hawkins and Mr. Adair, the two surgeons that are attending here, in all probability may be wanted, and therefore, if your lordships please, we will call them.

L. H. S. Yes, certainly the surgeons may be called, as they may be wanted elsewhere.

Lords. Ay, ay.

Cæsar Hawkins, esq. sworn.

Examined by Mr. Attorney General.

Mr. Hawkins, were you sent for to Mr. Chaworth, on the 26th of January last?—I was.

Did you go to him?—I did immediately upon receiving the message.

What time of the night might that be?—A little after eight, as near as I can recollect.

In what condition did you find Mr. Chaworth?—I found him sitting by the fire-side, in the back-room, up one pair of stairs, with the lower part of his waistcoat open, his shirt bloody, and his hand holding his belly.

Had you any conversation with him there, how that misfortune had befallen him?—He said to me, that he believed he had received a mortal wound; that he felt within himself a peculiar kind of faintness and sinking; and that he had a sensation of stretching and swelling of his belly, that made him believe he bled internally.

Did he say any thing more how this unfortunate affair happened?—After I had made my proper enquiries and examination, he pressed me earnestly to tell him what his real situation was, and, as he expressed it, not to flatter him, but to inform him truly, if I thought him in any immediate danger, for if he was, that he had private affairs which he wished extremely to settle. I told him, I was afraid his wound was dangerous. He then desired that Mr. Levinz might be immediately sent for to him, and desiring the other gentlemen, who were in the room, to step out for a few minutes, he gave me some directions relative to his private affairs, which he desired I would mention to Mr. Levinz, in case he died before Mr. Levinz could be brought to him. This conversation being ended, I think before the other gentlemen

returned into the room, I asked him in what position his body was when he received the wound? To which question, as I apprehend, to make his answer more explicit, he gave me the following detail: that lord Byron and he came into that room together, lord Byron leading the way, and walking on towards the further end of the room, said something very rough to him; upon which he said, Then, my lord, it is right I should fasten the door (I am not sure whether he said fasten the door, or bolt the door); that he turned to the door, and did fasten it; that as he turned round again towards lord Byron, he saw his lordship with his sword either drawn, or nearly drawn, upon which he immediately drew his own, and at the same time that he presented the point of his sword to his lordship, that he made a thrust at him, which he thought had hit him, and dangerously wounded or killed him; that immediately afterwards he perceived his lordship shortening his arm to make a thrust at him, which he thought to have parried with his left hand, with which he endeavoured to catch the point of the sword; and he looked at his hand once or twice, thinking that he had either scratched or wounded his hand in the attempt; that he perceived the sword enter his body, and imagined it had gone in deep, for that he had felt a pain quite through to his back; that immediately after he laid hold of the gripe of lord Byron's sword, and struggling with him for it, and being the stronger man, he disarmed his lordship, saying to him, he hoped he was not dangerously wounded; that lord Byron replied something to the same purpose to him; and, I think, added, that lord Byron said, That he hoped now he would allow or acknowledge (it was either allow or acknowledge, I am not sure which of the two words) that he (his lordship) was as brave a man as any other in the kingdom; and some considerable time passed afterwards at the tavern, before Mr. Chaworth was carried to his own house, partly on account of Mr. Chaworth's being of opinion, that he still felt himself bleeding inwardly; and as he wished extremely to see Mr. Levinz, he desired to avoid moving, for fear the bleeding should be increased by it, and so accelerate his death. A part of the time was likewise taken up in our endeavouring to get proper conveniencies for his removal. During this time he recollected some other little circumstances relative to his private affairs, on which account he desired the gentlemen, who were then in the room, to retire again. When he had mentioned what he had to say upon that subject, he repeated to me again with great earnestness, what I had heard him declare before, two or three times in different expressions, equally strong, that pained and distressed as he then was, and in immediate danger of death, he had rather be in his present situation, than live under the misfortune of having killed another person. This strong expression of humanity led me to ask him, if

there had been any serious cause of offence between them, meaning between lord Byron and himself, that should have occasioned the quarrel? He paused for a moment or two, as one recollecting himself, and then answered, No, nothing that might not have been explained and made up; I think his expression was, easily made up. After a little time more he grew stronger, and he was removed to his own house, without any great uneasiness or difficulty. I had desired the assistance of another surgeon; and then Mr. Adair, and soon after Dr. Addington, his physician, met me. We all joined in our best endeavours to give him some relief, but without any hopes of doing him good, and the next morning about nine o'clock he expired. On the Monday evening, by the coroner's directions, we examined the dead body: the sword had entered about an inch on the left side of the navel, and passing obliquely upwards, had made its exit about five or six inches higher, on the left side of the back: in its passage, the sword went through one of the small intestines, and had made a very large opening at the back part of the bottom of the stomach; so that all the contents of the stomach, a part from the intestine, and a quantity of blood, were mixed together in the cavity of the belly. The sword had likewise passed through the lower part of the diaphragm, and there was a small quantity of blood in the cavity of the left breast. Upon the whole, there was not the least doubt but that the wound we examined was the immediate cause of Mr. Chaworth's death.

Att. Gen. My lords, we have done with this witness.

L. H. S. My lord Byron, would your lordship chuse to ask this witness any questions?

Lord Byron. No, my lords.

Sol. Gen. The next witness, if your lordships please, is Mr. Adair, the other surgeon.

Robert Adair, esq. sworn.

Examined by Mr. Solicitor General.

Do you remember being sent for to Mr. Chaworth on the 26th of January last?—I was.

At what time were you sent for?—About nine o'clock.

In what condition did you find Mr. Chaworth?—I found him with a wound upon the left side of his belly, near the navel, which passed upwards, and went through between five and six inches higher than at its entrance.

Did Mr. Chaworth say any thing upon the subject of the wound?—Nothing to me.

Nor in your hearing?—Nor in my hearing.

Were you present when the body was opened?—I was present.

Do you think this wound occasioned his death?—Most certainly.

L. H. S. My lord Byron, does your lordship chuse to ask this witness any questions?

Lord Byron. No, my lords.

Serjeant Glynn. If your lordships please, we know call John Sherwin, esq.

John Sherwin, esq. sworn.

Examined by Mr. Serjeant Glynn.

Were you at the Star and Garter, at the Nottinghamshire club, on the 26th of January last?—I was.

Do you remember whether lord Byron and Mr. Chaworth were there?—They were.

Do you remember any conversation about game?—There had been some conversation by the company in general about game.

Do you remember what part lord Byron, and what part Mr. Chaworth, took in that conversation?—Lord Byron spoke upon that subject.

What did lord Byron say?—He thought that being too severe hurt the game, and that they were preserved more by the other method.

Did Mr. Chaworth express himself of a different opinion?—Mr. Chaworth did.

What did Mr. Chaworth say?—He said, nothing could be so clear as that the poachers were idle fellows, and did a great deal of mischief in the country.

Did Mr. Chaworth say any thing about game in his own manors?—After this conversation, lord Byron offered a bet of 100*l.* that he had more game upon an acre on his manor than Mr. Chaworth had.

Did Mr. Chaworth accept the bet?—Mr. Chaworth said he would.

What did he say upon that?—He offered to take the bet, and I believe desired that pen, ink, and paper might be sent for.

Was there any bet laid?—I said, it was a bet that could never be determined.

Was any thing said about sir Charles Sedley's manor?—After this there arose a dispute about their manors.

Repeat what passed upon that occasion.—Nuttall manor was mentioned, and another or two that I do not remember.

By whom was Nuttall mentioned?—I remember its being mentioned by Mr. Chaworth; he said, your lordship has nothing to do there, it is sir Charles Sedley's manor, it was bought out of my family.

Was there any thing more said upon this subject?—There was more conversation, which I do not remember.

How long did the conversation continue upon this subject?—It might continue a quarter of an hour, or twenty minutes.

Did the company then enter upon any other subject of conversation?—During the dispute between lord Byron and Mr. Chaworth, I remember Mr. Chaworth's saying, As to sir Charles Sedley, my lord, he will give you an answer; as to myself, your lordship knows where I live.

Did lord Byron take any part in the future conversation of the company?—Not that I remember; in general, I believe, he talked with Mr. Molyneux, who sat next him.

Did he appear to be in good humour or not?—I did not observe that at all, either one way

or the other; there was no further conversation between lord Byron and Mr. Chaworth.

When did Mr. Chaworth leave the room?—It might be twenty minutes after Mr. Chaworth had said, You know where I live, my lord.

Did Mr. Chaworth go out alone, or did any person go with him?—He asked Mr. Donston, who sat next him, to go out with him, he wanted to speak to him.

Did Mr. Donston return again to the company, and how soon?—He came into the room again very soon, almost in two minutes.

Did you observe when lord Byron left the room?—I remember his getting up out of his chair.

Before or after the return of Mr. Donston?—I think it was before.

Where did you see Mr. Chaworth again that evening?—Soon after Mr. Donston came into the room again, a drawer, or somebody came in, and said, there had been a quarrel; the company above stairs went down stairs into that room where Mr. Chaworth was; I went with them.

In what condition did you find Mr. Chaworth?—He was sitting in a chair, holding his belly with his right hand, his waistcoat was open, and his shirt bloody.

Had you any conversation with Mr. Chaworth?—I do not remember I had.

Did you hear any conversation between Mr. Chaworth and any other of the company?—Somebody asked him how he did? He said, he had not five minutes, or five hours, to live, I forget which. Mr. Hawkins came in, who had been sent for; and in a little time, the company left Mr. Hawkins and Mr. Chaworth together, and went up stairs, where they had dined.

Did you hear any declarations from Mr. Chaworth, respecting the accident that had happened to him?—I did not.

L. H. S. Would lord Byron ask the witness any questions?

Lord Byron. How was Mr. Chaworth employed during the twenty minutes that he was in the room, after the conversation that passed?—*Sherwin.* I do not remember in particular, but I imagine he was talking to the gentlemen on his right hand, or on his left.

Was he not employed in settling the reckoning?—I believe he was.

Did you observe any thing particular in his manner at the time?—I cannot say I did.

L. H. S. The witness may withdraw.

Mr. Stowe. If your lordships please, the next witness we will call is Thomas Willoughby, esq.

The Hon. Thomas Willoughby sworn.

Examined by Mr. Stowe.

Were you at the Star and Garter on the twenty-sixth of January last?—I was.

Were you there between four o'clock and seven in the afternoon?—I dined there a little

after four, and was there at seven in the afternoon.

Do you remember any dispute between lord Byron and Mr. Chaworth concerning the preservation of game?—They were of different opinions about their preserving of game.

What passed between lord Byron and Mr. Chaworth upon that subject?—Mr. Chaworth's argument was, that there was no such thing as having game, unless gentlemen were severe with the poachers.

Did lord Byron differ with Mr. Chaworth upon that head?—He did.

Did any words of anger pass between them?—I did not perceive any.

Do you remember any inquiry made concerning the manors of sir Charles Sedley?—Nuttall, a manor of sir Charles Sedley's, was mentioned.

By whom?—I do not know whether it was mentioned by lord Byron first, or Mr. Chaworth; but Mr. Chaworth said, Nuttall belonged to sir Charles Sedley; he knew it, for it was bought of his family.

Did any thing more pass, and what, about that?—No, not that I recollect.

Do you remember any bet on either side?—Lord Byron offered to bet Mr. Chaworth 100*l.* that he had more game upon his manor, or manors, than Mr. Chaworth had.

What followed upon that offer?—Mr. Sherwin said, it would be very difficult to decide that bet.

Do you know if any bet was made?—I do not.

Were there any words passed afterwards between lord Byron and Mr. Chaworth, respecting sir Charles Sedley, his manor, or his estate?—Not that I heard.

Do you remember Mr. Chaworth afterwards going out of the room?—I do.

At what distance of time might that be from the finishing the conversation?—Perhaps three quarters of an hour, or thereabouts, I cannot say exactly.

Did lord Byron, during that three quarters of an hour, discourse with Mr. Chaworth, or any other gentleman of the company?—I did not hear him.

Do you recollect, when Mr. Chaworth went out of the room, if any body went with him or followed him?—Mr. Donston went out at the same time.

Did Mr. Chaworth, when he went out of the room, take his hat with him or not?—I did not take notice of that.

How long was Mr. Chaworth out of the room, and did he return again?—He never returned again.

Did Mr. Donston return again?—He did.

In what space of time?—In a very short time.

Can you form any judgment of the time?—I cannot speak exactly, perhaps five minutes.

Where was lord Byron when Mr. Donston came into the room?—He was got up, and gone towards the door, or out of the door, I do not know which.

Did lord Byron take his hat?—I do not know.

How long might lord Byron be gone out of the room before you heard any thing more relative to lord Byron or Mr. Chaworth?—A very few minutes.

Who mentioned any thing to you concerning lord Byron and Mr. Chaworth?—The waiter came up and told us what had happened.

Did you go to the place, and see lord Byron and Mr. Chaworth, or either of them there?—I did.

Did you see Mr. Chaworth?—I did.

In what condition and situation was Mr. Chaworth?—He was sitting in a chair, with his hand on his belly, and his shirt was bloody.

Did Mr. Chaworth say any thing how he came by that wound?—He did not; only he said he was a dying man, and that lord Byron had run him through.

Did he say any thing more that you recollect?—He said several times over that he was a dying man, and had but a few minutes to live.

Mr. Stowe. My lords, we have done with this witness.

L. H. S. Lord Byron, would you ask this witness any questions?

Lord Byron. Were not you conversing with Mr. Hewett, during the latter part of the conversation between Mr. Chaworth and me, so as you might not hear it?—*Willoughby*. The last word I heard, was, that Nuttall belonged to sir Charles Sedley, that it was bought of his family, and he knew it.

Were not you conversing with Mr. Hewett so as to prevent you from hearing any more?—That was the last I heard.

L. H. S. Has lord Byron any thing more to ask this witness?—Lord Byron. No, my lord.

L. H. S. The witness may withdraw.

Mr. Cornwall. If your lordships please, the next witness we shall call is John Edwards.

John Edwards sworn.

Examined by Mr. Cornwall.

Were not you a waiter at the Star and Garter, on the 26th of January last?—I was.

Did you attend the gentlemen of the Nottinghamshire club, who met there that day, between eight and nine in the evening?—I did.

What was the purpose of your attendance between eight and nine?—To answer the bell, and to carry any thing into the room.

What commands had the company laid upon you at that time?—To bring up a bottle of claret.

Did you go down?—I did, to the bar, but not into the cellar.

What did you do then?—I called to my master to get some wine, who, when I called him first, I thought he was—
I called him twice—
him.

Whilst you were standing at the bar waiting for the bottle of claret, did you hear the bell ring?—I did not.

Did you hear any body call?—I heard somebody call Waiter, up stairs.

Did you know the voice?—I did not.

Did you obey?—I did not the first time, I thought to have taken the wine up stairs with me.

Was it repeated?—It was once or twice.

Did you go up?—I did.

Whom did you meet?—When I came up the first pair of stairs, I saw lord Byron and Mr. Chaworth coming down, or rather waiting upon the stairs for somebody to come up. Lord Byron asked me, if either of these rooms were empty (there being two rooms in his view?) I answered in the affirmative, and said, This; being the door which was on the right-hand.

What then did you do?—I had a candle in my right hand; I opened a green baize door, with a brass lock, with my left-hand, and shewed lord Byron and Mr. Chaworth into the room; I set the candle upon the table in the room; I quitted the room, and pulled the inner door after me; the outer door shuts with a pulley. I went down stairs immediately for the bottle of wine, which I had desired my master to get; I met him by the bar or the cellar door (which are together) with the wine in his hand. I took it from him, and went up stairs to the Nottinghamshire club, up two pair of stairs. I drew the cork, and heard the bell ring into the room into which I had shewed lord Byron and Mr. Chaworth, twice, whilst I was decanting the wine. When I had decanted the wine, I came down stairs, and found I was too late to answer the bell, as is common for a waiter that shews the room. I heard somebody had been in. When I came to the ground floor, the first person I spoke to (to the best of my knowledge) was my master. He clapped his hands together, and said, Mr. Chaworth is wounded, or lord Byron has wounded Mr. Chaworth; the expression I cannot exactly tell.

Did you go into the room?—Not till after I had been in the Nottinghamshire club-room, and had informed the gentlemen that Mr. Chaworth was wounded.

Did you stay long?—I did not stay long.

Did you hear Mr. Chaworth say any thing?—He seemed extremely desirous of seeing two or three friends, particularly Mr. Levinz.

What was the size of the room you shewed lord Byron and Mr. Chaworth into?—In some parts of the room, I have measured it, it is sixteen feet long and sixteen feet broad in some parts; the chimney is taken out of the corner of the room.

What kind of a candle did you leave in the room?—A common tallow candle, about eight in the pound.

Was there any other candle in the room?—There was no other candle in the room, nor any other light, to my knowledge.

Was there a fire in the room?—There was a fire in the room, but it was rather down.

Mr. Cornwall. We have done with this witness.

L. H. S. Lord Byron, would your lordship ask this witness any questions?

Lord Byron. Was there any table in the room?—J. Edwards. There was a table in the room.

Did you set the candle upon it?—I did.

How large a space might the chairs and furniture of the room take up from the length of it?—I cannot tell, indeed.

In what part of the room did you leave Mr. Chaworth and me standing?—Both walked towards the fire-place.

Lord Mansfield. I would ask this witness, whether he is sure that he shut the inner door, on Mr. Chaworth and lord Byron's going into the room?—J. Edwards. I pulled it after me, but cannot tell certainly whether it shut or not.

Lord Mansfield. Was there any bolt to the inner door?—J. Edwards. There is, it is a brass lock, and there is a little bolt at the bottom.

Att. Gen. If your lordships please, we will call Mr. Fynmore.

Mr. James Fynmore sworn.

Att. Gen. My lords, this is the master of the tavern. Do you remember going up stairs on the 26th of January last into the room where lord Byron and Mr. Chaworth were?—Fynmore. I do.

What induced you to go thither?—A waiter came and told me that two gentlemen were come out of the Nottinghamshire club, into the room N° 7, and desired to speak to me.

What is the waiter's name?—John Gothorp.

In what situation did you find lord Byron and Mr. Chaworth?—I found them standing close together; Mr. Chaworth had his sword in his left hand, and lord Byron had his in his right hand. Mr. Chaworth said, Here, James, take my sword, for I am disarmed, or I have disarmed him, I do not know which. I turned to lord Byron, and said, Pray, my lord, give me your sword; on which lord Byron gave me his sword, and I took it and went down stairs with it. As I was going out of the room, either one or both called after me, and desired me to get help immediately; I went down the stairs with the two swords, and laid them upon the table, in a room at the bottom of the stairs, and then called Mr. Hawkins.

Did you hear Mr. Chaworth say any thing how this accident had befallen him?—No.

Att. Gen. My lords, we have done with this witness.

L. H. S. Lord Byron, will you ask this witness any questions?

Examined by Lord Byron.

Did not you carry up the club-book into the room where we dined?—I went up at seven o'clock, as is the custom, with the book and a bill.

Did you wait the settling of the bill?—I did.

Did not Mr. Chaworth settle it?—Mr. Chaworth settled the book that day.

What time might it take up in settling it?—It was done in five or six minutes.

Did you make any observation upon Mr. Chaworth's manner of settling it, or observe any thing particular?—No, I think not any thing particular.

Did you observe him to be ruffled or confused?—In one particular only; the book is marked with lines ruled in checks, each gentleman's name is upon a line, and against each name, if the gentleman be present, there is a 0; if absent 5s. The only remark I made of any flurry in Mr. Chaworth, was, he put 5s. against lord Byron's name instead of a 0; upon which I said, Sir, my lord is present; upon which he altered it, and made a 0.

What was the size of the room where we were?—It was sixteen feet in the clear both ways, except that the chimney was taken out of one of the corners.

What space might the chairs take up from the dimensions?—The chairs are pretty large, they might take two feet each chair into the room.

Is there any inner fastening, and what, to the door?—The door has a brass lock, and there is a little catch underneath, as there usually are to these doors.

Is it not a bolt?—It is a little sliding bolt.

When you went into the room, in what part did you find me and Mr. Chaworth standing?—I saw lord Byron and Mr. Chaworth standing shoulder to shoulder, close by the fire.

A Lord. Was the door bolted when you first came to the room?—Fynmore. No, it was not.

Viscount Folkestone. Did lord Byron deliver up his sword readily?—Fynmore. When Mr. Chaworth gave me his sword, I turned to lord Byron for his.

Viscount Folkestone. Did he give you his sword directly?—Fynmore. I took hold of it, and his lordship made no objection.

Viscount Folkestone. The reason I mention this is, because the counsel, in opening, said, that lord Byron delivered up his sword with reluctance. Was not lord Byron at this time employed in supporting Mr. Chaworth?—Fynmore. Lord Byron's left hand was round Mr. Chaworth, as Mr. Chaworth's right hand was round lord Byron's neck, and over his shoulder.

Viscount Folkestone. Did not lord Byron desire you to call assistance?—Fynmore. I had the swords in my hand, and my back was towards them, when one of them said, (I do not know which) Get some help immediately.

Sol. Gen. If your lordships please, we will call John Gothorp, another of the waiters.

John Gothorp sworn.

Examined by Mr. Solicitor General.

You are a waiter at the Star and Garter?—Yes, my lords.

Were you on the 26th of January last?—I was.

Do you remember the bell ringing in N° 7?—I do.

About what time?—About a quarter past eight.

Did you go up into the room?—I did.

Was the door fastened?—It was not.

Where did you see lord Byron and Mr. Chaworth?—Standing with their backs to the fire.

How near the door?—About ten feet, as near as I can recollect.

In what situation did you see lord Byron and Mr. Chaworth?—They were both standing together; lord Byron had his left-arm round Mr. Chaworth's waist, with his sword in his right-hand, with the point to the ground; Mr. Chaworth was standing, with his right-arm resting upon lord Byron's shoulder, with his sword in his left-hand extended up.

Did they say any thing?—Lord Byron bid me take this sword (meaning which I cannot say), and call up Fynmore immediately.

What did you do?—I immediately left the room, without taking any sword, to call my master up.

L. H. S. Lord Byron, will your lordship ask this witness any questions?—Lord Byron. No, my lords.

Lord Mansfield. Was the door open when you came to it, or was it fastened with a bolt?—Gethorp. It was fastened, but not with the bolt.

Serj. Glynn. If your lordships please, the next witness we will call is Mr. Wm. Man.

Mr. William Man sworn.

Examined by Mr. Serj. Glynn.

Did you attend Mr. Chaworth, as an apothecary, on the 26th of January last?—I did.

Whom did you find in the room with Mr. Chaworth?—His servant.

Was there any other person besides his servant?—Not in the room where he was.

Did any other person come in during the time you were there?—Mr. Hawkins and Mr. Levinz did.

Was there any conversation between Mr. Chaworth and Mr. Levinz concerning the accident that had happened?—There was.

Relate that conversation.—Mr. Chaworth said some few words arose at dinner concerning who had the most game upon their estates: about two hours after Mr. Chaworth had occasion to go down stairs: upon his returning back he was met by lord Byron, who said, Chaworth, I want to speak to you; a waiter

at the same time, lord Byron said,

They went into the

My lord,

some person will

Chaworth, when he

the door, saw lord

drawn, who said,

Chaworth drew imme-

diately, and made the first pass, and entangled his sword in my lord's waistcoat; he then endeavoured to disarm lord Byron, and my lord gave him a push or blow, and then ran him through.

Was this the whole of what Mr. Chaworth declared at that time?—No.

Relate the whole.—Mr. Chaworth said, when he was first desired to walk into the room by lord Byron, he did not in the least imagine that he was going to be offered a challenge.

Was that the whole?—No.

Go on.—Some time after Mr. Chaworth said, This will not in the least be to my lord Byron's credit.

Is that the whole of what was said?—Yes, my lords.

Serj. Glynn. My lords, we will ask no more of this witness.

L. H. S. My lord Byron, would your lordship ask this witness any questions?

Lord Byron. Was any body present besides Mr. Levinz?—Man. Mr. Chaworth's servant.

Lord Byron. What is his name?—Man. Michael Cullum.

Lord Byron. At what time was this declaration made?—Man. I cannot positively say, but I think it was between the hours of two and four.

Lord Byron. Was it before he signed his will?—Man. I think it was, but I am not certain.

Mr. Cornwall. If your lordships please, we will call Michael Cullum.

Michael Cullum was called, but did not appear.

Att. Gen. My lords, I find that this witness is not here. If your lordships please, we will call Mr. Levinz.

L. H. S. How many more witnesses do you intend to call?—Att. Gen. We will only call Mr. Levinz, and one more.

Lord Mansfield. From the opening of the prosecutor's case, it seems to me, they are very near the end of their evidence, and there is nothing else left but the paper; it is now past five o'clock, and, I should think, it would be more for the ease of the prisoner and your lordships, to adjourn to the Chamber of Parliament.

Then the Lord High Steward returned back to the chair.

Lord President of the Council. My lords, I move your lordships to adjourn to the Chamber of Parliament.—Lords. Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same order they came down, except the Lord High Steward, who walked after his royal highness the duke of of York; and, the House being there resumed; Resolved to proceed farther in the Trial of William lord Byron, in Westminster-hall, tomorrow, at ten of the clock in the morning;

and ordered, That the said William lord Byron should be remanded prisoner to his majesty's Tower of London, there to be kept in safe custody; and that he be brought again to the bar of this House in Westminster-hall, to-morrow, at ten of the clock in the morning.

THE SECOND DAY.

Wednesday, April 17, 1765.

The Lords and others came from the Chamber of Parliament in the same order as on Tuesday last, except the Lord High Steward, who walked after his royal highness the duke of York; and the Peers were there seated, and the Lord High Steward in his chair.

Lord High Steward. My lords, the House is resumed. Is it your lordships' pleasure that the Judges may be covered?—*Lords.* Ay, ay.

Then the Serjeant at Arms made proclamation for silence as usual; and afterwards the following proclamation.

Serjeant at Arms. Oyez, Oyez, Oyez! Lieutenant of the Tower, bring forth your prisoner, William lord Byron to the bar, pursuant to the order of the House of Lords.

The deputy governor of the Tower brought the prisoner to the bar, in the like form as before; and then he kneeled down.

L. H. S. Your lordship may rise.

The Lord High Steward, by leave of the Lords, went down to the table for the convenience of hearing.

L. H. S. Mr. Attorney General, you will proceed in your evidence.

Attorney General. My lords, the first witness we call is Mr. Levinz.

William Levinz, esq. sworn.

Att. Gen. Mr. Levinz is uncle to the deceased Mr. Chaworth. Did you see Mr. Chaworth on the 26th of January last?—*Levinz.* I did, about ten at night or thereabouts.

Where did you first see him?—I first saw him at his own house.

That was after the misfortune?—It was after the misfortune.

Did he give you any account how that misfortune had happened?—He did.

What was that account?—As soon as I got into the house I went into his bed-chamber, he took me by the hand, and told me lord Byron had given him a mortal wound; desired I would send for a lawyer as soon as possible to make a new will, saying he believed he should be dead before morning; upon which I came out into the outward room. There were Mr. Serjeant Hawkins, Mr. Adair, Mr. Willoughby, and Mr. Hewett. I told them that Mr. Chaworth had desired me to send for a lawyer, but I was so totally deprived of recollection, I could not remember where any one lived; upon

VOL. XIX.

which Mr. Hawkins told me, there was one Mr. Partington, who lived in that neighbourhood, that was a man of character, and that, if I pleased, he would send for him. Mr. Partington came, I believe, in a quarter of an hour. As soon as he came, I introduced him to Mr. Chaworth, and I left him in the room to take his instructions. When the gentlemen were gone down stairs, and Mr. Partington had begun making the will in the next room, I went to Mr. Chaworth, and asked him how this unfortunate affair had happened? He told me, that lord Byron took him into a room; upon which Mr. Chaworth said, If we are to talk I had better shut the door, or else they may overhear what we say. Upon his shutting the door, the first thing he saw when he turned his head about, was lord Byron's sword half drawn; upon which he drew his as quick as possible, and got the first pass at him; and finding his sword engaged in something, he thought it was my lord's body, and therefore wished to disarm him, and in endeavouring to close in for that purpose, my lord shortened his sword, or arm, I am not positive which, and gave him that mortal wound. From that time till the time the will was executed, which was about three in the morning, Mr. Chaworth's head was so full of his private affairs, that I cannot say I heard him mention the unfortunate affair, till after the will was executed, when I asked him, Has this been fair? But he made no answer; at I could hear, but said he saw my lord's sword half out, and, knowing his man, he drew his sword as quick as he could; that he had the first pass at him, and then my lord wounded him, and after that he disarmed his lordship, when my lord swore he was as brave a man as any in England. He said twice to me, Good God! that I should be such a fool as to fight in the dark; for indeed there was very little light. He said he did not believe lord Byron intended fighting when they went into the room; but seeing him up by the door, he believed he thought he had him at an advantage; and the first thing he saw, upon turning his head, was his lordship's sword half-drawn. He said he died as a man of honour, but he thought lord Byron had done himself no good by it. I asked him several times in the night, how this affair begun above stairs? he always answered, It is a long story, and it is troublesome to me to talk. They will tell you; Mr. Donston will tell you. That is all I know of this unfortunate affair.

Att. Gen. I shall ask Mr. Levinz no more questions.

L. H. S. Lord Byron, will your lordship ask this witness any questions?

Lord Byron. My lords, I shall ask no questions of this witness.

A Lord. Did you understand that Mr. Chaworth went to shut the door, that they might not be overheard, or to bolt the door?—*Levinz.* He expressly said, that he went to shut the door, that they might not over-hear what they said.

A Lord. Was it before or after the making of the will that Mr. Chaworth gave that account to you?—*Levinz.* The first account was about eleven at night, I believe, when the will was first begun: the last time he spoke to me about this unfortunate affair was, I believe, within the hour after the will was executed.

Earl of Morton. Before the will was made, when he gave the account to the gentlemen in the room, did he seem to have most attention to the making of his will?—*Levinz.* To the making of the will; he seemed to have it prodigiously at heart.

Earl of Morton. Did he seem to you in bodily pain?—*Levinz.* He was more or less so the whole night; for about an hour after the will was executed, he was amazingly composed; about four he fell into vast tortures. I sent for Mr. Adair, who came to him, and by applying warm fomentations relieved him very much; but from that time I cannot say he talked about the unfortunate affair; he sent for me up to desire that something might be done as soon as ever he was dead.

Earl of Morton. The last time he spoke to you, was he seemingly in pain?—*Levinz.* My lords, he never was free from pain.

Earl of Denbigh. Did Mr. Chaworth tell you what past upon the stairs, previous to his going into the room?—*Levinz.* He never said any thing to me about what passed upon the stairs; I wished to know it, but never could learn it.

L. H. S. The witness may withdraw.

Sol. Gen. The next witness, my lords, is Mr. Partington.

Thomas Walley Partington, esq. sworn.

Examined by Mr. Solicitor General.

Did you attend Mr. Chaworth on the 26th of January last?—I did.

At what time did you attend him?—A little after ten o'clock.

Whom did you find with Mr. Chaworth?—When I first came into the house, I was taken into a parlour, where there were Mr. Levinz, Mr. Hawkins, Mr. Adair, Mr. Hewett, and Mr. Willoughby. I stayed there a very few minutes. I first asked what I was sent for? I was told, to make Mr. Chaworth's will; and by the conversation that passed between the gentlemen there, I understood that lord Byron and Mr. Chaworth had fought in a room by themselves, and, according to an expression of one of the gentlemen, by a farthing candle. After the will was executed, Mr. Chaworth began to talk of his situation as of a dying man. He expressed a satisfaction that he was in that situation, rather than to have lived and to have had the life of any man to answer for.

— conversation, Mr. Levinz, in seeming, said to him, Dear Billy, for what was this? was it fair? Mr. was turned towards the gentleman, Mr. Levinz stood on that question being asked, he

turned his head to Mr. Levinz, sinking upon the pillow. He said something which I could not distinguish, for I stood at the bottom of the bed, and immediately went round to where Mr. Levinz stood, and as I opened the curtain, I heard him say something of lord Byron's sword being drawn; upon which, and from what I understood had passed, I was led to ask him this question, Mr. Chaworth, was my lord Byron's sword drawn when you came into the room? He then answered what I afterwards wrote down.

How soon after did you write it down?—Upon coming down into the parlour, after I had sealed up and delivered the will to Mr. Levinz, as I had advised some question might be asked when the will was executed, so I thought it prudent, whilst we were together, that we should set down the answer that Mr. Chaworth gave: the gentlemen assented. I took a pen and ink and wrote, "When he came into the room, Mr. Chaworth said," and went on a little further, when I read what I had wrote; and I think Mr. Hewett in particular excepted to those words "When he came into the room," I tore the paper, and threw it into the fire, and wrote the words which I now have in my hands.

How long after the finishing the will were the declarations contained in this paper made?—It must be but a very few minutes.

Sol. Gen. We desire the paper may be read.

The witness read it as follows:

'Sunday morning, the 27th of January, about three of the clock, Mr. Chaworth said, that my lord's sword was half-drawn, and that he, knowing the man, immediately, or as quick as he could, whipt out his sword, and had the first thrust; that then my lord wounded him, and he disarmed my lord, who then said, By God, I have as much courage as any man in England.'

L. H. S. Lord Byron, will your lordship ask this witness any questions?

Lord Byron. Did not you understand this declaration of the facts to be an answer to the question whether it was fair or not?—*Partington.* I understood the declaration to be an answer to Mr. Levinz and myself, and to the inquiry in general, which was making by the gentlemen.

Lord Byron. Did not you understand from those declarations that what had passed was fair?

Lord Mansfield. They will not ask the witness as to his understanding, but to the facts only. Your lordships will draw the conclusion.

L. H. S. You had this paper to refresh your own memory?—*Partington.* I had, my lords.

Lord Ravensworth. I desire to know whether this paper in Mr. Partington's hand was not read, and allowed to be what Mr. Chaworth

* As to dying Declarations, see the Case of Reason and Tranter, vol. 16, p. 1.

said before every one in the room. I do not look upon it as a paper to refresh his memory, but as a paper taken from the mouth of Mr. Chaworth as a declaration from him; and therefore desire to know, if it was read to the gentlemen in the room, and who those gentlemen were?

L. H. S. Your lordships will observe, that the witness has been examined upon oath with respect to the declaration he has in his hand, which was reduced into writing; you may therefore ask this witness, whether he took that paper in order to refresh his memory, or for what other purpose?—*Partington.* I took it for our general recollection of the words that Mr. Chaworth said.

L. H. S. Were those declarations made to you?—*Partington.* To all of us. They are the very words I heard.

L. H. S. Then you may refresh your memory from the paper.

Lord Ravensworth. Was this paper read to the gentlemen who were below stairs; and who were in the room when Mr. Chaworth made the declaration?—*Partington.* Mr. Levinz, Mr. Hewett, Mr. Hawkins, Mr. Willoughby, and Mr. Adair, I think no other gentleman was present, except myself, in the room; after I had wrote this, I read it over, and they agreed it was the substance of what Mr. Chaworth said.

Lord Ravensworth. Were they the persons present in the bed-chamber when the declaration was made?—*Partington.* They were the persons present in the bed-chamber when the words were spoke; they were the persons present in the parlour when I read it over; and it was agreed by all, that they were the words Mr. Chaworth said.

Lords. Read the paper over again. (Which was done by the witness.)

Earl of Denbigh. Did you ever hear Mr. Chaworth say any thing of any conversation which passed previous to lord Byron's drawing his sword in the room?—*Partington.* I was with Mr. Chaworth, backwards and forwards, from half an hour past ten till three, and he said nothing more to me than what I have repeated to your lordships, concerning what had passed between him and lord Byron.

Duke of Manchester. Did you ever shew this paper, of which you now speak, to Mr. Chaworth before his death?—*Partington.* No, my lords; I never saw Mr. Chaworth after I came down from him, after he had executed his will.

Lord Viscount Townshend. Was it ever read by any of the gentlemen to Mr. Chaworth?—*Partington.* Not to my knowledge; it has never been in my custody since.

Lord Viscount Townshend. Where was it?—*Partington.* I delivered it to Mr. Levinz that night; and I never saw it since, but once in Mr. Joyner's, Mr. Levinz solicitor's hands.

Duke of Manchester. The paper that you first began to write, I think you said was thrown into the fire?—*Partington.* It was.

Duke of Manchester. Was it not completed when thrown into the fire?—*Partington.* I had wrote as far of the paper as where the expression half drawn is mentioned.

Lord Cathcart. Did the paper you burnt, and the other paper you now have, differ?—*Partington.* No.

Earl Gowrie. I desire to know whether you threw the paper into the fire, because it differed from the account Mr. Chaworth gave, or because it differed from your own account?—*Partington.* The reason it was thrown into the fire was, I thought it was better to write it over again, than to have it appear with an alteration in it. I had struck out some words Mr. Hewett objected to, and for that reason I wrote it over again fair.

L. H. S. The witness may withdraw.

Earl of Denbigh. I desire Mr. Levinz may be called in again.

Att. Gen. I think it my duty to inform your lordships, that from a misapprehension on our part, that the witnesses might differ in some little matters, we were extremely tender of examining any of them to what was contained in the writing, conceiving the legal evidence to be the paper-writing itself; and if your lordships think that the paper cannot be admitted, I am in your lordships' breasts, if it is not proper for us to call the witnesses to speak to these declarations. We were extremely tender in examining to any thing that should lead to the conversation contained in this paper.

Lord Mansfield. By my notes it appears, that Mr. Hewett spoke precisely to the declarations of Mr. Chaworth; for after he had been examined to the writing, he said, there was an exception taken to some words in it, and it was destroyed, and a new one was wrote.

Duke of Richmond. My lords, a question was some time since asked by the prisoner of Mr. Partington, the answer to which I did not at this distance hear.

L. H. S. That question was objected to by a noble lord as improper, and therefore it was not answered.

Earl of Denbigh. I desire that Mr. Levinz may be called to the bar again, to be further examined.

Lord Harwich. Your lordships cannot enter into any debate here: if there be any difference of opinion, it will be necessary to go back to the Chamber of Parliament.

The Lords were then moved to adjourn to the Chamber of Parliament.—*Lords.* Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same order as they went from thence this morning, and the House was there resumed; and, after some time, again adjourned to Westminster-hall; and the Peers and others went down in the same order as before; and the Peers being there seated, and the Lord High Steward in his chair,

L. H. S. My lords, the House is resumed: Is it your lordships' pleasure that the Judges may be covered?—*Lords.* Ay, ay.

Then the Serjeant at Arms made proclamation for silence as usual, and afterwards the following proclamation.

Serj. at Arms. Oyez! Oyez! Oyez! Lieutenant of the Tower, bring forth your prisoner, William lord Byron, to the bar, pursuant to the order of the House of Lords.

The deputy governor of the Tower brought the prisoner to the bar in the like form as before, and then he kneeled down.

L. H. S. Your lordship may rise.

Then the Lord High Steward, by leave of the Lords, went down to the table.

L. H. S. Mr. Attorney General, you will proceed in your evidence.

Att. Gen. My lords, if I could have conceived that there remained a doubt in the minds of any one of your lordships, that the contents of this paper were not true, I should have thought it my duty to have called all the witnesses to have substantiated the contents: but as I cannot now trespass upon your lordships' patience, the evidence on behalf of the crown is closed; and we leave it here.

Earl of Denbigh. I desire that Mr. Levinz may be called to the bar.

Mr. Levinz was called again.

Earl of Denbigh. There was a conversation passed between Mr. Chaworth and the noble prisoner at the bar, previous to Mr. Chaworth's shutting the door; now I should be glad to know whether Mr. Chaworth said any thing to you, relative to the conversation which passed between him and lord Byron upon the stairs, previous to their going into the room where they fought?

Levinz. No, my lords; what he told me was, that lord Byron asked him into the room; that when he came into the room, he said, My lord, if we are to talk we had better shut the door, or else they may overhear what we say: and I never heard Mr. Chaworth say any thing else about it.

Duke of Newcastle. When you asked Mr. Chaworth whether it was fair, you were on one side of the bed, and Mr. Chaworth turned his head, and said something which Mr. Partington did not hear; I desire to know whether, upon that occasion, you heard any answer to that question?

Levinz. At that time I did not; I asked him the same question once afterwards, and he gave me no answer; but seemed to me to shrink his head into the pillow.

Lord Viscount Folkestone. Where-
worth told you what passed in
they fought, did he say th
him defend himself, or
purpose?

Levinz. Mr. C

his turning his head from the door, he saw lord Byron's sword half-drawn. My lord said, Draw, draw! I am sure Mr. Chaworth said the word, Draw, twice.

Lord Viscount Folkestone. Did Mr. Chaworth explain to you in what manner he received the wound?

Levinz. He told me he felt the point of his sword engaged in something, and that he took it to be my lord's body; that, therefore, he wished to disarm him; and in endeavouring to close in for that purpose, my lord shortened his sword, or his arm (I am not certain which word he made use of,) and gave him that wound. This was all that he said to me on that subject.

L. H. S. The witness may withdraw.

Att. Gen. My lords, as the witnesses have fully proved the evidence and facts which I stated to your lordships in the opening, I will not trouble your lordships to call any more witnesses, but will rest our evidence, in support of the prosecution, here.

Sol. Gen. My lords; The evidence on the part of the prosecution being closed, it remains for me, according to the usual course of proceeding, to collect, as far as it may be necessary, into one view, the proofs that have been made, and to apply them to the present charge: a very painful task! but yet justice to the public peace, to the memory of the deceased, and to the solicitude of his surviving friends, authorizes and requires it. I should wish to discharge this part of my duty with that benevolence and humanity which possessed the mind of the deceased in the last hours of his life.

The noble prisoner at the bar is charged with having killed Mr. Chaworth deliberately and maliciously; or, in the terms of the indictment, with malice aforethought. That he killed him, is a truth beyond dispute; and he who takes away the life of another, is presumed to have taken it away deliberately and maliciously, till it shall appear to have been the effect of necessity, of accident, or of sudden passion; for as necessity will justify, and accident excuse the fact, an ungovernable transport of passion will so far alleviate the crime, as to make that, which would otherwise have been murder and a capital offence, manslaughter only, which saves the life of the offender.

This is a condescension the law shews to the frailties of the human mind, which upon great and sudden provocations cannot command itself, nor maintain its reason; but whilst the law shews this condescension, it guards the life of the subject, with all possible caution and re-

against the excess and abuse of the be-
whose mind is
the guilt of ma-
did in action.
I have acted
less, without
if it should
then did not

irritate, or irritating did not overcome the reason, or overcoming the reason, the mind cooled and deliberated, or had time to cool and deliberate, and then he fought and killed; he has incurred the guilt of malicious murder; he did not act from the impulse of a present passion; and whatever motive actuated him, whether some secret grudge, or an imaginary necessity of vindicating his honour, or of satisfying the world of his courage, or any other latent cause, he is no object of this benignity of the law.

The law books do not make it murder, only where the passion has actually cooled; but where, in the time that has passed, it ought in reason to have cooled. And in *major Oneby's Case*,* no more than an hour had passed, and the judges thought that sufficient for the purpose.

There is no specific evidence required to shew that the mind has cooled, it must depend upon the particular circumstances of the case; but all the books, from the time of *lord Morley's Case*,† in the reign of Charles 2, down to the treatise of a late learned judge, [qu. Foster] agree, that the party engaging in different conversation, or in amusements, affords a convincing proof that he labours under no transport of passion, but has cooled and recovered his reason.

I will not abuse your lordships' patience with going through the detail of the evidence. Your lordships serious and unwearied attention, during the course of this trial, have made it unnecessary. I shall only point out some observations arising from what passed at the three most material periods of time, that is, during the conversation in the room where the company dined; upon the stairs; and in the room below.

Nothing could be more innocent than the conversation of the company about the best method of preserving of the game; there could be no offence in Mr. Chaworth's saying, that he had more game upon his estate, than lord Byron had upon his; nor was there any in lord Byron's saying, that he had the most. The first offence, that seems to have been taken, was my lord Byron's repeating the question relative to sir Charles Sedley's manors; Mr. Donston understood it to be so. But it does not precisely appear, whether the offence was given by the bare repetition of the question, or that it imported a reflection upon an absent friend; or that it contained too flat a contradiction of what he had asserted; or that there was any thing particularly affronting in the tone of voice, or in the countenance, or in the gesture; but it is very plain, Mr. Chaworth thought himself offended, and Mr. Chaworth's expressions upon the stairs, in asking Mr. Donston if he had been wanting in 'his reply,' imports it. It is clear too, from the questions lord Byron asked Mr. Chaworth, that lord Byron saw Mr. Chaworth had taken offence. But whatever effect lord Byron's behaviour

had upon Mr. Chaworth, Mr. Chaworth's had no visible effect upon lord Byron: no action or expression of anger escaped him; there was no change of countenance; the matter ended there. Other conversation engaged the company; lord Byron appeared to Mr. Hewett to be conversing in good humour with Mr. Molyneux; and Mr. Molyneux confirms the reality of it. A full hour passed in general conversation. Mr. Chaworth does not seem to have been much discomposed, though Fynmore says he was a little ruffled; which he collects from a mistake he made in settling the book; a trifling circumstance! from which no just inference can be drawn. But the question is not, whether Mr. Chaworth was ruffled, but whether lord Byron was agitated with any violence of passion? It is for your lordships to determine whether this period affords any proof of a sudden quarrel, or of a heated temper; without time to cool, or leisure to deliberate; and whether any thing can be collected from hence, that will intitle the noble prisoner to this benignity of the law, which is extended only to the impetuosity of a sudden passion.

In this situation lord Byron left the room, in appearance cool and deliberate; if he had then a purpose to fight, I am afraid it must have been deliberate; if he had not, it imports lord Byron to prove some new occasion of quarrel. What passed upon the stairs affords only one observation, lord Byron told Mr. Chaworth he wanted to speak to him. If the purpose for which he wanted to speak to him is to be explained by what passed below, that purpose was deliberate and without provocation; if he had not such purpose in his mind at that time, will it not warrant Mr. Chaworth's suspicions? Your lordships will recollect what Mr. Chaworth said, and what he thought was the reason for calling him to an account in that place and in that manner. Your lordships will recollect likewise what disadvantages the place gave to Mr. Chaworth. If Mr. Chaworth understood the sword, he understood it as the accomplishment of a gentleman. It never hurt his innocence, he abhorred to shed the blood of any man. The darkness of the room, and confinement of the place, probably prevented him from giving a signal proof of it in disarming his adversary. There is reason to believe it. How conspicuous in his last hours was his benevolence to all mankind, his humanity to the author of his death, his serious and earnest attention to the discharge of the remaining duties of his life, and the magnanimity with which he beheld the approaching minute of his death!

I shall lay no weight upon the manner in which the wound was given. Till Mr. Partington was examined, an inference arose to the disadvantage of lord Byron from the supposed silence of Mr. Chaworth, when he was asked, Whether the wound was fairly given? Mr. Partington's evidence may have left it now in some doubt, what opinion Mr. Chaworth had of that circumstance. I will not

* See it in this Collection, vol. 17, p. 30.

† Ibid. vol. 6, p. 770.

allow myself to observe upon it; nor will I repeat that unguarded expression your lordships have heard, that my lord Byron used after the wound was given, and after Mr. Chaworth had closed in, and was endeavouring to prevent further mischief. It must give pain to the noble prisoner to hear it repeated; it must have made its impression on your lordships' minds; it is fitter to remain there than to be the subject of public discussion. It is for your lordships to determine whether this mischief has happened from the impulse of a sudden passion, or resulted from a deliberate and premeditated purpose.

Lord High Steward. My lord Byron, the counsel for the crown have done: now is the time for your lordship to make your defence; and if you have any witnesses to examine, now is your time to call them.

Lord Byron. My lords, I shall not call any witnesses. I have reduced into writing what I have to offer to your lordships; which, as my voice is very low, I am apprehensive of my not being heard by your lordships, and therefore desire it may be read by the Clerk.

Lords. Read, read.

Clerk reads:

My lords; your lordships are now in full possession of the evidence against me, and, I am convinced, will weigh it with the wisdom and impartiality which have ever distinguished the court of the Peers of Great Britain.

This consideration, my lords, affords me comfort and support, though oppressed under the heavy load of an accusation of murder, against which I am now required to speak in my own defence.

My inexperience in the nice distinctions of law, and in proceedings of this nature, but ill qualify me for this task; and will furnish very ample occasion for the goodness and indulgence of your lordships.

The witnesses (as far as their knowledge and observation could lead them) have already sufficiently proved the accidental manner in which the greatest part of the transaction happened; and the innocence of my own intentions, through the whole of it, makes it difficult for me to select any particular passages which may more immediately demand your lordships' attention.

Let me presume, however, to lay before you my own narrative of the fact, according to the best of my recollection. It agrees in substance with great part of what has fallen from the witnesses, but it supplies some particulars which may possibly deserve weight and credit. In doing this, the respect which I owe to your lordships, as well as a tender concern for my own honour, will not suffer me to prevaricate, neither will I conceal or deny what is true.

After we had dined at the club, about seven o'clock, a discourse began concerning game, and Mr. Chaworth insisted, that strictness and

severity were the only effectual methods with the country people.

I must confess that I was of a different opinion, being for gentler measures; and therefore observed, that such severity might only prompt them to do more mischief: and added such circumstances as I thought supported what I said.

This discourse lasted some time; and, during the whole of it, I was concerned to observe that the deceased gentleman, without any cause, treated me in a slighting and contemptuous manner.

Towards the conclusion of it, he, with some heat, said, There would be no game in the country; and that I should not have a single hare on my estate, if it was not for the care taken by himself and sir Charles Sedley, to preserve the game on their manors; and added, that he had more game on five acres than I had in all my manors. The proposal of a bet followed, but some of the gentlemen interfered, and no bet was made.

Mr. Chaworth again mentioned sir Charles Sedley's manors, and his care of the game; upon which I happened to ask what manors of sir Charles Sedley he meant; when he answered, Nuttall and Bulwell; to which I replied, I did not understand how that could be, for though I knew Nuttall was sir Charles Sedley's, yet Bulwell-park was mine.

Mr. Chaworth answered, that besides Bulwell-park, there was the lordship of Bulwell town (a point, which I believe may formerly have been in dispute between Mr. Wentworth's family and mine, but has long lain dormant), and that sir Charles Sedley had a deputation for that lordship.

Upon which I made some insignificant observation on the uncertainty of deputations, as they are liable to be recalled at any time, or something to that purpose.

Whereupon, to the best of my recollection, Mr. Chaworth replied in the following words: "Sir Charles Sedley, my lord, lives at Mr. Cooper's, in such a place, and I doubt not, will be ready to give your lordship satisfaction about his manors, if you have any thing to say concerning them; and as to myself, you know where I live, and I shall be ready to answer your lordship whenever you will call upon me, if you have any thing to say to me."

These words, so unexpected, of such an import, uttered, and repeated in the manner they were, would not admit of any reply, but put an end to the discourse; so that nothing further passed between the deceased gentleman and myself, at that time; but during the short stay I made afterwards, I might possibly have some very short conversation, on indifferent matters, with Mr. Molyneux, who was next me.

And here, I must observe, that as I sat at the lower corner on the one side, and Mr. Chaworth at the upper corner on the other side of a long table, at which ten people had dined, no

private intimations for a future meeting, or other signs, could be given by either of us, without being perceived by all the rest of the company, to whose evidence I must refer, observing only that no such thing is pretended, or even suspected by any of the gentlemen who have been called upon.

Soon after this discourse was finished in the abrupt manner I have mentioned, the club book was brought to Mr. Chaworth, who usually settled it, and did so on this occasion, though with some hurry and confusion, as Fynmore, the master of the tavern, has told your lordships.

The book being settled, and the reckoning paid by Mr. Chaworth, and several of the company, I saw him go behind a screen in the room which entirely conceals the door, and I had every reason to conclude that he was gone.

I stayed some time to settle and discharge my reckoning, which might detain me near ten minutes, and then I took my hat, and left the company.

As I was going out of the room, I remember that somebody passed me behind the screen near the door, and believe it might be Mr. Donston, who (I think) says, he met me, but being in the shade, I could not well distinguish him, so as to take particular notice, or say any thing to him.

When I opened the door, I saw Mr. Chaworth on the landing-place, near the upper step of the stairs, with his face towards the door, and his back to the stairs, not moving (as he appeared to me), but rather as if he waited for somebody coming out.

The landing-place is so narrow, that to go without the door of the room was unavoidably to pass near Mr. Chaworth, who immediately said, "Has your lordship any commands for me?" which he spake in a very particular and significant manner, and not (to my apprehension) as a question either of civility or respect.

I only answered, "I should be glad of an opportunity of speaking a few words to him." Mr. Chaworth replied, "That the stairs were not a proper place, and, if I pleased, we would go into a room."

We then went down together to the landing-place of the one pair of stairs (for we dined up two pair of stairs), and there the waiter was called, and as it was repeated three or four times, it is most probable we both called him.

The waiter soon came with a candle, and being asked (I am sorry I cannot recollect who put the question) which of those rooms (meaning the two rooms on that floor) was empty, he threw open the door of one of them, and going in first, set his candle upon the table, which stood towards the middle of the room, whilst we went to the fire.

He retired immediately, and shut the door after him.

I then said to Mr. Chaworth, as we still continued standing by the fire, "How am I to

take those words you used above as an intended affront from sir Charles Sedley, or yourself?" Mr. Chaworth replied, "Your lordship may take them as you please, either as an affront or not, and I imagine this room is as fit a place as any other to decide the affair in."

Then turning round, he said, he would bolt the door to prevent any interruption, or any body interfering, or words to that effect. Accordingly, he went to the door and fastened it. In the mean time, his intention being but too manifest, by this action and his last expression, I went round on the further side of the table, towards the most open part of the room, which your lordships have been informed by Fynmore is about sixteen feet square, and the furniture did not leave a vacant space of more than twelve feet in length, and as I believe, five feet in breadth, where it was my unhappy lot to be obliged to engage.

Mr. Chaworth was now turned round from bolting the door, and as I could not any longer continue in doubt of his intention, it was impossible for me in such a situation to avoid putting my hand to my sword, and I believe I might at the same time bid him draw, or use some other words of the like import, though I cannot now be certain of the expression.

Mr. Chaworth immediately drew his sword, and made a thrust at me, which I parried; he made a second, which also missed of its effect: and then finding myself with my back against the table, with great disadvantage of the light, I endeavoured to shift a little more to the right hand, which unavoidably brought us nearer to each other, and gave me an opportunity to perceive that the deceased gentleman was making a third pass at me. We both thrust at the same time, when I found Mr. Chaworth's sword against my ribs, having cut my waistcoat and shirt for upwards of eight inches; and I suppose it was then, that he received the unlucky wound, which I shall ever reflect upon with the utmost regret.

Mr. Chaworth paused, and said, "I am afraid I have killed you;" at the same time putting his left-hand to his belly, which, on withdrawing it again, I could perceive was bloody.

I expressed the like apprehension on his account; and, Mr. Chaworth telling me that he was wounded, I said that I was sorry for it, and went to the bell near the fire, to ring it, in order to call for assistance, whilst the unfortunate gentleman, being still near the door, unbolted it.

I then returned to him; and as I was supporting him to an elbow-chair which stood near the fire, I could not help observing, that, he might thank himself for what had happened, as he had been the aggressor; that I supposed he took me for a coward, but I hoped I had as much courage as another man. Mr. Chaworth replied, My lord, all I have to say is, you have behaved like a gentleman.

During this discourse Fynmore came into the room, took our swords, whilst I was employed, to the best of my power, in supporting Mr. Chaworth, and at my request went for the surgeon. The rest of the gentlemen also, who were above stairs, being now alarmed, came down into the room; where I continued for some time, being desirous to give every kind of assistance to the deceased; and afterwards I waited in a room below, till he was removed to his own house.

My lords, this is my melancholy story. I cannot pretend to call any witnesses in support of those parts of it, which relate to what passed during the few minutes whilst we were in private; but as the declarations of the deceased are admitted as evidence, your lordships will compare the broken accounts collected by those gentlemen who discoursed with him, with such circumstances as my memory and knowledge tell me are exactly true.

There are several persons now attending, and ready to attest various instances of friendly intercourse and civility from me to the deceased; but as nothing has been offered to induce your lordships to believe the contrary, I will not enter into that evidence, nor offer any other on my part, relying upon your lordships' justice, and my own innocence: not only as that innocence may be presumed from the insufficiency of proof on the part of the prosecutors, to shew either malice or premeditation in me, but as most of the witnesses unanimously agree in declaring the provocation, challenge, and insult offered me; and your lordships will not imagine that I felt them with less emotion, because my manner and my words were decent.

My lords, as the provocation was great, so the time was very short, between the conversation and my meeting with Mr. Chaworth upon the stairs, which was quite unexpected to me.

After that accidental meeting, the time of our continuing together (which was scarce four minutes), the light, the unsuitness of the place, and every other circumstance prove, in the strongest manner, that nothing could be more sudden and unpremeditated than the conflict that ended so unfortunately, and in which I received the first thrust, at the peril of my own life.

Our fighting could not be very regular, circumstanced as it was; but notwithstanding some insinuations, my own mind does not charge me with the least unfairness. The facts declared by Mr. Chaworth, import the contrary; and Mr. Partington has acquainted your lordships, that the last declarations, reduced into writing, were understood by him, and by the other gentlemen present, as an answer to every question which had been asked.

My lords, it is very plain from the evidence, that Mr. Chaworth had not cooled; and if the infirmity of his temper was such, as not to have recovered itself in so short an interval, though he had done the injury; your lord-

ships, I hope, will at least make that allowance (which the law permits) to the like infirmity of nature in him who had been injured.

Grieved and affected as I am on this occasion, and willing to spare any reflection on the dead, the necessity of my defence obliges me to take notice, that according to the evidence of Mr. Donston, whom he desired to speak with on the stairs, he but too clearly explained the sense in which his words were intended, by asking that gentleman, Whether he had observed what passed between himself and me, and whether he had left the matter short?

Such a behaviour, my lords, needs no comment, especially if considered with the sequel of it; after we came into the room below, where he declined giving me any reasonable explanation, though such an one might easily have been given as would have been consistent with my honour and character.

In such a case your lordships will, no doubt, have some consideration for human weakness and passion, always influenced and inflamed in some degree by the customs of the world.

And though I am persuaded that compassion can never obstruct your impartial justice, yet I trust that you will incline to mitigate the rigour of it, and administer it, according to law, in mercy.

I am told, my lords, that it has been held by the greatest authorities in the law, that if contumelious words (and still more, I presume, if contemptuous words of challenge) have been given by one man to another, and, before they are cooled, either bids the other draw his sword^a and death ensues, after mutual passes, the fact in that case will not amount to murder.

Therefore I am willing to hope, that your lordships, in weighing these circumstances, may find sufficient cause to acquit me of all malice, and to consider me as an unhappy man, innocent in intention, conscious only of misfortune.

My lords, I will detain you no longer. I am in your lordships' judgment, and shall expect your sentence, whether for life or death, with all the submission that is due to the noblest and most equitable court of judicature in the world.

Then the Lord High Steward returned back to his chair.

L. H. S. Lieutenant of the Tower, take William lord Byron from the bar.

Which was done accordingly.

Lord President. My lords, I move your lordships to adjourn to the Chamber of Parliament.—*Lords.* Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same order they came

^a See Leach's *Hawkins's Pleas of the Crown*, book 1, c. 31, § 28.

down: and, after some time, the House was adjourned again into Westminster-hall; and the Peers being there seated, and the Lord High Steward in his chair, and the House resumed, the Serjeant at Arms made proclamation for silence as usual.

L. H. S. Your lordships have heard the evidence, and every thing that has been alledged on both sides; and the solemnity of your proceedings requires that your lordships' opinions on the question, of Guilty, or Not Guilty, should be delivered severally in the absence of the prisoner, beginning with the junior baron; and that the prisoner should afterwards be acquainted with the result of those opinions by me. Is it your lordships' pleasure to proceed now to give your opinions on the question, of Guilty, or Not Guilty?—*Lords.* Ay, ay.

Then the Lord High Steward stood up uncovered; and, beginning with the youngest peer, said,

George lord Vernon, What says your lordship? Is William lord Byron Guilty of the felony and murder whereof he stands indicted, or Not Guilty?

Whereupon *George lord Vernon*, standing up in his place, uncovered, and laying his right hand upon his breast, answered, Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

In like manner the several lords after-mentioned, being all that were present, answered as followeth:

Edward lord Beaulieu. Not Guilty, upon my honour.

Joseph lord Milton, John lord Montague, John lord Lovel and Holland, William lord Boston, Nathaniel lord Scarsdale, Richard lord Grosvenor, Thomas lord Grantham, Lewis lord Sondes, William lord Wycombe, George lord Lyttelton, Wills lord Harwich, William lord Mansfield, Horatio lord Walpole, Thomas lord Hyde, Vere lord Vere, William lord Ponsoby, Henry lord Ravensworth, Matthew lord Fortescue, Thomas lord Bruce, Samuel lord Sandys, George lord Edgcombe, Frederick Henry lord Chedworth, Thomas lord Montfort, John lord Monson, William lord King, Matthew Ducie lord Ducie, Charles lord Cadogan, Samuel lord Masham, Robert lord Trevor, Edmund lord Boyle, Charles Schaw lord Cathcart, William lord Craven, Nathaniel lord Delamer, John lord Berkeley of Stratton, Edward lord Leigh, John lord Clifton, John lord St. John of Bletsoe, John Peyto lord Willoughby of Broke, Norborne lord Botetourt, George lord Abergavenny; Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

Francis lord Le Despencer. Not Guilty, upon my honour.

John viscount Dudley and Ward, William viscount Courtenay, Edward viscount Wentworth, John viscount Spencer, William viscount Folkestone, George viscount Torrington;

VOL. XIX.

Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

Hugh viscount Falpouth. Not Guilty, upon my honour.

Frederick viscount Bolingbroke and Saint John, Thomas viscount Weymouth, George viscount Townshend, Richard viscount Say and Sele, Edward viscount Hereford; Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

Stephen earl of Ilchester, Thomas earl Fancouberg, Philip earl of Hardwicke, Charles earl Cornwallis, Simon earl Harcourt, Richard earl Temple, Hugh earl of Northumberland, Henry Arthur earl Powis, John earl of Buckinghamshire, William earl of Harrington; Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

George earl of Orford. Not Guilty, upon my honour.

John earl of Ashburnham, John earl Waldegrave, John earl Ker, George earl of Macclesfield, Henry earl of Sussex, George earl of Halifax, Heneage earl of Aylesford, Charles earl of Tankerville, William earl of Dartmouth, William earl of Strafford, Edward earl of Oxford and Mortimer, John earl of Bute, Hugh earl of Marchmont, William earl of March and Ruglen, William earl of Dunmore, John earl of Breadalbane, John earl of Loudoun, James earl of Abercorn, Alexander earl of Eglington, James earl of Morton, Vere earl Poulet, George William earl of Coventry, George earl of Albemarle, Richard earl of Scarborough, Other Lewis earl of Plymouth, Henry earl of Gainsborough, George Henry earl of Litchfield, Anthony Ashley earl of Shaftesbury, George earl of Cardigan, William Anne Holles earl of Essex, John earl of Sandwich, Daniel earl of Winchelsea and Nottingham, Charles earl of Peterborough and Moemouth, Thomas earl of Westmoreland, Basil earl of Denbigh, Henry earl of Suffolk and Berkshire, Henry earl of Lincoln, Henry earl of Pembroke and Montgomery, Francis earl of Huntingdon, Granville Levison earl Gower, (lord chamberlain of the household,) William earl Talbot, (lord steward of the household.) Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

Charles marquis of Rockingham. Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

Francis duke of Bridgwater, Henry duke of Chandos, George duke of Manchester, William Henry Cavendish duke of Portland, Thomas Holles duke of Newcastle, Peregrine duke of Ancaster and Kesteven, (lord great chamberlain of England,) John duke of Argyle, John duke of Rutland, Thomas duke of Leeds, Augustus Henry duke of Grafton, Charles duke of Richmond, John duke of Bedford, (lord president of the council.) Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

His royal highness William Henry duke of Gloucester and Edinburgh, Not Guilty of

Murder, but Guilty of Manslaughter, upon my honour.

His royal highness Edward duke of York and Albany. Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

Then the *Lord High Steward*, standing uncovered at the chair, laying his hand upon his breast, said;

My lords, I am of opinion that William lord Byron is Not Guilty of Murder, but Guilty of Manslaughter, upon my honour.

L. H. S. Your lordships have found that William lord Byron is Not Guilty of the felony and Murder whereof he stands indicted; but have found him Guilty of Manslaughter; one hundred and nineteen of your lordships having voted him Guilty of Manslaughter, and the remaining four having declared him to be Not Guilty generally: is it your lordships' pleasure that he should be called in, and acquainted therewith?—*Lords.* Ay, ay.

Proclamation was then made for the lieutenant of the Tower to bring the prisoner to the bar, which was done in the same order as before; and afterwards proclamation was made for silence, as usual.

L. H. S. William lord Byron, the Lords have considered of the charge and evidence brought against you, and have likewise considered of every thing which you have alledged in your defence, and upon the whole matter, their lordships have found you Not Guilty of the Murder whereof you stand indicted, but Guilty of Manslaughter. What has your lordship to alledge against judgment being pronounced upon you?

Upon which his lordship claimed the benefit of the statute of Edward the sixth.

Whereupon the Lord High Steward ac-

quainted him, that he was allowed the benefit of that statute,* and was discharged, paying his fees.

Proclamation was then made for silence in the usual manner.

L. H. S. My lords, this trial being at an end, nothing remains to be done here, but to determine the Commission.

Lords. Ay, ay.

L. H. S. Let proclamation be made for dissolving the Commission of High Steward.

Sergeant at Arms. Oyez, Oyez, Oyez! Our sovereign lord the king does strictly charge and command all manner of persons here present, and that have here attended, to depart hence in the peace of God, and of our said sovereign lord the king, for his grace my Lord High Steward of Great-Britain intends now to dissolve his Commission.

Then the white staff being delivered to the Lord High Steward by the gentleman usher of the Black Rod upon his knee, his grace stood up uncovered, and holding the staff in both his hands, broke it in two, and declared the Commission to be dissolved; and then leaving the chair, came down to the woolpack, and said, Is it your lordships' pleasure to adjourn to the Chamber of Parliament?

Lords. Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

Then the Peers and others returned back to the Chamber of Parliament, in the same order they came down, except that their royal highnesses the duke of Gloucester and duke of York, walked after the Lord Chancellor.

* As to this, see in this Collection, A. D. 1776, the Case of the person calling herself duchess dowager of Kingston.

546. The Trial of KATHARINE NAIRN and PATRICK OGILVIE, for the Crimes of Incest and Murder, before the High Court of Justiciary in Scotland, upon the 5th, 12th, 13th, 14th, 15th, and 16th days of August: 5 GEORGE III. A. D. 1765.

CURIA JUSTICIARIA S. D. N. Regis, tenta in Nova Sessionis Domo de Edinburgh, quinto die mensis Augusti, millesimo septingentesimo sexagesimo quinto, per Honorabiles Viros Dominum Gilbertum Elliot de Minto, Baronetum, Dominum Justiciarium Clericum, Alexandrum Boswell de Auchinleck, Andream Pringle de Ale-moor, Henricum Home de Kames, Jacobum Ferguson de Pitfour, et Georgium Brown de Coalston, Commissionarios Justiciarum S. D. N. Regis.

Curia legitime affirmata.

Intran'

Katharine Nairn, widow of the deceased Thomas Ogilvie of Eastmill, in the county of Forfar; and

Patrick Ogilvie, lieutenant of the 89th regiment of foot, brother german of the said deceased Thomas Ogilvie; both now prisoners in the Tolbooth of Edinburgh, pannels.

INDICTED and accused at the instance of Thomas Miller of Barskimming, esq. his majesty's advocate, for his majesty's interest, for the crimes of incest and murder, in manner

mentioned in the criminal indictment raised thereon, bearing, That whereas, by the law of God, and the laws of this and all other well-governed realms, the crime of incest, committed betwixt a man and the wife of his brother-german, especially when such crime is committed within the dwelling-house of the injured husband, where the offenders were cherished and entertained by him with confidence and trust, is a heinous crime, and most severely punishable; and particularly by an act passed in the parliament of Scotland, in the year 1567, being the first parliament of king James the 6th, chap. 14, intituled, "Anent them that commit incest," it is statuted and ordained, "That quhatsumever person or persones that committes the said abhominable cryme of incest, that is to say, quhatsumever person or persones they be that abuses their bodie with aik persones in degrie, as God in his word has expresselie forbidden, in ony time cumming, as is contained in the xviii chapter of Leviticus, sall be punished to the death:" And also whereas, by the same holy law of God, and by the laws of this and every other well-governed realm, all wilful homicide or murder, especially when perpetrated by poison, and above all, when such murder is committed under trust, or upon a person to whom fidelity and affection are due by the most sacred ties, is also a crime of most heinous and atrocious nature, and severely punishable: yet true it is, and of verity, that the said Katharine Nairn and Patrick Ogilvie, shaking off all fear of God and regard to the laws, have presumed to commit, and are guilty, actors, art and part, of both, or one or other of the said heinous crimes of incest and murder, aggravated as aforesaid: in so far as, the said Katharine Nairn having been married to the said deceased Thomas Ogilvie in the month of January last, in this present year 1765; and the said Patrick Ogilvie having about that time returned from abroad, and taken up his residence at the house of Eastmiln belonging to the said deceased Thomas Ogilvie his brother, in the parish of Glenylla and county of Forfar, the said Katharine Nairn did, soon after her said marriage, alienate her affections from her said husband, and fall into a course of indecent familiarities with the said Patrick Ogilvie, which soon became the subject of observation and regret to her unhappy husband, and to her friends and family; and notwithstanding repeated admonitions given to the said Katharine Nairn, and to the said Patrick Ogilvie, by the said Thomas Ogilvie and their other relations, to abstain from such indecent familiarities, they obstinately persisted therein, frequently retired together, and continued in private for a considerable time, as well in the fields as within the house of Eastmiln, and in other houses and places of that neighbourhood; and the said Katharine Nairn and Patrick Ogilvie, yielding to their inordinate desires, did, after the said marriage, viz. in the months of January, February, March, April, May, and June, all

last past,* and before the 12th day of that last month, at different times, and in one or other of the rooms of the house of Eastmiln, and in the out-houses adjacent thereto, lie together, and abuse their bodies with one another; and thereby they, and each of them, committed the abominable crime of incest; and their indecent conduct having at last become the subject of observation and just censure, not only to the said deceased Thomas Ogilvie and his family, but to the neighbourhood, the said Patrick Ogilvie was, on that account, dismissed by the said Thomas Ogilvie from his house, on or about the 23d day of May last; and the said Katharine Nairn, did upon that occasion, and thereafter, express her resentment against her husband, and by the most outrageous behaviour; and before the said Patrick Ogilvie left the said house, or soon after, he and the said Katharine Nairn did treacherously and wickedly conspire to murder the said Thomas Ogilvie by poison; and, upon different occasions, the said Katharine Nairn signified this her wicked purpose to Anne Clark, daughter of the deceased Allan Clark, officer of excise, who then lived in family with her, and informed her, that the said Patrick Ogilvie had undertaken to provide the poison, which she did not then believe either of them capable of, and endeavoured to divert the said Katharine Nairn from such wicked thoughts; but, instigated by the temptations of the devil and of their own wicked hearts, the said Katharine Nairn and Patrick Ogilvie persisted in their wicked conspiracy; and from the time the said Patrick Ogilvie was dismissed from his brother's house, he and the said Katharine Nairn carried on a secret correspondence by letters, and had private meetings together for the purpose of concerting the perpetration of their wicked design; one of which letters, without a date, and unsigned, but of the handwriting of the said Katharine Nairn, will be produced in evidence against them, and will be lodged in the hands of the clerk of the High Court of Justiciary, before which they are to be tried, that they may see the same: and, for accomplishing the murder so concerted betwixt them as aforesaid, the said Patrick Ogilvie did, about the latter end of May last, repair to the burgh of Brechin, in the county aforesaid, and there bought and received from James Carnegie, surgeon in that burgh, a small phial glass of laudanum, which he pretended was for his own health, and about half an ounce or more of arsenic pulverized, and put up in three or four different doses, in separate paper-covers, pretending that he had occasion for that poison, in order to kill some dogs, which destroyed the game in that part of the country where he resided. And the said Patrick Ogilvie brought the said poison to Alyth, within a few miles of Eastmiln, where he arrived upon

* As to the tract of time, within which the offences are alleged, see 1 Hume's Comm. Trial for Crimes, c. 7, pp. 375, et seq.

or about Monday the third day of June last, at the house of Andrew Stewart, merchant there, his brother-in-law; and, upon the day following, he did there receive a letter from the said Katharine Nairn, which, by her orders, was delivered to him in private, by Elizabeth Sturrock her servant; to which he returned an answer that same day, with the said Elizabeth Sturrock, by a letter, with injunctions to deliver it privately to the said Katharine Nairn; which was done accordingly: and, upon the day following, being the 5th day of June, the said Andrew Stewart having had occasion to go to the house of Eastmilk, he, the said Patrick Ogilvie, did send with him two small phial glasses, one of which he said contained laudanum, and a paper with directions about the manner of using it; and also a packet, which he said contained salts, and a letter closed with a wafer, and likewise sealed with wax, addressed to the said Katharine Nairn at Eastmilk; and he informed the said Andrew Stewart that these were medicines for the use of the said Katharine Nairn herself, and desired him to deliver them and the letter privately into her own hands: and the said Katharine Nairn, having been previously advised by the said Patrick Ogilvie, that he was to send the poison by the said Andrew Stewart, watched his arrival at the house of Eastmilk, and, upon his coming there, conducted him into a private room, and received from him the above particulars, which she presently locked up in a drawer along with the letter, without reading the same; and, in this manner, or by some other conveyance to the prosecutor unknown, the arsenic bought by the said Patrick Ogilvie as aforesaid, was conveyed by him to, and received by the said Katharine Nairn at the house of Eastmilk: and the said Andrew Stewart having, some time after his arrival there, discovered to the said Anne Clark, that he had brought some medicines from the said Patrick Ogilvie, which he had delivered to the said Katharine Nairn, Anne Clark did thereupon disclose to the said Andrew Stewart, and to Isobel M'Kenzie, the mother of the said Thomas Ogilvie, her apprehensions of danger to the said Thomas Ogilvie's life; and all these persons, or some of them, did that night advise and caution the said Thomas Ogilvie, to take no meat or drink from his wife, except what he saw others taking; and some time that same night, the said Katharine Nairn said to the said Andrew Stewart, she wished her husband was dead; and the said Thomas Ogilvie did that same night sup with the said Katharine Nairn, his wife, and the other persons above named, in his ordinary state of health, and went to bed at the usual time of night, having been abroad the preceding day: that next morning, the 6th day of June, or one or other of the days in the beginning of that month, breakfast was set in the parlour earlier than usual, and the said Thomas Ogilvie not having then got out of bed, the said Katharine Nairn filled out the first of the tea in a bowl, which she said she was going

to carry up to the laird, meaning her husband; and accordingly left the parlour with the said bowl in her hand; but instead of carrying it straight to her husband, she went into a closet adjoining to his bed-room, where she remained for some time, and there wickedly and feloniously mixed the arsenic which she had received as aforesaid, or some other deadly poison, into the said bowl of tea, which she afterwards carried to her husband, and pressed him to drink the same, which he accordingly did: and soon after he rose from bed, went abroad, conversed with some of his tenants and servants, and then appeared to be in his ordinary state of health; but before he got back to the house, and within the space of an hour or thereby after he had drunk the said bowl of tea, he was seized with a violent reaching and vomiting, and having got into the kitchen, he continued there for some time in great distress, upon which he was helped up to his own room, and laid in bed, where he remained reaching, vomiting, and purging with such violence, that he sometimes appeared convulsed; and, in the intervals of his distress, he did say to his friends, and others about him, that he had been poisoned by the said bowl of tea which he had got from his wife; and he having called for water to drink, which was brought up to the room by Anne Sampson his servant-maid, in the same bowl, or one like to that out of which he had drank the tea, he said, "Damn that bowl, for I have got my death out of it already," and ordered her to bring up the water in the tea-kettle, for he would drink out of nothing else; and having continued in the situation above described for several hours, his tongue swelled, and his mouth became so parched and dry, that he could scarcely speak; and, during his illness, though from the beginning very alarming, the said Katharine Nairn not only endeavoured to hinder his friends and neighbours to have access to him, but when she was pressed, by the said Andrew Stewart, to send for a surgeon, she obstinately resisted that proposal till near sun-set, when the said Thomas Ogilvie her husband appearing to be then very low and near his end, she sent a servant on horseback to bring Peter Meik, surgeon at Alyth, who accordingly came with all dispatch; but, before his arrival, her husband was dead, having died in the night betwixt the 6th and 7th days of June last, or upon one or other of the days or nights in the beginning of that month: and from the symptoms of his disorder, and whole circumstances of the case above recited, it evidently appears that he died of the poison which was mixed and given to him, by the said Katharine Nairn, in the bowl of tea as above mentioned. And some days thereafter, when it was proposed to inspect the dead body, she, Katharine Nairn, appeared like one distracted, and cried out, What will I do! and the said Patrick Ogilvie being advised of the death of the said Thomas Ogilvie his brother, to whom he is heir, in case the said Katharine Nairn be not with child, he immediately came to Eastmilk, took up his

residence there, and gave the necessary orders for the interment. And the said Katharine Nairn and Patrick Ogilvie, having been apprehended there, and committed to the prison of Forfar, by George Campbell, esq. sheriff-substitute of that county, as guilty of the murder of the said Thomas Ogilvie, and examined by the said sheriff-substitute upon the 14th and 15th days of June last, did each emit two several declarations, which were subscribed by each of them, and by the said sheriff-substitute; which declarations are to be used in evidence against them upon their trial, and shall be lodged in the hands of the clerk of the said Court of Justiciary, that they may have access to see the same: and another examination of the said Patrick Ogilvie, taken before James Balfour, esq. sheriff-substitute of the county of Edinburgh, upon the 23d day of the said month of June last, and subscribed by him and the said James Balfour; and also an examination of the said Katharine Nairn, taken before the said James Balfour, upon the 24th day of the said month of June last, and subscribed by him, will likewise be produced in evidence against them in the course of their trial, and will in like manner be lodged in the hands of the clerk of the said Court of Justiciary, that they may have access to see the same. At least, at the time and place aforesaid, the said Thomas Ogilvie was murdered or died by poison, wilfully administered to him; and of which murder or poisoning the said Katharine Nairn and Patrick Ogilvie, and each of them, or one or other of them, are guilty, actors, or art and part. All which, or part thereof, or that they were guilty of the crime of incest above charged against them, being found proven by the verdict of an assize before the lords justice-general, justice-clerk, and commissioners of justiciary, they, and each of them, ought to be punished with the pains of law, to the terror of others from committing the like in time coming.

THOMAS MILLER.

LIST OF ASSIZE.

- Sir James Clark of Pennycook.
 Sir Alexander Gibson of Pentland.
 Sir Robert Morton of Gogar.
 Thomas Trotter of Mortonhall.
 5 George Warrender of Burntisfield.
 John Howieson of Braehead.
 John Borthwick of Cruikston.
 James Forrest of Commiston.
 Alexander Muirhead of Linthouse.
 10 Hugh Dalrymple of Fordel.
 John Wightman of Maulsle.
 John Christie of Baberton.
 Adam Cunningham of Bonnytown.
 Thomas Brown of Braid.
 15 Alexander Sheriff of Craigleith.
 James Finlay of Wallyford.
 Alexander Gibson of Cliftonhall.
 James Linn of Georgie.
 Sir Robert Dalziel of Birnie.
 20 Tho. Sharp younger, of Houston.
 Robert Ramsay of Blackorraig.

- John Paterson of Kirkton.
 David Dundas younger, of Newhalls.
 James Dallas younger, of Parklie.
 25 Henry Cochran of Barbacklaw.
 Sir George Suttie of Balgonie.
 Sir John Hall of Dunglass.
 Sir John Sinclair of Stevenson.
 John Henderson of Liston.
 30 William Hay of Lawfield.
 Charles Hay of Hopes.
 Richard Newton of Newton.
 James Hume of Gemmelshiels.
 Alexander Wedderburn of St. Germaine.
 35 William Ramsay of Preston.
 Oliver Colt of Auldham.
 John Forrest sen., merchant in Edinburgh.
 Wm. Callender, merchant there.
 Ralph Dundas, merchant there.
 40 John Fordyce, merchant there.
 Daniel Seton, merchant there.
 George Chalmers, merchant there.
 Wm. Ramsay, merchant there.
 Gavin Hamilton, bookseller there.
 45 Archibald Wallace, merchant there.
 GILB. ELIOT, ALEX. BOSWELL,
 AND. PRINGLE, GEO. BROWN.

LIST OF WITNESSES.

The Witnesses so (†) marked were examined for the Prosecutor.

- 1 † George Spalding of Glenkilrie.
 2 Bethia Nairn his spouse.*
 3 † Andrew Stewart, merchant in Alyth.
 4 Martha Ogilvie his spouse.
 5 † James Carnegie, surgeon in Brechin.
 6 † Gilbert Ramsay, surgeon in Coupar of Angus.
 7 † Peter Meik, surgeon in Alyth.
 8 † Dr. John Ogilvie, physician in Forfar.
 9 † Lieutenant George Campbell, late of the 89th regiment of foot.
 10 † Patrick Dickson, merchant in Brechin.
 11 The Rev. Mr. Thomas Masson, minister of Glenylla.
 12 Katharine Gruer, relict of — M'Kenzie, late servant in Eastmilsn.
 13 † James M'Kenzie, session clerk of Glenylla.
 14 James Rattray of Kirkhilllocks.
 15 Anne Robertson his spouse.
 16 William Clarke of Holmerry, one of the elders of the parish of Glenylla.
 17 † Elizabeth Sturrock, late servant to the deceased Thomas Ogilvie of Eastmilsn.
 18 † Anne Sampson, late servant to the said deceased Thomas Ogilvie of Eastmilsn.
 19 † Alexander Lindsay, late servant to the said deceased Thomas Ogilvie of Eastmilsn.
 20 † Katharine Campbell, late servant to the said deceased Tho. Ogilvie of Eastmilsn.
 21 John Guthrie in Dalnakebock, late servant to the said deceased Thomas Ogilvie of Eastmilsn.

* As to the admission of female witnesses in Scotland, see some particulars in a Note to the Case of *Sommersett the Negro*, A. D. 1772.

- 22 Anne Robertson, late servant to the said deceased Thomas Ogilvie, of Eastmains.
- 23 John Rattray, servant to John Robertson of Cray.
- 24 Margaret Downie, servant to William Ker, writer in Forfar.
- 25 Jean Low, servant to William Gerty, taylor in Forfar.
- 26 † Anne Clark, daughter to the deceased Allan Clark, officer of Excise.
- 27 † George Campbell of Caragownie, esq.
- 28 † Mr. John Ure, sheriff-clerk of Forfar.
- 29 Patrick Orr, writer in Forfar.
- 30 Fergus Ferguson, residenter in Kirkton of Glenylla.
- 31 Margaret Rait his spouse.
- 32 William Shaw, residenter at Little Farther in the parish of Glenylla.
- 33 † John Gilloch, wright in Dalnakeock.
- 34 † Mr. James Balfour of Pitrig, advocate, sheriff-substitute of Edinburgh.
- 35 † William Dunbar, writer in Edinburgh.
- 36 William Campbell, writer in Edinburgh.
- 37 James Mc'Niccol in Newton of Glenylla.
- 38 John Hall, portioner of Achlish.
- 39 † James Millars, tacksmen of the Eastmains of Glenylla.
- 40 James Dougal, surgeon in Kerriemuir.
- 41 Mr. Lawrence Browne, minister at Lintrathan.
- 42 Andrew Marison, one of the macers of Justiciary.
- 43 Charles Copland, messenger in Edinburgh.
- 44 † David Rattray younger, in Cammock in the parish of Glenylla.
- 45 † John Lassar in Craigendench in the said parish.
- 46 Alexander Barneet in Cammock in the said parish.
- 47 Helen Murray, spouse to the said Alexander Barneet.
- 48 † James Barneet, son to the said Alexander Barneet.
- 49 Alexander Reid, writer in Edinburgh.
- 50 David Spalding of Whitehouse.
- 51 Alexander Reid, tenant in Ennoch in Glenkilrie.
- 52 John Tudhope, residenter at Guardwell in the parish of Libberton.
- 53 Isobel Fergusson his spouse.
- 54 — Tudhope, relict of — Knight, and daughter to the said John Tudhope, residenter near Dean.
- 55 Mrs. — Dallas, spouse to — Gibb, coachmaster in Cannongate.
- 56 Dr. William Cullen, physician in Edinburgh.
- 57 James Russell, surgeon in Edinburgh.
- 58 † Robert Smith, surgeon in Edinburgh.
- 59 James Rae, surgeon in Edinburgh.
- 60 William Forrester, or Froster, tenant in Eastmains.
- 61 John Turnbull, writer in Edinburgh.
- 62 John Stewart, writer in Edinburgh.
- 63 Isobel M'Kenzie, relict of the deceased Thomas Ogilvie of Eastmains, and mother to the deceased Thomas Ogilvie last of Eastmains.

64 Dr. John Rutherford, physician in Edinburgh.

List of the Writings and other Particulars to be adduced in Evidence.

The bottle of laudanum mentioned in the indictment.

The declarations therein mentioned.

The letter therein mentioned.

A letter from Katharine Nairn the pannel to the deceased Thomas Ogilvie, dated Glenkilry, Weensday.

A letter from Katharine Nairn the pannel to the said Thomas Ogilvie, dated Glenkilry, January 4th, 1766.

The said Indictment being read over to the pannels in open court; and they being severally asked, What they had to say against the same? They answered, They were Not Guilty.

Procurators for the Prosecutor.—Thomas Miller of Burskimming, esq. his majesty's advocate, for his majesty's interest; Mr. James Montgomery, advocate, his majesty's solicitor; Sir David Dalrymple, Mr. Patrick Murray, and Mr. David Kennedy, advocates.

Procurators in Defence.—Mr. Alexander Lockhart, Mr. David Grange, Mr. David Rae, Mr. Andrew Crossie, and Mr. Henry Dundas, advocates.

Dundas, for Katharine Nairn the pannel, repeated the signed defences; and represented, That, in 1764, the now deceased Thomas Ogilvie of Eastmains, a gentleman rather advanced in years, of a tender constitution, and possessed of a very small fortune, made his addresses to this unfortunate pannel, (then scarce 19 years of age) in proposals of marriage: which, contrary to the opinion of her friends, by reason of the smallness of his fortune, she accepted of from principles of pure love and affection: and the marriage being accordingly celebrated in the beginning of January last, 1765, was dissolved, by Mr. Ogilvie's death, upon the 6th of June last; when the affection she had conceived for her husband can scarce be supposed to have had time to cool or subside.

Notwithstanding of which, it is her now very singular misfortune to be indicted and accused, at the instance of his majesty's advocate, upon the information of Alexander Ogilvie, her husband's youngest brother, as guilty of two of the most enormous crimes known in the law: 1st. The crime of incest, which she is charged to have committed with lieutenant Patrick Ogilvie, her husband's immediate younger brother: 2dly, The crime of murder, committed upon the person of her said husband, by poison administered to him.

Her parentage, education, age, sex, character, and behaviour, in that stage of life previous to her marriage, when female passions are most powerful and predominant, which she flatters herself will be attested by persons of the greatest honour and probity, render

it highly incredible, that any person not hardened and inured to every species of wickedness, lost and abandoned to every principle of virtue, should at once plunge into crimes of so deep a dye.

Conscious of her innocence, she wishes for nothing more ardently than a fair and impartial trial, as the only means of reparation that can be made to her injured character, so much traduced; and which, in the event, she is hopeful, will appear to be the result of the most inveterate rancour, hatred, and deadly malice, conceived against her by one of her own sex, a person of most flagitious life, and abandoned character, and who, she is now told, is the principal evidence meant to be used against her.

Since her imprisonment, no endeavours have been spared to impress the public with sentiments of her guilt, by publication of many false, malicious, and wicked reports, industriously propagated to the prejudice of her general character.

But she rejoices in the appeal she will soon be able to make to the world, to her judges and jury, to vindicate her from the charge of those horrid crimes with which she stands now arraigned. At the same time she cannot know what false evidence may be produced against her, self-preservation requires, that she should not pass over any material objection to the form of this indictment.

And in that view, she objects to that article of the indictment which charges the crime of incest, said to have been committed in one or other of the rooms of the house of Eastmils, and out-houses adjacent thereto, at different times, in January, February, March, April, May, and June, all last past, and before the 12th day of that last month; that is, in other words, from the day of her marriage, till the 6th day after her husband's death.

She takes no exception to the generality of the places charged, where this crime should have been committed, viz. "In one or other of the rooms of the house of Eastmils, and out-houses adjacent thereto;" though she is advised, that after so full a precognition as she is told has been taken, by examination upon oath of every person that could be supposed to have the least knowledge in these matters, at which none were allowed to be present upon her part, the places where this supposed crime is said to have been so frequently repeated, should have been specially condescended upon, and described. But she is advised, and humbly submits it to the consideration of her honourable judges, and the impartial world, that a most unbecoming and improper latitude has been taken, in charging the time of the commission of this supposed offence, comprehending the whole space, every hour, day, week, and month, from the period of her marriage, to her husband's death, and even while he was lying a corpse, before his interment on the 12th of June.

The disadvantages to which she must necessarily be exposed, in making her defences

against so general a charge, are too obvious to need illustration; and therefore she does humbly insist, that this branch of the indictment cannot be sustained, or admitted to proof.

But if, contrary to expectation, the same shall be sustained, she proposes, by undeniable evidence, to traverse and redargue every material circumstance charged in the indictment, as well with regard to this as the other crime with which she is accused; and without departing from any other defences which may occur to her counsel, the great lines of those facts which she proposes to prove, will be these following:

1st, That she accepted of Mr. Ogilvie for her husband, contrary to the opinion of her friends, out of pure love and affection: that Mr. Ogilvie before his marriage, was, and continued thereafter, so long as he lived, to be of a tender constitution: that he had repeated and violent attacks of internal disorders, cholic pains, convulsions in his bowels, &c. insomuch that he was not only looked upon to be in a dangerous way, but having had some violent attacks recently before his actual death, gave himself up for lost; and both the day and the night before he actually died, had such violent returns of these disorders, that he thought himself dying, and resolved to have sent for a physician at many miles distance.

2d, That the pannel herself, soon after her marriage, did likewise fall into a bad state of health, costive in her body, and restless in the night, which obliged her frequently to take small doses of salts and laudanum.

3d, That lieutenant Patrick Ogilvie, her husband's younger brother, the supposed associate in the crimes charged, having returned from the East Indies, broken and shattered in his constitution, much about the time of the pannel's marriage, came to pay his first visit to his brother, and for some time had his principal residence in his brother's house; whereby, and by means of his near relation, he distinguished a becoming friendship and intimacy with the pannel, his sister-in-law.

4th, That the pannel having inadvertently allowed herself to run short of the salts and laudanum she used to take, and having occasionally mentioned this in the hearing of lieutenant Ogilvie, he told her, that as these were medicines which he himself had been advised to use, he had brought home in his chest a small quantity of laudanum, and a parcel of salts, of the very best quality; and that if she pleased, he would send her a small phial of the laudanum, and a few doses of the salts, how soon his chest, in which they were, should arrive from Dundee. She accepted of the offer; and did accordingly some time after receive from him, by the hands of Andrew Stewart, brother-in-law to Eastmils, who came to Eastmils on an occasional visit, a small phial of laudanum, and two doses of salts; and which are supposed to be the particulars alluded to in this indictment, as the doses of poison said to be secretly conveyed to the pannel.

5th, That Alexander Ogilvie, the younger brother of her husband, had, about the beginning of this year 1765, intermarried with a woman of the lowest rank, the daughter of a common porter in Edinburgh, which gave great offence to his two brothers, and the pannel does not doubt but she might, upon occasion thereof, have expressed her sense and feeling of the reproach thereby brought upon their family. Of which the said Alexander Ogilvie having got intelligence, this, joined with the disappointment in the expectation he had conceived of the succession to his brother's estate, he from thenceforward entertained a most groundless resentment against the pannel, the innocent cause of that disappointment; and took every occasion to publish the most scandalous falsehoods, calculated to create a misunderstanding between her and her husband.

6th, That for some time before the said Alexander Ogilvie's marriage, he had cohabited, in a most unbecoming manner, with Anne Clark, a cousin-german of the family; a woman of the most infamous character, and who, for a course of years, had lived as a common servant-maid, in one of the most notorious stews or lewd houses in Edinburgh, and other houses of bad fame, till at length she took up her residence with the said Alexander Ogilvie.

7th, Anne Clark's relation to Mr. Ogilvie's family furnished Alexander Ogilvie with a pretence of sending her over to Eastnailn, to pass some weeks there, and to endeavour by every possible means, to bring about a reconciliation between Mr. Ogilvie and his brother Alexander. In this view, she attached herself at first to the pannel, thinking by her means to have some influence with Mr. Ogilvie, himself; till at length, finding they were both equally averse to have any further correspondence, either with Alexander or his wife, she fell to work in another way; quarrelled with the pannel; made her court to Mr. Ogilvie; and first, by dark insinuations, thereafter more explicitly, endeavoured to instil into Mr. Ogilvie's mind, suspicions of the pannel's virtue, and of a criminal intimacy between his brother the lieutenant and her; and that they had even gone the length to form a scheme to deprive him of his life, by poison or otherwise; and these her pretended suspicions she communicated to the good old lady Mr. Ogilvie's mother: the tendency of all which was, to operate a misunderstanding and separation betwixt Mr. Ogilvie and the pannel.

8th, This diabolical contrivance happened unluckily, in point of time, to coincide with some differences that had arisen between Mr. Ogilvie and his brother the lieutenant, in settling accounts about money-matters; which having at length produced high words, and put both brothers in a passion, lieutenant Ogilvie declared he would stay no longer in a house where he had been so used; and was preparing to directly, when Mr. Ogilvie giving

passion, gave the parting blow, by

acquainting the lieutenant of the information he had received of his familiarity with the pannel, his sister-in-law; by which lieutenant Ogilvie, justly enraged, having peremptorily insisted to know his author, Anne Clark came at last to be suspected as the author and propagator of this wicked and malicious story; and what afterwards happened, too fully justified the suspicion.

9th, Lieutenant Ogilvie immediately left the house. Mr. Ogilvie soon cooled, and became sensible of the folly of his proceedings, and of the injury he had done, both to his wife and brother; as so abrupt a separation could not fail to put them in the mouth of the world. He therefore wrote to his brother the lieutenant, pressing him most anxiously to return to the family: the pannel, as far as decency would permit, joined in the same request.

10th, At this unlucky period was Mr. Ogilvie seized with a return of one of those violent disorders in his bowels and stomach. He had been almost dead the day before; he relapsed at night, complained much, thought himself a-dying, continued ill all night; finding himself easier arose in the morning as usual; again turning bad, returned to bed, where he took a bowl of warm tea and biscuit; after which he made another effort, got up, put on his clothes, went abroad to take the air, relapsed, fell a vomiting, threw up a deal of bile, and expired about 12 that night.

11th, The pannel's behaviour upon that melancholy occasion was decent and becoming, expressive of the real sorrow and grief she felt. The tale that is told of her having administered the poison in a bowl of tea that morning, will be disproved in the strongest manner. She had none to administer; and every circumstance, as it is expected to come out on proof, will shew, that she had it not in her power so to have done, had she intended it; and that *de facto* none was administered.

12th, Mr. Ogilvie's corpse remained uninterred until the 11th. It was viewed by physicians and surgeons of character and skill; the appearances were nothing but what is usual in natural distempers proceeding from various internal causes. A dissection of the body would easily have shewn whether there had been poison in the case or not; and it was the duty of Alexander Ogilvie, the informer, who had come to the house, and stopped interment for one day upon this very suspicion, to have caused the body to be laid open. This was not done; whereby the infallible means were lost of detecting the crime, if any was committed, and this unhappy pannel was deprived of the only infallible means of proving her innocence.

These are the great lines of principal facts which the pannel proposes to prove: many others to the same tendency, will, it is expected, come out in leading the proof; and she flatters herself that these, with an intelligent jury, will be effectual to detect the falshood of this accusation, and to vindicate the character and innocence of an unfortunate young woman,

whose present state, several months gone with child, renders her a very improper object to undergo a trial of this nature; which, from the accumulation of two capital crimes in one indictment, and the great number of witnesses given out in list, besides those to be adduced for her exculpation, must draw out to an immoderate length.

Crosbie, for lieutenant Patrick Ogilvie, pannel, repeated his signed defences; and represented, That the said lieutenant Patrick Ogilvie, having obtained a commission in the regiment, he behaved in the execution thereof in a proper and inoffensive manner; and being ordered along with his regiment to the East Indies, he remained there till his health obliged him to return home; when he came to the house of Eastmilk, where his brother resided, who was then about to be married to Katharine Nairn, the other pannel, and where he continued for some time with an inoffensive character, suitable to that which he had maintained in the regiment in which he had served, of which there are many officers ready to attest the character he held.

About the time that the pannel Patrick Ogilvie returned home, and about the same time that the defunct Thomas Ogilvie of Eastmilk was married to Katharine Nairn, Alexander Ogilvie, the third and youngest brother of the family, married the daughter of one Rattray a porter, a person greatly inferior in rank to himself; and his relations, and immediate connections, highly disapproved of the match, and alienated themselves from him on that account. This marriage happened near about the time that the deceased Thomas Ogilvie was married to the pannel Katharine Nairn.

There was one Anne Clark, who was related to the family of Eastmilk by the mother's side. This woman had for several years resided as a servant in a house of dissolute reputation in Edinburgh, and which, as a house of bad fame, had regularly been visited by the constables. Some months, at least weeks, however, before the marriage of Alexander Ogilvie, she had cohabited with him in the same room, and the same house; and after his marriage she had lived in his father-in-law's house. In consequence of all which it may be presumed a very particular intimacy had arisen between her and the said Alexander Ogilvie.

The friends of the family of Eastmilk had taken umbrage at the marriage of Alexander Ogilvie with the daughter of a common porter; he thought it necessary, therefore, to send some person to interpose as a mediator with that family; and the person he made choice of was Anne Clark.

Anne Clark was accordingly dispatched to the house of Eastmilk. She was received, without suspicion, as a relation of the family; and, in that character, without enquiry into her former life and conversation, she was treated as an equal, and a gentlewoman.

Such was the pretext of sending Anne Clark to the house of Eastmilk: something deeper,

VOL. XIX.

however, seems to have been intended. The deceased Thomas Ogilvie of Eastmilk had for many years been subject to consumptive symptoms; he had been afflicted with ulcers in his bowels, which had been discovered at the distance of five years before his death; ever after he had been in a valetudinary state; and there was reason to apprehend he would not be long-lived. The relations of Mrs. Ogilvie in particular had shewn some apprehensions, that by his premature death the provisions in her favour might be rendered ineffectual. The pannel Patrick Ogilvie was also in a bad state of health: he had been obliged to return from the East Indies, where he had been in service with his regiment, on account of his valetudinary habit: and from the situation which the two elder brothers were then in, there is the greatest reason to believe, that Alexander Ogilvie had entertained the most sanguine hopes of succession to the estate; which, by the marriage of Thomas, and the return of Patrick for the recovery of his health, seemed likely to be disappointed.

That issue should not be procreated between Thomas Ogilvie and Katharine Nairn his wife, and that Patrick Ogilvie should be obliged to betake himself to those inhospitable climates which he had left, and whose inclemencies had well nigh already put an end to his life, seemed desirable objects in the eyes of Alexander Ogilvie. To promote dissention, therefore, between Thomas Ogilvie and his wife, and to alienate the mind of Patrick Ogilvie the pannel, from this country, seemed to have been the purpose for which Anne Clark was dispatched from Edinburgh. As a relation of the family, she was received with implicit confidence at Eastmilk, particularly by the pannels, who were little aware what a snare was prepared for their unguarded confidence.

Miss Clark had but a short time resided at the house of Eastmilk, when she made it her business to sow dissention and animosity among all the members of the family. She endeavoured to inspire Mr. Ogilvie with jealousy towards his wife, and distrust towards his brother: and she was but too successful in her endeavours; Mr. Ogilvie, a sickly man, and too susceptible of such impressions, was soon misled by the artful Miss Clark into a belief of what, if he had trusted his own judgment, he could never have supposed.

The period which was chosen to insinuate these jealousies was remarkable. The pannel, lieutenant Patrick Ogilvie, had some differences with his elder brother, concerning his patrimony; for a dispute had occurred about the balance of a bond of provision resting owing to Patrick Ogilvie. Miss Clark laid hold of that opportunity to propagate her malicious allegations; and in the heat of a conversation which arose concerning the balance of this bond of provision, and what Thomas had done with it after he took it up from the custodian, the deceased first insinuated his apprehen-

sion of an improper intercourse between the two pannels.

To minds already heated by a dispute concerning money-matters, this incident served to add greater warmth. The two brothers parted with some animosity, the pannel Patrick declaring his intention never to return to the house of Eastmilk.

The intention of the pannel was, after visiting his friends in the country, as he had now tolerably recovered his health, to return to his military service in the East Indies; hoping, by means of this, to avoid both the jealousy of his brother, and the envy of his other relations. Though often solicited, therefore, to return to his brother's house, he kept always at a distance, from that day when he discovered the first symptom of jealousy.

Mrs. Ogilvie, the other pannel, had for some time before this complained of bad health; and particularly she complained of want of sleep: on account of her complaints, she had been in use to take salts and laudanum as medicines. In the hearing of the pannel she had expressed her desire to have some of these medicines; and as he, while at sea, had been in use to take both on account of his bad state of health, and in a short time expected one of his sea-chests would arrive, in which he had a quantity of both, he proffered to her to send her some laudanum and salts, as soon as the trunk or chest they were in should be brought to the country: and she told him she would be obliged to him for them, as they were so ill to be had of a proper kind in that remote part of the country.

After the pannel had left the house of Eastmilk in the manner above mentioned, his trunk or chest came to hand; it was brought from Dundee by Andrew Stewart, merchant in Alyth, to his house; and was, in his presence, in the public shop, opened by the pannel; who has reason to believe, that the said Andrew Stewart observed both the salts and laudanum that were therein. But the quantity of laudanum proving very small, as a great part of it had been used during the voyage, the pannel found himself under the necessity of purchasing a small quantity of laudanum, in order to send as much as was requisite to Mrs. Ogilvie. He did accordingly buy a small quantity of laudanum for this purpose; which, together with what he already had, he put into a phial, and with two doses of salts, which in the presence of Andrew Stewart, he took out of the chest or trunk aforesaid, put up, and sent by the said Andrew Stewart, who was going on an occasional visit to see Eastmilk and Mrs. Ogilvie.

What symptoms attended the deceased Mr. Ogilvie's last illness, the pannel, not having been at the house of Eastmilk, cannot, from his personal knowledge, pretend to say. As far as he has been able to inform himself, however, he cannot discover, that there is the least evidence that he died by poison. Nor did the pannel, on any occasion, pretend to hinder a dissection of the body, or any other means of discovery, whether the defunct had died of

poison or not. On the contrary, he urged and insisted, that such trial should be made. And he having sent for a surgeon to inspect and open the body, the person whom he had dispatched express for that purpose, was privately stopped by Alexander Ogilvie, the younger brother, who is the person on whose signed information he was originally committed to prison.

Such are the material facts which the pannel apprehends he is called on to explain, in vindication of his good fame: and to these facts he subjoins the following defence, in terms of the statute:

1st, That the libel contains a 'Cumulatio actionum in criminibus;' which is reprobated in law.

2dly, That so far as relates to the incest, the libel is utterly vague and inconclusive, being destitute of all circumstances of time or place, or other requisites that can enable the pannel to make a pointed defence; and therefore ought not to pass to the knowledge of an assize.

3dly, The libel, as far as respects the crime of poisoning, is utterly irrelevant *quoad* this pannel.

Lockhart, for Katharine Nairn, and Rec, for Patrick Ogilvie.

Adhering to the defences severally proposed for them, represented, That the indictment charges the pannels with incest committed betwixt them, in the months of January and June, and intervening months, and before the 12th day of the said month of June: that the said Katharine Nairn and the deceased Thomas Ogilvie were not married till the 30th day of the said month of January; and to instruct that, produces and opposes their contract of marriage, dated the 29th of January, and they were married the subsequent day. And therefore contended, that as to the month of January, the indictment could not go to proof, farther than as to the last day of that month.

2dly, As the deceased Thomas Ogilvie died on the 5th of June, the time intervening betwixt that and the 12th, were equally irrelevant, as incest could not be committed with the widow after the death of the husband, at least to infer the pains of law, by which, in our practice, are generally meant the pains of death.

Sir David Dalrymple, for the prosecutor, answered, That 'cumulatio actionum criminalium,' is established in the practice of the Judiciary Court; and in this case is particularly necessary and proper.* That it is esta-

* In the Scots law, a very great latitude of accumulating one charge upon another is allowed to the prosecutor. Mr. Hume, in discussing this subject (*Commentaries on the Law of Scotland respecting Trial for Crimes*, vol. 1, c. 7, p. 277,) distributes this power of cumulation into three divisions, under each of which he cites many adjudged cases. "In the first

blished in the practice of the Justiciary Court, is evident by the following examples, selected from many of the same nature which occur in the books of adjournal.

place," says he, "the competency has never been disputed, of charging, in one libel, any number of criminal acts, if they are all of one name and species, or even of one class and general description, so as to cohere, in this point of view, and stamp a character on the pannel, as one who is an habitual offender in this sort, and of whom no amendment is to be expected." And as to this, he instances the union, in one libel, of three acts of horse-stealing, and one of pulling and stealing wool; the union of the charges of incest, many adulteries, and bestiality. And where the offences imputed to the pannel are all of the same name and species, as sundry highway robberies, sundry acts of house breaking, horse-stealing or pocket-picking, he says, "I believe I may affirm, that there is no instance of the distribution of the several charges into separate libels."

"In the second place," continues he, "the like practice is naturally and justly observed on all those occasions, unhappily too frequent, where, though the criminal acts be of different kinds and appellations, yet they have a natural relation, and a dependence on each other, as parts of one foul and nefarious story, and as successive steps in the progress of the pannel through a course of increasing guilt into which the indulgence of one criminal passion has betrayed him." And under this head, he cites the present case of Nairn and Ogilvie; and he gives many other instances, in support of his position: thus, of the union of charges of incest and murder; of adultery and murder; of robbery and murder; of adultery, forgery, attempt to poison, and false conspiracy; of sundry acts of robbery, an attempt to rob, and wounding and deforming the officers of justice, of several acts of horse-stealing, and having broken gaol; of acts of breaking prison and house-breaking; of murder and fire-raising committed at one time, assailing a person of whose evidence the prisoner was afraid, and suborning that witness to bear false testimony.

He proceeds, "The latitude which is allowed the prosecutor, is not, however, limited to cases of this description. On the contrary, he is suffered to combine in one libel several charges which are both heterogeneous in themselves, and have little or no connection with each other in the particular case; so that a person may be tried, perhaps, in one sitting, for a murder, a theft, and a forgery, committed in different years, and to the injury of different persons. The object of this permission, is not only the doing of justice as expeditiously, and with as little expence and trouble as may be to the public, but also, provided it be kept within certain bounds, for the advantage of the pannel himself; that he may be relieved of the long confinement and of the anxiety and agitation,

February 16, 1580. Andrew Glencorse indicted for poisoning his wife, and for incest with his wife's mother.

September 6, 1610. William Douglas of

which would attend the distribution of the several charges into as many libels, and the successive trial of these with separate juries and at different diets." And he notices many cases, selected from among a much greater number, of such accumulation of heterogeneous charges.

As to this consolidation of charges, Mackenzie (Criminals, part 2, tit. 19, s. 7.) expresses himself thus, "A person accused was not obliged to answer of old, but for one crime in one day, except there were several pursuers, *Quoniam Attachamenta*, cap. 65, by which, accumulation of crimes was expressly unlawful, 'sed hodie aliter obtinet;' for now there is nothing more ordinary, than to see five or six crimes in one summons or indictment, and to see one accuser pursue several summonses; and yet seeing crimes are of so great consequence to the defender, and are of so great intricacy, it appears most unreasonable, that a defender should be burdened with more than one defence at once; and it appears, that accumulation of crimes is intended, either to leze the fame of the defender, or to distract him from his defence."

"But," says Mr. Hume, "although it thus appears, that the accumulation of many crimes in one libel is not received as a reason in our practice, for throwing the process out of court; it is not, however, to be understood, that the judge is therefore deprived of all discretion in this matter, and must needs proceed to the trial, in one diet, of any number of charges which it shall please the prosecutor to lay before him; nor even that the prosecutor himself, who has united so many articles in his ditty, is therefore obliged to persist in his first purpose, of hazarding the whole of them with one assize. On the contrary, he may desist for the time, from as many of them as he thinks advisable, and crave an adjournal of the diet as to these, while he proceeds with the immediate trial of the others.

"The Court, in like manner, whensoever they find that the immediate trial of such manifold charges is likely to prove oppressive, either to the witnesses, the jury, or themselves; and still more, if they see cause to believe that it may be attended with any disadvantage to the pannel, by embarrassing him in his defence, or begetting prejudices against him in the minds of his jury, or the like; and more especially still, if it appear, that to lay him under this hardship was the prosecutor's object in thus accumulating his charges:—In any of these cases, they have it certainly in their power to divide or parcel out the libel, and to proceed in the first instance to the trial of so many of the articles only, as may fitly be dispatched in a single diet; reserving the others to be tried afterwards, on the same libel indeed, and with the same list of jurymen, but in an-

Lincolnden, slaughter and treasonable theft, being a landed man

March 30, 1638. Isobel Kaittie, notour adultery, and murdering two children born of the adulterous intercourse.

March 30, 1638. Andrew Harvie, art and part of the murder of Isobel Dalgleish, and of adultery with Helen Stevenson.

July 27, 1642. Margaret Cunningham, adultery, and murder of the child born in the adultery.

March 19, 1645. John Gordon, bigamy, adultery, and theft.

March 28, 1646. Margaret Thomson, adultery, and lorgery.

December 20, 1649. James Wilson, incest with his wife's daughter, and adultery with another woman.

April 21, 1664. John Swinton and Janet Brown, notour adultery, and murder of Swinton's wife.

other diet, or in more than one, and before a special jury of different persons, if they see cause."

And under this head, he mentions the case of David Young, 1738, in which this discretionary power of the Court had been exercised; and also the earlier case (December, 1727, January, 1728) "of Walter Buchannan of Balquhan, who was accused in one libel, of ten different species of crime: namely, fire-raising; attempts and threats to raise fire; attempts to poison; theft and depredation; reset of theft; the harbouring, outhounding, and maintaining of thieves and robbers; sorn-ing, and levying of black-mail; and the killing, and eating of other people's sheep: under which different heads." [There seem to be more than ten crimes charged, and I am not sufficiently acquainted with Scottish law, to know with certainty into what 'ten different species of crime' they are to be distributed.] "he was charged with a variety of separate acts, to the number of twenty, committed against sundry persons, from 1720 to 1726, and many of those acts right loosely laid in the libel. The lords judged it proper to restrict the trial to those charges which were most special, and of the highest order withal, viz. the fire-raising, the attempts and threats to raise fire, and the attempt to poison. The other articles they remitted for trial with the judges on the western circuit."

He afterwards considers whether several private parties having interest may properly unite their instances in the same libel against a single pannel; first in cases where the prosecution is at the instance of the lord advocate, and secondly in cases where a number of individuals insist for their several interests, with the concurrence only of the lord advocate for the sake of form. And he seems to be of opinion, that more prosecutors than one, would not be allowed to join in one libel offences committed against them separately.

May 27, 1665. Margaret Hamilton, adultery and murder of her husband.

April 9, 1670. Major Thomas Weir, fornication, adultery, incest, and bestiality.

September 12, 1678. Isobel Hay, adultery, and murder of her adulterous child.

January 15, 1694. Doctor John Elliot, Daniel Nicolson, and Marion Maxwell, murder, falsehood, forgery, and notour adultery.

November 9, 1702. Margaret and David Myles, incest and child-murder.

November 9, 1703. Mary Graham, incest with her father, and child-murder.

February 21, 1706. Elizabeth Hunter, incest and adultery.

As this 'cumulatio actionum criminalium' is fully established by practice, so in this case it is particularly proper and necessary: the two crimes charged, incest and murder, are, from the circumstances of the charge, intimately connected; and it is proposed in general to prove both by the same witnesses. To make separate trials for each crime would be oppressive to the witnesses, the jury, and the parties. It is true, that accusations for different crimes may be thrown into one libel, in such manner as to prove oppressive. Whenever this is attempted, the Court will interpose; but not in order to prevent the trial of different crimes in one libel, where nothing oppressive is meant, and where the expediency of the 'cumulatio actionum' is obvious. As to what is said, that the charge for incest is unintelligible or vague, it is answered, That it is laid in terms the most unexceptionable, in the express words of an act of parliament; and surely the legislature must be presumed capable of conveying, by words, a just idea of the crime which it meant to punish. As to what is said, that the libel for incest is vague, charging the crime as committed in January and June 1765, and the intervening months, it is answered, That in all criminal indictments a latitude of this kind is allowed in practice; for witnesses may be distinct as to the circumstances of the crime charged, and yet may not be certain as to a day, or even as to a month. Indictments do generally comprehend the term of three months. In the case, the king's advocate against Oliphant, 4th February 1736, a libel for a single act of sodomy, bearing two months in one year, and two in another, was held sufficiently articulated; and in that form was remitted to the knowledge of an assize. When an indictment contains the charge of a crime, which in its own nature is capable of frequent repetition, as incest is, a still greater latitude is allowed. Thus in the case of Forbes 1758, tried for corrupting young girls, an indictment was remitted to the knowledge of an assize, although it bore that the crime was committed in some one or other of the months from May 1757, to April 1758, inclusive. If the pannel Mrs. Ogilvie was not married till the 30th of January 1765, the charge of incest preceding that date, will cease of course. If it shall be proved that she and lieutenant Ogilvie

defiled their bodies after the death of Eastmilk, it may not perhaps be capital incest by the act 1567, which refers to the xviiith chapter of Leviticus; but it will nevertheless be incest punishable in law: and if no incest but what was committed after the death of Eastmilk should be proved, then the jury will find accordingly, and the Court will adapt the punishment to the offence. As to what is said, that the murder by poisoning is not properly laid against lieutenant Ogilvie, it is answered, That the contrary appears from the tenor of the indictment. But although this were not the case, yet he is charged as guilty art and part of that crime, which is in law a relevant indictment, and as such must be remitted to the knowledge of an assize.*

* As to the debate on the relevancy of the libel, [the proper questions concerning the relevancy of a libel are these; does it in proper form, and with all necessary circumstances, charge the pannel with an offence which is known in the law of Scotland, and does the offence so charged amount to the species of crime which is stated in the major proposition of the libel?] Mr. Hume (2 Comment. ch. 10, p. 41,) tells us, that "as far as can be gathered from the face of the records, the ancient custom, which continued to be observed till after the beginning of the seventeenth century, was for a spoken debate, whereof the clerk took down a minute, stating in his own words, and always very briefly, the heads of the several defences, without any detail of the arguments or authorities on either side. In the course of that century, this course was exchanged for the more cumbersome and tedious one of a written pleading, wherein the counsel on either part, in presence of the judge, dictated at large to the clerk of court, in the form of defences, answers, replies, and so forth, all that occurred to them as proper to be said on the case. This dry and tedious style of disputation, which often drew out to a great length, was abolished by the statute of 1695, c. 4." By this act, it is, "for the better regulating of the justice court, and facilitating and more sure ordering of the form and method of processes therein used," statute and ordained, that "in all time coming, the use and custom hitherto observed in that court, of advocats or procurators their dictating, and the clerks writing of the defences, duplies, triplies, quadruples, and so furth, for the defender and pursuer, be discharged and laid aside, and that in place thereof, his majestie's advocat or other advocats or procurators for the pursuer, with the advocats or procurators for the defender or pannel debate the relevancy *vidé voce*, and that after the said dispute *vidé voce* is ended, then time be allowed to the lords and judges of that said court, to the effect after mentioned, and that the king's advocat, or advocats, or procurators for the pursuer, do within the space of forty eight hours, give into the clerk his information in writing subscribed with his hand, and that

"The Lord Justice-Clerk and Commissioners of Justiciary, having considered the criminal indictment raised and pursued at the instance of Thomas Miller of Berskimming,

advocats or procurators for the pannel may take it up and give in their answers in writing also under their hands, within other forty eight hours, which information and answers shall be by the clerk recorded in the books of Adjournal, in place of the foresaid written dispute formerly in use; and then at the advising the said information and answers shall be first read in open court, and if any thing be found new on either side, and not noticed by the other party, the parties or judges shall point the same to the other party concerned, and hear both parties thereon *vidé voce*, the clerk minuting in presence of, and at sight of the said judges what is so further debated, and then the said judges shall proceed to the advising."

Upon this Mr. Hume observes, "under this ordinance, a debate on the relevancy *vidé voce*, and next a debate in writing, became an ordinary, or rather a necessary part of every criminal process, whether there were or were not any room for difference of opinion respecting the propriety or sufficiency of the charge. And hence the great load of frivolous objection, and sophistical argument, with which, after that period, the records are filled, in the shape of informations, on cases where there could be little doubt of the proper judgment to be pronounced. At length, the statute 30th Geo. 2, c. 43, § 41, 42, relieved our judges from this tedious and unprofitable bondage; having ordered that the debate on the relevancy of the libel, if there be any thing to offer on that head, shall be conducted *vidé voce*, and be followed with an immediate judgment, if the Court incline; and that otherwise, they may order informations on the case, for the better and more deliberate trial of the question."

Again Mr. Hume (vol. 2, c. 13, p. 193) says, "As far as appears from the oldest books of Adjournal, our first practice had been to receive the depositions *vidé voce*, without entering in the record so much as the names even of the persons examined. In the trial of John Maxwell for murder, Feb. 14, 1615, the depositions are for the first time set down at large, though without being signed by either judge or witness. After that time, the depositions are occasionally taken notice of, but often in a very imperfect form, and such as more resembles a brief note of the result or general substance of the testimony, than a narrative taken from the mouth of the witness. As, for instance, in the trial of James Clark, March 19, 1634, for cozenage and other offences, the record bears this and no more with respect to the two principal witnesses, that they swore to the verity of the dittay [Robert Moubray and Robert Doig, sworn anent the sword, depones *conformis*, that the article of the dittay red to theme there anent, is trew in the self.] But even this sort of summary of the evidence, was more

esq. his majesty's advocate, for his majesty's interest, against Katharine Nairn, widow of the deceased Thomas Ogilvie of Eastmills, in the county of Forfar, and Patrick Ogilvie, lieutenant of the 89th regiment of foot, brother-german of the said deceased Thomas Ogilvie, pannels, with the foregoing debate, repel the hail objections made to the form of the indictment; and find the said indictment relevant to infer the pains of law: but allow the pannels and each of them to prove all facts and circumstances that may tend to their exculpation, or alleviation of their guilt; and remit the pannels, with the indictment as found relevant, to the knowledge of an assize."

(Signed) GILB. ELLIOT, I. P. D.*

"The Lord Justice-Clerk and Commissioners of Justiciary continue the diet against the said Katharine Nairn and lieutenant Patrick Ogilvie, pannels, till Monday next, the 12th instant, at seven o'clock in the morning; and ordain parties, assizers, witnesses, and all concerned, then to attend, each under the pains of law; and the pannels in the mean time to be carried back to prison."

CURIA JUSTICIARIE, S. D. N. Regis, tenta in Nova Sessionis Domo de Edinburg, sexto die Augusti, millesimo septingentesimo sexagesimo quinto, per honorabiles viros, Dominum Gilbertum Elliot de Minto, Baronetum, Dominum Justiciarium Clericum, Alexandrum Boswell de Auchinleck, Andream Pringle de Alemoor, Henricum Home de Kames, Jacobum Ferguson de Pitfour, et Georgium Brown de Coalston, Commissionarios Justiciarum, S. D. N. Regis.

Curia legitime affirmata.

The which day, there was a petition presented to the said lords in the names of Katharine Nairn, relict of the deceased Thomas Ogil-

frequently omitted than given; nor does the practice of inserting the depositions at large seem to have been established till 1661, or thereby. From that time, though attended with much trouble and loss of time, it continued to be uniformly observed till the 21st of Geo. 2; when, by special statute, c. 19, of that year, a dispensation was given in this respect, as far as related to the trial of Crimes, not inferring death or demerbration, under provision that one of the judges should sum up the evidence to the jury, before inclosing. The like allowance, and qualified with the like provision, is, by statute 23, Geo. 3, c. 45, extended to the trial of all crimes; under reservation, as in the former statute, of power to the Court still to proceed in the old form, in any case where they shall judge it advisable.

* Concerning the Interlocutor of Relevancy, see something in the Case of James Stewart, a. d. 1752, p. 1, of the present volume.

vie of Eastmills, and lieutenant Patrick Ogilvie, brother to the said Thomas Ogilvie; humbly shewing,

That the petitioners stood indicted before their lordships, at the instance of his majesty's advocate, for the alleged crimes of incest, and accession to the supposed murder of the said Thomas Ogilvie.

That the petitioners had pleaded Not Guilty to this grievous accusation; and were confident, that in the course of the trial their innocence would be fully vindicated to the satisfaction of the Court and Jury.

That as the petitioners did assert, and had good reason to believe, that that prosecution took its rise from malice, and most false and injurious calumnies raised and propagated by persons, who, from most unjust views, have been desirous of ruining the petitioners; it was therefore highly necessary and just, that the petitioners, who were then to undergo that solemn trial for their lives, should be secured as far as possible against every kind of influence and undue practice, that might, or could be used, upon witnesses to be adduced in that cause.

That, among other misfortunes under which the petitioners laboured, they had been accused, by report, of endeavours to secrete material witnesses in that matter; and though conscious of their innocence in that, as well as in other respects, yet several of the witnesses have, on that or some other account, been secured as prisoners in the castle of Edinburgh.

That, among these witnesses, was Anne Clark, designed daughter of the deceased Allan Clark, officer of excise, who is now confined in the same room with two or more maid-servants, who were in the house of Eastmills at the time of Thomas Ogilvie's death, and who would be most material witnesses for the petitioners in that cause.

That the petitioners would make it appear, by uncontestable evidence, that the said Anne Clark was not only a person of the worst character and disposition, such as rendered her improper and inhabile to be received as a witness; but also, that she had entertained and expressed deadly malice and hatred against both the petitioners; and that, in pursuance thereof, she had been the author and propagator of the false and malicious stories which had given rise to the present prosecution. And, in fine, that she was in a combination to ruin the pannels, and, as far as she could, to deprive them of their lives, as well as their reputation.

That it would occur to their lordships, that the petitioners were exposed to imminent danger by the said Anne Clark's being constantly confined in the same room with other material witnesses, whose sex, station, and inexperience, though otherwise honest and well-inclined, might expose them to be influenced and prejudiced by the malicious endeavours of that artful woman. For these reasons, the petitioners were confident, that their lordships would forthwith give orders for separating the

said Anne Clark from the said other witnesses. Therefore praying, That it might please their lordships forthwith to grant warrant to the deputy-governor of the castle of Edinburgh, or any other proper officer, to remove the person of the said Ann Clark from the room in which she was presently confined; or otherwise to separate her from the said maid-servants, and to keep her separate from them, or any other witnesses to be adduced against the petitioners in that present prosecution. According to justice, &c.

(Signed) HENRY DUNDAS. DAV. RAE.

Edinburgh, 6th August, 1765.

I Thomas Miller, esq. his majesty's advocate, consent, That the prayer of the within petition be granted; but upon this express condition that no person whatever be admitted or have access to any of the said three witnesses, except in presence of one or other of the officers of the Court of Justiciary, which their lordships shall think proper to appoint.

(Signed) THO. MILLER.

"The Lord Justice Clerk and Commissioners of Justiciary having seen and considered the foregoing petition, with the consent of his majesty's advocate subjoined thereto, recommend to the deputy-governor of the castle of Edinburgh, or other proper officers, to cause remove the said Anne Clark from the room where she and the other two women before-named are presently staying, into some other room in the said castle, until Monday next the 12th day of August current; and also recommend as above, that care be taken that no person get access to any of the said three women, betwixt and that time, except in presence of Robert Auld, writer, or Andrew Murison, macer of this court, or either of them.

(Signed) "GILB. ELLIOT, I. P. D."

CURIA JUSTICIARIE, S. D. N. Regis, tenta in Nova Sessionis Domo de Edinburgh, duodecimo die Augusti, millesimo septingentesimo sexagesimo quinto, per honorabiles viros Dominum Gilbertum Elliot de Minto, Baronetum, Dominum Justiciarium Clericum, Alexandrum Boswell de Auchinleck, Andream Pringle de Ale-moor, Henricum Home de Kames, Jacobum Ferguson de Pitfour, et Georgium Brown de Conlston, Commissionarios Justiciarie S. D. N. Regis.

Curia legitimè affirmata.

Intran'

Katharine Nairn, widow of the deceased Thomas Ogilvie of Eastmilk, and

Patrick Ogilvie, lieutenant of the 89th regiment of foot, brother-german of the said deceased Thomas Ogilvie; both present prisoners in the Tolbooth of Edinburgh; pannels.

Indicted and accused as in the former *Sederunt*.

The interlocutor on the relevancy being read over to the pannels in open court,

The lords proceeded to make choice of the following persons to pass upon the assize of the said pannels:

ASSIZE.

Sir James Clark of Pennycuik.
John Howieson of Braehead.
John Christie of Baberton.
Adam Cuninghame of Bonnytown.
Alexander Sheriff of Craigleith.
David Dundas younger, of Newhalls.
Sir George Suttie of Balgonie.
Charles Hay of Hopes.
William Ramsay of Preston.
John Forrest, senior, merchant in Edinburgh.
George Chalmers, merchant in Edinburgh.
Gavin Hamilton, bookseller in Edinburgh.
Archibald Wallace, merchant in Edinburgh.
John Borthwick of Cruikston.
Thomas Brown of Braid.

The above Assize being all lawfully sworn, and no objection to the contrary,

His Majesty's Advocate proceeded to call the following Witnesses:

David Rattray younger, in Cammock, in the parish of Glenylla, aged 42, married, purged of malice and partial counsel, sworn, and interrogate, depones, That he lives in the neighbourhood of Eastmilk, and did hear it talked in the country, that Mrs. Ogilvie the pannel, and lieutenant Ogilvie the other pannel, lived in too familiar a-way, and walked out together without others in their company: that the deponent himself once saw them at their walk, when there was nobody with them, when they were leading other arm and arm, and at that time he saw the pannel, lieutenant Ogilvie, kiss Mrs. Ogilvie, the other pannel, once: that this happened after the late Thomas Ogilvie of Eastmilk's marriage with the pannel, and before his death; cannot remember the precise time, but there was a storm on the ground then: that at the above-mentioned time the pannels were walking near the house of Eastmilk, crossing the king's highway, when the witness saw as above, when he was no farther from them than the fourth part of a quarter of a mile; and that the pannels were in a hollow way when he saw lieutenant Ogilvie give the other pannel one kiss as above. *Causa scientiæ patet.* And this is truth, as he shall answer to God.

(Signed) GILB. ELLIOT. DAVID RATTRAY.

John Lamar, in Craigendeach, in the parish of Glenylla, aged 47, married, purged of malice and partial counsel, sworn and interrogate, depones, That he lives very near Eastmilk, and has heard the clashing people of the country commonly report, that the pannel Mr. Ogilvie liked Mrs. Ogilvie the other pannel too well; and that a dispute in the family of Eastmilk about that time arose, which took its rise,

as was said, from a suspicion, that the two pannels liked other too well: that upon this Mr. Ogilvie the pannel left the house of Eastmilk, as was reported, upon the above suspicion; and it was even said in the country, that the two pannels loved one another too well: that the deponent himself knows, that Mr. Ogilvie the pannel went away from the house of Eastmilk about a fortnight, as he thinks, before Eastmilk's death, and the deponent saw him return to the house of Eastmilk the morning after Eastmilk's death: that before Mr. Ogilvie the pannel left Eastmilk's house, the deponent has often seen the two pannels walking arm in arm, and their arms about each other's neck: that he has seen them in that posture at their walk, even when Miss Clark and the laird of Eastmilk himself were in company, as well as when there was nobody else with them. Depones, that the report of the love between the two pannels he did not hear in the country till after lieutenant Ogilvie had left the house of Eastmilk as above; and that he never saw the pannel Mrs. Ogilvie till after her marriage: that since the marriage he has seen Dr. Alexander Ogilvie, a brother of Eastmilk's, at the house of Eastmilk; and that Anne Clark, a witness cited in this trial, was there before him, and at the same time: that the deponent's house lies at about a quarter of a mile's distance from Eastmilk's house, on the other side of the river, from whence it is easy to see any person who comes out or goes into the house of Eastmilk. *Causa scientie patet.* And this is truth, as he shall answer to God. And depones he cannot write.

(Signed)

GILB. ELLIOT.

James Barnet, son to Alexander Barnet in Cammock, in the parish of Glenylla, aged 15 years, unmarried, purged of malice and partial counsel, sworn and interrogate. Dismissed.

John Gilloch, wright in Dalnakebock, aged 26 years, married, purged of malice and partial counsel, sworn, and interrogate, depones, That, about a fortnight after Eastmilk's marriage, the deponent was sent for to the house of Eastmilk to put on some locks and brass-work upon a drawer: that accordingly the deponent went to the room where the drawers stood, in which room he saw the pannel Mr. Ogilvie lying in bed: that when he was so employed, Mrs. Ogilvie the pannel came to the room door where the deponent was at work, she having heard him as he supposed, at work. Upon Mr. Ogilvie the pannel observing her, he desired her to come in: that after having said to the deponent, John, are you begun? she went in and asked Mr. Ogilvie the pannel, What! are not you up yet? and then she went towards the bed-side, where stood a table, upon which she put down, and then they had some sweet-bread together, and then went at a market. That, after she came and her hand about the deponent, and then she went to him.

did not observe whether her hand was below the bed-clothes, or above. Depones, that when Mrs. Ogilvie the pannel was going out of the room, lieutenant Ogilvie kicked up the bed-clothes with his feet, and threw them up upon his body; upon which Mrs. Ogilvie said, At you daft dog! and the deponent at that time saw so much of the said lieutenant Ogilvie's body, that he the deponent could judge whether he was a man or a woman: that after breakfast, Mrs. Ogilvie came to where the deponent was at work, and gave him a dram and lieutenant Ogilvie being present, she gave him also a dram, for he was by that time dressed. Depones, that the week before Eastmilk's death, the deponent went to Eastmilk to do some work: that when he was sawing Elizabeth Sturrock, then a servant in that family, came to the deponent, and asked him, he knew which way the laird had gone? He said, He could not tell. Upon asking her what she put such a question, she answered, That lieutenant Ogilvie was expected at Eastmilk that day, she could wish the laird and he might meet. And depones, that he the deponent saw Eastmilk walk away from the house some time before. Depones, that on the evening of the day last mentioned, as the deponent was returning from his work, he saw Mrs. Ogilvie the pannel returning to Eastmilk, upon the road that leads from the Kirkton to that place and observed Mrs. Ogilvie and Anne Clark meet upon that road; and that same night he saw Mr. Ogilvie the pannel standing at the Kirkton, which is not a quarter of a mile from Eastmilk: that, at the time above-mentioned when lieutenant Ogilvie kicked up the clothes and the lady said to him, Ah! you daft dog the deponent does not think she saw the condition the lieutenant's body was in, as she was then going out of the room. Depones, that while Mrs. Ogilvie was sitting upon the chest by lieutenant Ogilvie's bed, as above deponed to, the deponent could see Mr. Ogilvie's breast from the posture he was then in. Being in interrogate for the pannel, depones, that when he saw Mrs. Ogilvie the pannel upon the road from the Kirkton returning to Eastmilk, as above deponed on, and Anne Clark upon the same road, that they were both walking towards Eastmilk, and Anne Clark foremost. *Causa scientie patet.* And this is truth, as he shall answer to God. (Signed)

GILB. ELLIOT. JOHN GILLOCH

Katharine Campbell, late servant to the deceased Thomas Ogilvie of Eastmilk, being called; against adducing of whom it was objected, that she ought not to be received as a witness, no execution being returned against her 24 hours before the diet of comparance conform to the forms of court established. 2d0,

* = 13/1. Delirious, insane, stupid, block-headed, giddy, thoughtless, playful, sportive, wanton." Jamieson's Etymological Dictionary.

deponent slept had no plastered ceiling, so that the smallest noise in the room above could be heard there. Depones, that there were two other servant-maids at Eastmilk at that time, to wit, Anne Sampson and Elizabeth Sturrock. Depones, that she never heard, while she continued in Eastmilk, any circumstances happening between the two pannels, such as have been above described, except one night as before mentioned; and remembers particularly, that the other nights that Eastmilk was at Dunsinnan, the lieutenant's bed in the morning had the appearance as if it had been slept in; and so had Mrs. Ogilvie's. Depones, that she never spoke of what she heard the night above-mentioned, to the best of her remembrance, till after she had left the house of Eastmilk, when she communicated the same to lady Glenkilrie, the pannel Mrs. Ogilvie's sister. Depones, that the deponent constantly slept in the kitchen alone, while Eastmilk was at Dunsinnan, and all the time she was in the service. Depones, that, while the deponent was in the service at Eastmilk, there was a sister of the laird's married in his house; after which the whole family went to Dunsinnan, and when they returned, all of them, except Eastmilk and his mother, expressed dissatisfaction with the deponent, but upon what occasion they never explained to her. And being further interrogate, depones, that the motion she heard in the room above her, deponed to above, she then thought was the motion of a man and woman in bed together, and such as a husband and wife have together; and that she would have been of this opinion, though she had not seen the lieutenant's bed unruffled next morning. And being interrogate by one of the jury, depones, that she always considered that it was Anne Clark who stirred up her mistress against her the deponent. And being specially interrogate, depones, that the night aforesaid, when she heard the noise in the bed above described, she slept none till towards the morning; then fell asleep, awakened again in a fright, and told the old lady Eastmilk that she was under terror, but did not explain the cause. Depones, that Anne Clark was not come to the family at the time the laird went to Dunsinnan, and she heard the noise as above in the bed. And being interrogate for the pannels, depones, that Anne Clark came to Eastmilk about a fortnight, to the best of the deponent's remembrance, after the deponent came there. And further depones, upon the pannel's interrogatory, that she did not hear the motion above-mentioned, but at the time above deponed to, and did not hear these motions repeated at any other period that night. Further depones, that while she staid in the house, she made all the beds without the assistance of any of the other servants. And, upon recollection, depones, that she slept in the kitchen by herself ever till Anne Clark came to the house; but after she came, Elizabeth Sturrock slept in the kitchen with her the deponent. Depones, that Anne Clark met the laird as he was going to

Dunsinnan, and came to Eastmilk two nights before he returned. Further depones, that when she found lieutenant Ogilvie's bed in the state above described in the morning, as if no person had laid in it, it was about sun-rising: that she saw the lieutenant come down stairs, and Mrs. Ogilvie the pannel was still in bed: that she made up Mrs. Ogilvie the pannel's bed that same day, but after dinner: that when Eastmilk went to Dunsinnan, to the best of her remembrance, he staid away three nights, and came home the fourth. And upon the oath being read over to her, desired that it might be marked, that what is said of her having made up Mrs. Ogilvie's bed in the morning, is a mistake, and improperly taken down, for that it was after dinner she made it up. Depones, that she never got any wages but a pair of shoes from Eastmilk: and that when she asked her wages, she was told by Mrs. Ogilvie the pannel, in presence of Anne Clark, lieutenant Ogilvie, and the deceased Eastmilk, that she was well off that she got leave to go without wages; and that the deceased Eastmilk followed her, and desired her to return, which she did, and staid for a day; but that Mrs. Ogilvie next morning turned her off. *Causa scientie patet.* And this is truth, as she shall answer to God. And depones she cannot write.

(Signed) RON. GRAY,
ALEX. BOSWELL,
JAMES FRASER.

Anne Clark, daughter to the deceased Allan Clark, officer of excise, being called,

Mr. Henry Dundas, for the pannels, made the following objections to her being received:

1st, That she is a person of an infamous character, being held and reputed to be a notorious liar and dissembler, a disturber of the peace of families and sower of dissension, and also a common whore and prostitute.*

2nd, That she has not only been held and reputed such as above described, but it will be clearly proved, that she lived and resided for no less than three years and a half in a noted bawdy-house within the city of Edinburgh, as a common prostitute, notwithstanding that at the same time the said house was frequently visited by the constables as a house of bad fame, and that frequent disturbances happened therein, to the great offence and scandal of the neighbourhood.

3rd, The said Anne Clark did, in confederacy with Alexander Ogilvie, brother to the deceased Thomas Ogilvie last of Eastmilk, publish and propagate false, scandalous, and mali-

* See 2 Hume's Comm. Trial for Crimes, pp. 154, 155, and Lowe's Case, A. D. 1687, vol. 12, p. 551, of this Collection. See also vol. 10, p. 613, vol. 11, pp. 622, 1364, Peake's Law of Evidence, part 1, c. 3, § 2. As to the objection to what are called ultraneous witnesses, see Mackenzie's Criminals, part 2. tit. 26, § 2, Hume's Commentaries, Trial for Crimes, vol. 2, cap. 13, p. 151, *et seq.*

cious aspersions upon the characters of the pannels, relative to the matters libelled, and did endeavour to make dissention and differences between the pannel Mrs. Ogilvie and her deceased husband. And,

4th, The said Anne Clark does, and has entertained and expressed, on sundry occasions before and since the decease of the said Thomas Ogilvie, deadly malice and inveterate ill-will against both the pannels, and has threatened repeatedly to do all she could to bereave them of their lives.

Sir David Dalrymple, on the part of his majesty's advocate, answered, That all and every one of the objections ought to be repelled; and that for the reasons following:

With respect to the first, it is obviously irrelevant. No such thing is ever allowed in the practice of the justiciary court, as a general proof of character; and indeed, were it allowed, criminal trials in Scotland would become inextricable; were the character of each witness to be thus inquired into, there would be as many separate trials as there are witnesses produced. Besides, were this new form to be introduced, witnesses would be deterred from appearing upon citation given. Instead of being called to give evidence, they would in effect be called to stand an inquiry upon the whole conduct of their lives. If they were to appear and undergo such a scrutiny, they would come much worse prepared for their defence than the parties themselves when tried for the greatest crimes. For the parties know what is charged against them, and by what evidence it is proposed to prove such charge; they are therefore enabled to prepare for their defence. But witnesses neither know what may be charged against them, nor by what evidence it is proposed to prove such charge; they are therefore incapable of preparing for their defence. Indeed, by the forms established in Scotland, the public prosecutor himself has no means of confuting such a charge brought against a witness. He may be possessed, as he is actually in the present case, of certificates from credible persons to prove the character of the witness to be unblemished; but he is not at liberty to produce them, because he must confine himself to the examination of the witnesses whose names are given out with the libel, and to the evidence therein mentioned.

With respect to the second objection, That the witness is a common prostitute, &c. it cannot be received in this case; for the crimes charged are occult crimes, said to have been committed *infra familiam*, and they can only be proved by witnesses who resided in the family, be their character what it will. The witness against whom the objection is moved, did reside in the family at the period when the crimes charged are said to have been committed. She was a near relation of the family of Eastmilk, was received and entertained as such, and had occasion to have daily intercourse with the pannels. If such necessary witnesses were

to be rejected, it follows, that the crimes charged could not be proved at all. Against the last witness, Katharine Campbell, it was objected, That she had been turned out of the family for some small thefts, had vowed revenge, and entertained malice against Mrs. Ogilvie the pannel. Against this witness it is objected, That she is of an abandoned character and a common prostitute. Like objections might be moved against every other person of the family called as witnesses; and thus it would follow, that in the house of Eastmilk, the greatest crimes might be committed with certain impunity, because there were in the family no witnesses of irreproachable characters, who might give evidence of such crimes.

With respect to the third objection, it is no less irrelevant. If the witness did spread such reports as are mentioned in the objection, from her proper knowledge or just suspicion of the truth of the matters libelled, she did nothing unlawful; and until the closing of the evidence, it cannot be known whether the reports, if spread by her, were true or false. It is therefore premature in the pannels to offer to prove the falsehood of reports while the inquiry subsists, whether the facts reported were true.

With respect to the fourth objection of deadly malice, it is a charge in itself most improbable, That a witness would deliberately resolve to perjure herself out of malice. The pannels ought to condescend, not only on the particular expressions used, but also on the cause of such deadly malice. Were a general proof of malice expressed in words to be permitted, then it would be in the power of every witness favouring the pannel, to incapacitate himself from bearing evidence to facts which might be hurtful to the pannel; and hence it is, that the practice of the Court requires, that not only the expressions importing malice be proved, but that the probable cause of such deadly malice be also proved.

"The Lord Justice-Clerk and Commissioners of Justiciary, having considered the foregoing objections and answers thereto, repel the objections; and allow the said Anne Clark to be examined, reserving the consideration of the alledgeance, as to the said Anne Clark's being the author of the report of the pannels' guilt, till their exculpation; and also reserving to the consideration of the Court, whether or not any special expressions of malice, that may be condescended on by the pannels in their exculpation, shall be admitted or not.

(Signed) "GILB. ELLIOT, I. P. D."

On pronouncing of which interlocutor, Mr. Alexander Lockhart advocate, procurator for the pannels, protested for remeid of law.

The said Anne Clark, daughter to the deceased Allan Clark, officer of excise, aged 30 and upwards, unmarried, purged of malice and partial counsel, sworn, and interrogate, depones, That she was cousin-german to the deceased Mr. Ogilvie of Eastmilk, and went to

Eastmilk upon the first day of March last : that her reasons for going there were, not only to see Eastmilk and Mrs. Ogilvie who were then recently married, and lieutenant Ogilvie who was then come from abroad, but also to endeavour to make up the peace betwixt that family and their brother Alexander, who had entered into a very mean marriage below the rank of his family : that after the deponent had been some little time at Eastmilk, she came to be informed, that Mrs. Ogilvie the pannel was censured for being too familiar with the other pannel, lieutenant Ogilvie : that the deponent informed Mrs. Ogilvie the pannel of what she had thus heard ; and desired Mrs. Ogilvie to be upon her guard as to her conduct, and to abstain from the lieutenant's company : that notwithstanding this, Mrs. Ogilvie was frequently in a room by herself with the lieutenant. Depones, That upon Sunday the 19th day of May last, all the family went to church, excepting the two pannels and the deponent ; and that they three staid together conversing in the lower part of the house ; but thereafter the two pannels left the deponent in the lower room, and went up stairs together to the east room above stairs, which was the lieutenant's room, and immediately over head of the room where the deponent was left : that she heard, by the motion of the feet, that both of them had entered the room above, and, as she judged, they went towards the bed ; and thereafter the noise of the feet ceased : that upon this the deponent, in order to discover what was passing, went up the stair ; and as the bed in the lieutenant's room was an alcove bed, the back of which came to the side of the stair, and there was nothing betwixt the bed and the stair, but a piece of plaster and the timber of the bed, so that a person standing in the stair could hear distinctly what passed in the bed ; she stood and listened, and from the motions that she heard, is positive that they were in bed together, and abusing their bodies together ; by which she means, they were lying carnally together. Depones, That immediately after this she came up to the room where the pannels were, and walked to the end of the room, without looking into the bed : that she then turned and saw the lieutenant, one of the pannels, standing close by the side of the bed buttoning his breeches ; and she observed his shirt at first out : that at this time she observed Mrs. Ogilvie was in the same bed ; and that she saw her clothes which she had then on, which were a red and white callico bed gown and skirt. Depones, That the same evening she told Mrs. Ogilvie the pannel what she had seen and heard : that Mrs. Ogilvie made no answer. Depones, That upon the Monday the pannels repeated the same thing, which the deponent is positive of, because she saw them go out of the low room, and heard them enter the lieutenant's room, move towards the bed : and then the deponent listened

the same motions re-
sunday and the Wed-
again retire together

to that room, and move towards the bed ; but she did not any of these two days go to the stair. Depones, That she told the deceased Mr. Ogilvie of Eastmilk's mother, the deponent's aunt, what she had heard and seen ; this she told her Sunday night, Monday and Tuesday. Depones, That she heard afterwards from the deceased Eastmilk, that his mother had said to him, that the pannel, Mrs. Ogilvie, was troublesome to the other pannel the lieutenant : that, on occasion of this information, there was ill blood and high words between the two brothers, and at length Eastmilk, deceased, ordered the lieutenant out of his house ; and that this happened upon the Thursday immediately subsequent to the Sunday aforesaid. And further depones, That upon the Sunday, Eastmilk, as she believes, was at Glenkilrie : that the other days he was at home ; but as he went to visit his workmen every morning, when the pannels went together to the lieutenant's room as aforesaid, it was at the times that Eastmilk was out with his workmen. Depones, That lieutenant Ogilvie left the house of Eastmilk about three o'clock after noon of the Thursday aforesaid : that, upon his leaving it, the other pannel, Mrs. Ogilvie, went up to the room which had been his, and threw herself down upon a bed in that room, different from the alcove bed above-mentioned ; and there fell a-tearing and crying ; and that, when her husband came to the room, she ordered him to go out of it : that Eastmilk, upon that occasion, told his wife, that her conduct was improper, and that she would ruin her reputation, by intermeddling in the differences betwixt him and his brother. And being further interrogate, depones, That before the Sunday above-mentioned, the deponent has frequently seen improper familiarities between the two pannels ; particularly she has seen them kissing one another, and him having his hand down her breast. Depones, That when the lieutenant went off, as above-mentioned, and Mrs. Ogilvie was in the above disposition, Eastmilk, as he had frequently upon former occasions, when he and his wife differed about the lieutenant, expressed his desire to go and leave his own house ; and the deponent, who at that time saw little prospect of harmony between them, proposed to Mrs. Ogilvie, that she should agree to this scheme, which she seemed very well pleased with ; but that next day both seemed to have changed their mind. And being further interrogate, depones, That about a fortnight or three weeks after the deponent went to Eastmilk, the two pannels and the deceased Mr. Ogilvie of Eastmilk having gone to pay a visit at Glenkilrie, they all of them returned, as the deponent thought, in very bad humour ; and, in particular, Mrs. Ogilvie the pannel was so, and expressed her dissatisfaction with her husband, and said, If she had a dose, she would give it him ; but the deponent at that time did not think Mrs. Ogilvie serious in what she said : that thereafter, but she cannot precisely specify the times, Mrs. Ogilvie did frequently

signify to the deponent, that she was resolved to poison her husband; and told the deponent, she intended to get poison either from Mr. Robertson, a merchant in Perth, or Mrs. Eagle who keeps a seed-shop in Edinburgh, upon pretence of poisoning rats: that the deponent, seeing Mrs. Ogilvie intent at that time upon that project, endeavoured to divert her from it by gaining time, and signified, that if she applied to these people for the poison, she would be brought to an untimely end; but that she the deponent would go to Edinburgh, and get a brother of the deponent's who lived there to buy the poison: that Mrs. Ogilvie approved of the deponent's proposal; but complained, that the deponent was long in putting it in execution, and therefore proposed to the deponent to speak of it to lieutenant Ogilvie the pannel, as he could get it more expeditiously; and this the deponent declined to do. Depones, that upon the day that the lieutenant was put from the house, she, Mrs. Ogilvie, told the deponent, that with much difficulty, she had prevailed upon lieutenant Ogilvie the pannel to undertake to furnish her with poison. Depones, that upon a Wednesday, which was the day immediately before Eastmilk's death, Mrs. Ogilvie the pannel told the deponent, that she had received a letter the day before from the lieutenant, which was brought to her hand by Elizabeth Sturrock; and in this letter he had acquainted her, that he had got the poison the length of Alyth, but did not chuse to trust Elizabeth Sturrock with it; and that he would send it by Andrew Stewart his brother-in-law, whom he was to send with it next day; so that she expected it there that night. Depones, that, upon this occasion, she told Mrs. Ogilvie, she never believed it would come to that pitch, and exhorted her most earnestly against the proposal, saying, it would not only bring her to misery, both in this world and the next, but would be bringing a disgrace upon the family she was come of, and upon that into which she was married: that upon this occasion, Mrs. Ogilvie said to the deponent, to let her alone, for the conversation was disagreeable to her, as the deponent knew, and she was determined to put her resolution in execution, whatever might be the event. Depones, that the reasons given by Mrs. Ogilvie for coming to this strange resolution, and for rejecting all the proposals the deponent made for her living in friendship with her husband, were, that she did not love her husband, and never could love him; and that he had used lieutenant Ogilvie ill upon her account; and said, How happy could they live at Eastmilk, if there were none there but the lieutenant, she, and the deponent! That, upon one occasion the deponent, in remonstrating against these wicked proposals, told Mrs. Ogilvie, that, although her husband were dead, she and the lieutenant could not enjoy one another. Mrs. Ogilvie answered, That they could go and live in some of the countries where he had been. And being further interrogate, depones, that when she was

remonstrating to Mrs. Ogilvie against poisoning her husband, she specially mentioned to her, that as she had been guilty of adultery and incest, it was a dreadful thing to crown all with murder. Depones, that upon the Wednesday's night aforesaid, immediately preceding Eastmilk's death, Mrs. Ogilvie the pannel, and the deponent went out together, Mrs. Ogilvie having expressed her impatience for Andrew Stewart's arrival: that they did not meet with Andrew Stewart; but when they returned to the house, found him sitting with the old lady Eastmilk, he having come in another way: that Mrs. Ogilvie the pannel immediately carried Andrew Stewart up stairs with her, who staid with her about half an hour, and then came down stairs by himself: that the deponent asked him, if he had brought any thing with him? He answered, Nothing, at first; but, upon her pressing, and saying, She was sure he had brought something with him, he then said he had brought some drugs for Mrs. Ogilvie, which, at that time, he described as being in two phial glasses: that the deponent, on this occasion said, they were black drugs: that Mrs. Ogilvie the pannel having come down stairs very soon after, the deponent did not get an opportunity at that time to explain to Andrew Stewart what she meant by calling them black drugs: but Mrs. Ogilvie and Andrew Stewart having gone out towards the Kirkton, and left the deponent and her aunt lady Eastmilk by themselves, the deponent told her aunt, that she believed what Andrew Stewart had brought was poison; for that Mrs. Ogilvie the pannel had told her, the deponent, that Andrew Stewart was to bring the poison. Depones, that the old lady Eastmilk was present when the deponent said to Andrew Stewart, they were black drugs, as above-mentioned: that the deponent, after acquainting the old lady as above, asked her, if she should inform the deceased Mr. Ogilvie of Eastmilk of the particulars? That the old lady said it would be improper; for that Mrs. Ogilvie would persuade her husband; that it was but laudanum for her own use, and would resent it against the deponent: and that the only method that occurred to her proper was, that both she and the deponent should caution Eastmilk against taking any thing from his wife in private. Depones, that after this she went to the Kirkton with a view of being advised by the minister, what was fit to be done in such a case; but had the misfortune to miss him, he not being at home, the door locked, but the key in it: that Eastmilk, and his wife the pannel, and Andrew Stewart, were all in the Kirkton at that time, in the house of Fergus Ferguson, a tenant of Eastmilk's, who keeps a public house: that they having come away from the Kirkton, Mrs. Ogilvie and Andrew Stewart walked on like a pistol-shot before Eastmilk; and the deponent joined Eastmilk, and signified to him, that it would be very proper and necessary for him to leave his own house, for that she believed his life

esq. his majesty's advocate, for his majesty's interest, against Katharine Nairn, widow of the deceased Thomas Ogilvie of Eastmils, in the county of Forfar, and Patrick Ogilvie, lieutenant of the 89th regiment of foot, brother-german of the said deceased Thomas Ogilvie, pannels, with the foregoing debate, repel the hail objections made to the form of the indictment; and find the said indictment relevant to infer the pains of law: but allow the pannels and each of them to prove all facts and circumstances that may tend to their exculpation, or alleviation of their guilt; and remit the pannels, with the indictment as found relevant, to the knowledge of an assize."

(Signed) GILB. ELLIOT, I. P. D.*

"The Lord Justice-Clerk and Commissioners of Justiciary continue the diet against the said Katharine Nairn and lieutenant Patrick Ogilvie, pannels, till Monday next, the 12th instant, at seven o'clock in the morning; and ordain parties, assizers, witnesses, and all concerned, then to attend, each under the pains of law; and the pannels in the mean time to be carried back to prison."

CURIA JUSTICIARIE, S. D. N. Regis, tenta in Nova Sessionis Domo de Edinburgh, sexto die Augusti, millesimo septingentesimo sexagesimo quinto, per honorabiles viros, Dominum Gilbertum Elliot de Minto, Baronetum, Dominum Justiciarium Clericum, Alexandrum Boswell de Auchinleck, Andream Pringle de Alemoor, Henricum Home de Kames, Jacobum Ferguson de Pitfour, et Georgium Brown de Coalston, Commissionarios Justiciarie, S. D. N. Regis.

Curia legitime affirmata.

The which day, there was a petition presented to the said lords in the names of Katharine Nairn, relict of the deceased Thomas Ogil-

frequently omitted than given; nor does the practice of inserting the depositions at large seem to have been established till 1661, or thereby. From that time, though attended with much trouble and loss of time, it continued to be uniformly observed till the 21st of Geo. 2; when, by special statute, c. 19, of that year, a dispensation was given in this respect, as far as related to the trial of Crimes, not inferring death or dememoration, under provision that one of the judges should sum up the evidence to the jury, before inclosing. The like allowance, and qualified with the like provision, is, by statute 23, Geo. 3, c. 45, extended to the trial of all crimes; under reservation, as in the former statute, of power to the Court still to proceed in the old form, in any case where they shall judge it advisable.

* Concerning the Interlocutor of Relevancy, see something in the Case of James Stewart, A. D. 1752, p. 1, of the present volume.

vie of Eastmils, and lieutenant Patrick Ogilvie, brother to the said Thomas Ogilvie; humbly shewing,

That the petitioners stood indicted before their lordships, at the instance of his majesty's advocate, for the alleged crimes of incest, and accession to the supposed murder of the said Thomas Ogilvie.

That the petitioners had pleaded Not Guilty to this grievous accusation; and were confident, that in the course of the trial their innocence would be fully vindicated to the satisfaction of the Court and Jury.

That as the petitioners did assert, and had good reason to believe, that that prosecution took its rise from malice, and most false and injurious calumnies raised and propagated by persons, who, from most unjust views, have been desirous of ruining the petitioners; it was therefore highly necessary and just, that the petitioners, who were then to undergo that solemn trial for their lives, should be secured as far as possible against every kind of influence and undue practice, that might, or could be used, upon witnesses to be adduced in that cause.

That, among other misfortunes under which the petitioners laboured, they had been accused, by report, of endeavours to secrete material witnesses in that matter; and though conscious of their innocence in that, as well as in other respects, yet several of the witnesses have, on that or some other account, been secured as prisoners in the castle of Edinburgh.

That, among these witnesses, was Anne Clark, designed daughter of the deceased Allan Clark, officer of excise, who is now confined in the same room with two or more maid-servants, who were in the house of Eastmils at the time of Thomas Ogilvie's death, and who would be most material witnesses for the petitioners in that cause.

That the petitioners would make it appear, by uncontested evidence, that the said Anne Clark was not only a person of the worst character and disposition, such as rendered her improper and inhabile to be received as a witness; but also, that she had entertained and expressed deadly malice and hatred against both the petitioners; and that, in pursuance thereof, she had been the author and propagator of the false and malicious stories which had given rise to the present prosecution. And, in fine, that she was in a combination to ruin the pannels, and, as far as she could, to deprive them of their lives, as well as their reputation.

That it would occur to their lordships, that the petitioners were exposed to imminent danger by the said Anne Clark's being constantly confined in the same room with other material witnesses, whose sex, station, and inexperience, though otherwise honest and well-inclined, might expose them to be influenced and prejudiced by the malicious endeavours of that artful woman. For these reasons, the petitioners were confident, that their lordships would forthwith give orders for separating the

said Anne Clark from the said other witnesses. Therefore praying, That it might please their lordships forthwith to grant warrant to the deputy-governor of the castle of Edinburgh, or any other proper officer, to remove the person of the said Ann Clark from the room in which she was presently confined; or otherwise to separate her from the said maid-servants, and to keep her separate from them, or any other witnesses to be adduced against the petitioners in that present prosecution. According to justice, &c.

(Signed) HENRY DUNDAS. DAV. RAE.

Edinburgh, 6th August, 1765.

I Thomas Miller, esq. his majesty's advocate, consent, That the prayer of the within petition be granted; but upon this express condition that no person whatever be admitted or have access to any of the said three witnesses, except in presence of one or other of the officers of the Court of Justiciary, which their lordships shall think proper to appoint.

(Signed) THO. MILLER.

"The Lord Justice Clerk and Commissioners of Justiciary having seen and considered the foregoing petition, with the consent of his majesty's advocate subjoined thereto, recommend to the depute-governor of the castle of Edinburgh, or other proper officers, to cause remove the said Anne Clark from the room where she and the other two women before-named are presently staying, into some other room in the said castle, until Monday next the 12th day of August current; and also recommend as above, that care be taken that no person get access to any of the said three women, betwixt and that time, except in presence of Robert Auld, writer, or Andrew Murison, macer of this court, or either of them.

(Signed) "GILB. ELLIOT, I. P. D."

CURIA JUSTICIARIE, S. D. N. Regis, tenta in Nova Sessionis Domo de Edinburgh, duodecimo die Augusti, millesimo septingentesimo sexagesimo quinto, per honorabiles viros Dominum Gilbertum Elliot de Minto, Baronetum, Dominum Justiciarium Clericum, Alexandrum Boswell de Auchinleck, Andream Pringle de Ale-moor, Henricum Home de Kames, Jacobum Ferguson de Pitfour, et Georgium Brown de Coalston, Commissionarios Justiciarie S. D. N. Regis.

Curia legitime affirmata.

Intran'

Katharine Nairn, widow of the deceased Thomas Ogilvie of Eastmilk, and

Patrick Ogilvie, lieutenant of the 89th regiment of foot, brother-german of the said deceased Thomas Ogilvie; both present prisoners in the Tolbooth of Edinburgh; pannels.

Indicted and accused as in the former *Sede-runt*.

The interlocutor on the relevancy being read over to the pannels in open court,

The lords proceeded to make choice of the following persons to pass upon the assize of the said pannels:

ASSIZE.

Sir James Clark of Pennycuik.
John Howieson of Braehead.
John Christie of Baberton.
Adam Cunningham of Bonnytown.
Alexander Sheriff of Craigleith.
David Dundas younger, of Newhalls.
Sir George Suttie of Balgonie.
Charles Hay of Hopes.
William Ramsay of Preston.
John Forrest, senior, merchant in Edinburgh.
George Chalmers, merchant in Edinburgh.
Gavin Hamilton, bookseller in Edinburgh.
Archibald Wallace, merchant in Edinburgh.
John Borthwick of Cruikston.
Thomas Brown of Braid.

The above Assize being all lawfully sworn, and no objection to the contrary,

His Majesty's Advocate proceeded to call the following Witnesses:

David Rattray younger, in Cammock, in the parish of Glenylla, aged 42, married, purged of malice and partial counsel, sworn, and interrogate, depones, That he lives in the neighbourhood of Eastmilk, and did hear it talked in the country, that Mrs. Ogilvie the pannel, and lieutenant Ogilvie the other pannel, lived in too familiar a-way, and walked out together without others in their company: that the deponent himself once saw them at their walk, when there was nobody with them, when they were leading other arm and arm, and at that time he saw the pannel, lieutenant Ogilvie, kiss Mrs. Ogilvie, the other pannel, once: that this happened after the late Thomas Ogilvie of Eastmilk's marriage with the pannel, and before his death; cannot remember the precise time, but there was a storm on the ground then: that at the above-mentioned time the pannels were walking near the house of Eastmilk, crossing the king's highway, when the witness saw as above, when he was no farther from them than the fourth part of a quarter of a mile; and that the pannels were in a hollow way when he saw lieutenant Ogilvie give the other pannel one kiss as above. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed) GILB. ELLIOT. DAVID RATTRAY.

John Lamar, in Craigendeach, in the parish of Glenylla, aged 47, married, purged of malice and partial counsel, sworn and interrogate, depones, That he lives very near Eastmilk, and has heard the clashing people of the country commonly report, that the pannel Mr. Ogilvie liked Mrs. Ogilvie the other pannel too well; and that a dispute in the family of Eastmilk about that time arose, which took its rise,

as was said, from a suspicion, that the two pannels liked other too well: that upon this Mr. Ogilvie the pannel left the house of Eastmilk, as was reported, upon the above suspicion; and it was even said in the country, that the two pannels loved one another too well: that the deponent himself knows, that Mr. Ogilvie the pannel went away from the house of Eastmilk about a fortnight, as he thinks, before Eastmilk's death, and the deponent saw him return to the house of Eastmilk the morning after Eastmilk's death: that before Mr. Ogilvie the pannel left Eastmilk's house, the deponent has often seen the two pannels walking arm in arm, and their arms about each other's neck: that he has seen them in that posture at their walk, even when Miss Clark and the laird of Eastmilk himself were in company, as well as when there was nobody else with them. Depones, that the report of the love between the two pannels he did not hear in the country till after lieutenant Ogilvie had left the house of Eastmilk as above; and that he never saw the pannel Mrs. Ogilvie till after her marriage: that since the marriage he has seen Dr. Alexander Ogilvie, a brother of Eastmilk's, at the house of Eastmilk; and that Anne Clark, a witness cited in this trial, was there before him, and at the same time: that the deponent's house lies at about a quarter of a mile's distance from Eastmilk's house, on the other side of the river, from whence it is easy to see any person who comes out or goes into the house of Eastmilk. *Causa scientie patet.* And this is truth, as he shall answer to God. And depones he cannot write.

(Signed)

GILB. ELLIOT.

James Barnet, son to Alexander Barnet in Cammock, in the parish of Glenylla, aged 15 years, unmarried, purged of malice and partial counsel, sworn and interrogate. Dismissed.

John Gilloch, wright in Dalnakebock, aged 26 years, married, purged of malice and partial counsel, sworn, and interrogate, depones, That, about a fortnight after Eastmilk's marriage, the deponent was sent for to the house of Eastmilk to put on some locks and brass-work upon a drawer: that accordingly the deponent went to the room where the drawers stood, in which room he saw the pannel Mr. Ogilvie lying in bed: that when he was so employed, Mrs. Ogilvie the pannel came to the room door where the deponent was at work, she having heard him as he supposed, at work. Upon Mr. Ogilvie the pannel observing her, he desired her to come in: that after having said to the deponent, John, are you begun? she went in and asked Mr. Ogilvie the pannel, What! are not you up yet? and then she went towards the bed-side, where stood a little chest, upon which she sat down, and then they eat some sweet-bread together, which had been got at a market. Depones, that he observed her hand about the bed-clothes, just upon lieutenant Ogilvie's breast; at which time she said to him, You are not poor, but pretty fat; but

did not observe whether her hand was below the bed-clothes, or above. Depones, that when Mrs. Ogilvie the pannel was going out of the room, lieutenant Ogilvie kicked up the bed-clothes with his feet, and threw them up upon his body; upon which Mrs. Ogilvie said, Ah! you daft^s dog! and the deponent at that time saw so much of the said lieutenant Ogilvie's body, that he the deponent could judge whether he was a man or a woman: that after breakfast, Mrs. Ogilvie came to where the deponent was at work, and gave him a dram; and lieutenant Ogilvie being present, she gave him also a dram, for he was by that time dressed. Depones, that the week before Eastmilk's death, the deponent went to Eastmilk to do some work: that when he was sawing, Elizabeth Sturrock, then a servant in that family, came to the deponent, and asked him, If he knew which way the laird had gone? He said, He could not tell. Upon asking her why she put such a question, she answered, That as lieutenant Ogilvie was expected at Eastmilk that day, she could wish the laird and he might not meet. And depones, that he the deponent saw Eastmilk walk away from the house some time before. Depones, that on the evening of the day last mentioned, as the deponent was returning from his work, he saw Mrs. Ogilvie the pannel returning to Eastmilk, upon the road that leads from the Kirkton to that place, and observed Mrs. Ogilvie and Anne Clark meet upon that road; and that same night he saw Mr. Ogilvie the pannel standing at the Kirkton, which is not a quarter of a mile from Eastmilk: that, at the time above-mentioned, when lieutenant Ogilvie kicked up the clothes, and the lady said to him, Ah! you daft dog! the deponent does not think she saw the condition the lieutenant's body was in, as she was then going out of the room. Depones, that while Mrs. Ogilvie was sitting upon the chest by lieutenant Ogilvie's bed, as above deponed to, the deponent could see Mr. Ogilvie's breast from the posture he was then in. Being interrogate for the pannel, depones, that when he saw Mrs. Ogilvie the pannel upon the road from the Kirkton returning to Eastmilk, as above deponed on, and Anne Clark upon the same road, that they were both walking towards Eastmilk, and Anne Clark foremost. *Causa scientie patet.* And this is truth, as he shall answer to God. (Signed)

GILB. ELLIOT. JOHN GILLOCH.

Katharine Campbell, late servant to the deceased Thomas Ogilvie of Eastmilk, being called; against adducing of whom it was objected, that she ought not to be received as a witness, no execution being returned against her 24 hours before the diet of comparance, conform to the forms of court established. 2do,

* "Daft. Delirious, insane, stupid, blockish, foolish, giddy, thoughtless, playful, sportive, frolicsome, wanton." Jamieson's Etymological Dictionary.

That she bears ill-will and malice against the pannel Mrs. Ogilvie, having been dismissed her service for theft; on which occasion she expressed resentment in strong terms, and swore revenge, which is offered to be proved *instantur*.

Sir David Dalrymple answered, on the part of his majesty's advocate, That the 1st objection ought to be repelled. The fact is, that this witness was given out in list with others; but as she had gone into a distant part of Scotland, could not be cited by the messenger so soon as the other witnesses were. She was cited on the Saturday before the first diet of compareance; but the execution did not come up to Edinburgh till after that diet. Upon its being received, it was on Wednesday last in the forenoon given out to the agents for the pannels. The act 1672 ordains, that the list of witnesses be given out with the indictment, and this was done here; but no law requires that the executions should be returned into court 24 hours before the first diet of compareance: in the present case, it was impossible that the execution could be sooner produced, and the pannels can suffer nothing by this; for they saw the name of the witness in list, and they have had more time for this purpose than they would have had, if the execution had been given out 24 hours before the first diet of court, and then the relevancy had been determined and the proof taken at the same diet.

As to the second objection, it ought also to be repelled. No particular condescendence has been made of malice or cause of malice at this time, and the witness will be purged of malice in the initials of her oath in common form; and therefore the objections ought to be repelled, agreeable to the universal practice of the court.

"The Lord Justice-Clerk and Commissioners of Justiciary, having considered the foregoing objections and answers thereto, repel the objections, and allow the witness to be received; reserving to the consideration of the Court, whether or not any special expressions of malice and the cause thereof, that may be condescended on by the pannels in their exculpation, shall be admitted or not.

"(Signed) GILB. ELLIOT, I. P. D."

On pronouncing of which interlocutor, Mr. Alexander Lockhart, advocate, procurator for the pannels, protested for remeid of law; and that any interrogatories he shall put afterwards to this or other witnesses, during the trial, shall not be deemed a passing from this protestation.

It being represented to the Court, That Katharine Campbell, the witness before-named, could speak the English language but very ill; and that an interpreter or interpreters would be necessary to interpret what she said in the Irish or Erse language into the English; and Robert Gray, writer in Edinburgh, and James Frazer, writer to the signet, having appeared,

VOL. XLX.

they were appointed to be interpreters, and gave their oaths as such *de fide*.

And the said Katharine Campbell, aged 27 years, unmarried, solemnly sworn, purged of malice and partial counsel, aud examined, depones, That twenty days after the deceased Mr. Ogilvie of Eastmils's marriage with Katharine Nairn one of the pannels, she was sent by the lady Glenkilrie, her sister, to serve as washer-woman at Eastmils: that the deponent staid in that service for ten weeks: that about fourteen days, to the best of her remembrance, after she went there, the said deceased Mr. Ogilvie went from home, and, as she heard, to Dunsinnan: that before Mr. Ogilvie went to Dunsinnan, she observed lieutenant Ogilvie the pannel frequently kissing Mrs. Ogilvie the pannel, and shewing a great fondness for her: that the deponent having said to lieutenant Ogilvie the pannel, that she thought he shewed too great fondness for his sister-in-law, and that it would not be worse if he shewed less, the lieutenant answered, that his brother desired him to be fond of her, to keep her cheerful in the beginning. Depones, that she saw the lieutenant frequently holding the pannel Mrs. Ogilvie in his arms when he was kissing her. Depones, that when the deceased Mr. Ogilvie went to Dunsinnan, the two pannels continued at Eastmils: that the deponent made up beds for them in two separate rooms: that the room she made up for Mrs. Ogilvie was immediately above the kitchen, where the deponent slept: that before the deponent went to bed, her mistress called down to her, if she was not yet to bed; and that she thought, she saw the deponent have a light; the deponent answered, she was not yet gone to bed, but was going soon: that after the deponent had gone to bed, she heard the pannel Mrs. Ogilvie utter these words, O fy! fy! and that she heard the bed moving as if somebody had been stirring in it: that the deponent upon this became under great terror, but thereafter fell asleep. That next morning when she went up stairs, she found the lieutenant's bed in the same state that she had made it up the night before, and the bed no way discomposed as if one had lain into it. Depones, that some time before she went to bed, she went up to Mrs. Ogilvie's room, where she saw the lieutenant sitting with her: that the deponent proposed to mend the fire in the lady's room, and to make a shake-down there, for the deponent's lying there all night by her: that Mrs. Ogilvie desired the deponent to go to her own bed, for that she had no difficulty to sleep in a house by herself. Depones, that the cause of her being under the terror as above, was, that she thought the two pannels were then in bed together. Depones, that she made up Mrs. Ogilvie's bed next morning, which was much tossed and tumbled; but as Mrs. Ogilvie might have done this herself, the deponent did not, from the appearance of that bed, form her conjecture. Depones, that the kitchen where the

deponent slept had no plastered ceiling, so that the smallest noise in the room above could be heard there. Depones, that there were two other servant-maids at Eastmilk at that time, to wit, Anne Sampson and Elizabeth Sturrock. Depones, that she never heard, while she continued in Eastmilk, any circumstances happening between the two pannels, such as have been above described, except one night as before mentioned; and remembers particularly, that the other nights that Eastmilk was at Dunsinnan, the lieutenant's bed in the morning had the appearance as if it had been slept in; and so had Mrs. Ogilvie's. Depones, that she never spoke of what she heard the night above-mentioned, to the best of her remembrance, till after she had left the house of Eastmilk, when she communicated the same to lady Glenkilrie, the pannel Mrs. Ogilvie's sister. Depones, that the deponent constantly slept in the kitchen alone, while Eastmilk was at Dunsinnan, and all the time she was in the service. Depones, that, while the deponent was in the service at Eastmilk, there was a sister of the laird's married in his house; after which the whole family went to Dunsinnan, and when they returned, all of them, except Eastmilk and his mother, expressed dissatisfaction with the deponent, but upon what occasion they never explained to her. And being further interrogate, depones, that the motion she heard in the room above her, deponed to above, she then thought was the motion of a man and woman in bed together, and such as a husband and wife have together; and that she would have been of this opinion, though she had not seen the lieutenant's bed unruffled next morning. And being interrogate by one of the jury, depones, that she always considered that it was Anne Clark who stirred up her mistress against her the deponent. And being specially interrogate, depones, that the night aforesaid, when she heard the noise in the bed above described, she slept none till towards the morning; then fell asleep, awakened again in a fright, and told the old lady Eastmilk that she was under terror, but did not explain the cause. Depones, that Anne Clark was not come to the family at the time the laird went to Dunsinnan, and she heard the noise as above in the bed. And being interrogate for the pannels, depones, that Anne Clark came to Eastmilk about a fortnight, to the best of the deponent's remembrance, after the deponent came there. And further depones, upon the pannel's interrogatory, that she did not hear the motion above-mentioned, but at the time above deponed to, and did not hear these motions repeated at any other period that night. Further depones, that while she staid in the house, she made all the beds without the assistance of any of the other servants. And, upon recollection, depones, that she slept in the kitchen by herself ever till Anne Clark came to the house; but after she came, Elizabeth Sturrock slept in the kitchen with her the deponent. Depones, that Anne Clark met the laird as he was going to

Dunsinnan, and came to Eastmilk two nights before he returned. Further depones, that when she found lieutenant Ogilvie's bed in the state above described in the morning, as if no person had laid in it, it was about sun-rising: that she saw the lieutenant come down stairs, and Mrs. Ogilvie the pannel was still in bed: that she made up Mrs. Ogilvie the pannel's bed that same day, but after dinner: that when Eastmilk went to Dunsinnan, to the best of her remembrance, he staid away three nights, and came home the fourth. And upon the oath being read over to her, desired that it might be marked, that what is said of her having made up Mrs. Ogilvie's bed in the morning, is a mistake, and improperly taken down, for that it was after dinner she made it up. Depones, that she never got any wages but a pair of shoes from Eastmilk: and that when she asked her wages, she was told by Mrs. Ogilvie the pannel, in presence of Anne Clark, lieutenant Ogilvie, and the deceased Eastmilk, that she was well off that she got leave to go without wages; and that the deceased Eastmilk followed her, and desired her to return, which she did, and staid for a day; but that Mrs. Ogilvie next morning turned her off. *Causa scientie patet.* And this is truth, as she shall answer to God. And depones she cannot write.

(Signed)

ROB. GRAY,
ALEX. BOSWELL,
JAMES FRASER.

Anne Clark, daughter to the deceased Allan Clark, officer of excise, being called,

Mr. Henry Dundas, for the pannels, made the following objections to her being received:

1st, That she is a person of an infamous character, being held and reputed to be a notorious liar and dissembler, a disturber of the peace of families and sower of dissension, and also a common whore and prostitute.*

2nd, That she has not only been held and reputed such as above described, but it will be clearly proved, that she lived and resided for no less than three years and a half in a noted bawdy-house within the city of Edinburgh, as a common prostitute, notwithstanding that at the same time the said house was frequently visited by the constables as a house of bad fame, and that frequent disturbances happened therein, to the great offence and scandal of the neighbourhood.

3rd, The said Anne Clark did, in confederacy with Alexander Ogilvie, brother to the deceased Thomas Ogilvie last of Eastmilk, publish and propagate false, scandalous, and mali-

* See 2 Hume's Comm. Trial for Crimes, pp. 151, 155, and Lowe's Case, A. D. 1687, vol. 12, p. 551, of this Collection. See also vol. 10, p. 613, vol. 14, pp. 622, 1361, Peake's Law of Evidence, part 1, c. 3, § 2. As to the objection to what are called utroneous witnesses, see Mackenzie's Criminals, part 2, tit. 36, § 2, Hume's Commentaries, Trial for Crimes, vol. 2, cap. 13, p. 151, *et seq.*

cious aspersions upon the characters of the pannels, relative to the matters libelled, and did endeavour to make dissension and differences between the pannel Mrs. Ogilvie and her deceased husband. And,

4th, The said Anne Clark does, and has entertained and expressed, on sundry occasions before and since the decease of the said Thomas Ogilvie, deadly malice and inveterate ill-will against both the pannels, and has threatened repeatedly to do all she could to bereave them of their lives.

Sir David Dalrymple, on the part of his majesty's advocate, answered, That all and every one of the objections ought to be repelled; and that for the reasons following:

With respect to the first, it is obviously irrelevant. No such thing is ever allowed in the practice of the justiciary court, as a general proof of character; and indeed, were it allowed, criminal trials in Scotland would become inextricable; were the character of each witness to be thus inquired into, there would be as many separate trials as there are witnesses produced. Besides, were this new form to be introduced, witnesses would be deterred from appearing upon citation given. Instead of being called to give evidence, they would in effect be called to stand an inquiry upon the whole conduct of their lives. If they were to appear and undergo such a scrutiny, they would come much worse prepared for their defence than the parties themselves when tried for the greatest crimes. For the parties know what is charged against them, and by what evidence it is proposed to prove such charge; they are therefore enabled to prepare for their defence. But witnesses neither know what may be charged against them, nor by what evidence it is proposed to prove such charge; they are therefore incapable of preparing for their defence. Indeed, by the forms established in Scotland, the public prosecutor himself has no means of confuting such a charge brought against a witness. He may be possessed, as he is actually in the present case, of certificates from credible persons to prove the character of the witness to be unblemished; but he is not at liberty to produce them, because he must confine himself to the examination of the witnesses whose names are given out with the libel, and to the evidence therein mentioned.

With respect to the second objection, That the witness is a common prostitute, &c. it cannot be received in this case; for the crimes charged are occult crimes, said to have been committed *infra familiam*, and they can only be proved by witnesses who resided in the family, be their character what it will. The witness against whom the objection is moved, did reside in the family at the period when the crimes charged are said to have been committed. She was a near relation of the family of Eastmilk, was received and entertained as such, and had occasion to have daily intercourse with the pannels. If such necessary witnesses were

to be rejected, it follows, that the crimes charged could not be proved at all. Against the last witness, Katharine Campbell, it was objected, That she had been turned out of the family for some small thefts, had vowed revenge, and entertained malice against Mrs. Ogilvie the pannel. Against this witness it is objected, That she is of an abandoned character and a common prostitute. Like objections might be moved against every other person of the family called as witnesses; and thus it would follow, that in the house of Eastmilk, the greatest crimes might be committed with certain impunity, because there were in the family no witnesses of irreproachable characters, who might give evidence of such crimes.

With respect to the third objection, it is no less irrelevant. If the witness did spread such reports as are mentioned in the objection, from her proper knowledge or just suspicion of the truth of the matters libelled, she did nothing unlawful; and until the closing of the evidence, it cannot be known whether the reports, if spread by her, were true or false. It is therefore premature in the pannels to offer to prove the falsehood of reports while the inquiry subsists, whether the facts reported were true.

With respect to the fourth objection of deadly malice, it is a charge in itself most improbable, That a witness would deliberately resolve to perjure herself out of malice. The pannels ought to condescend, not only on the particular expressions used, but also on the cause of such deadly malice. Were a general proof of malice expressed in words to be permitted, then it would be in the power of every witness favouring the pannel, to incapacitate himself from bearing evidence to facts which might be hurtful to the pannel; and hence it is, that the practice of the Court requires, that not only the expressions importing malice be proved, but that the probable cause of such deadly malice be also proved.

"The Lord Justice-Clerk and Commissioners of Justiciary, having considered the foregoing objections and answers thereto, repel the objections; and allow the said Anne Clark to be examined, reserving the consideration of the alledgeance, as to the said Anne Clark's being the author of the report of the pannels' guilt, till their exculpation; and also reserving to the consideration of the Court, whether or not any special expressions of malice, that may be condescended on by the pannels in their exculpation, shall be admitted or not.

(Signed) "Giles. ELLIOT, I. P. D."

On pronouncing of which interlocutor, Mr. Alexander Lockhart advocate, procurator for the pannels, protested for remeid of law.

The said Anne Clark, daughter to the deceased Allan Clark, officer of excise, aged 30 and upwards, unmarried, purged of malice and partial counsel, sworn, and interrogate, depones, That she was cousin-german to the deceased Mr. Ogilvie of Eastmilk, and went to

Eastmilk upon the first day of March last: that her reasons for going there were, not only to see Eastmilk and Mrs. Ogilvie who were then recently married, and lieutenant Ogilvie who was then come from abroad, but also to endeavour to make up the peace betwixt that family and their brother Alexander, who had entered into a very mean marriage below the rank of his family: that after the deponent had been some little time at Eastmilk, she came to be informed, that Mrs. Ogilvie the pannel was censured for being too familiar with the other pannel, lieutenant Ogilvie: that the deponent informed Mrs. Ogilvie the pannel of what she had thus heard; and desired Mrs. Ogilvie to be upon her guard as to her conduct, and to abstain from the lieutenant's company: that notwithstanding this, Mrs. Ogilvie was frequently in a room by herself with the lieutenant. Depones, That upon Sunday the 19th day of May last, all the family went to church, excepting the two pannels and the deponent; and that they three staid together conversing in the lower part of the house; but thereafter the two pannels left the deponent in the lower room, and went up stairs together to the east room above stairs, which was the lieutenant's room, and immediately over head of the room where the deponent was left: that she heard, by the motion of the feet, that both of them had entered the room above, and, as she judged, they went towards the bed; and thereafter the noise of the feet ceased: that upon this the deponent, in order to discover what was passing, went up the stair; and as the bed in the lieutenant's room was an alcove bed, the back of which came to the side of the stair, and there was nothing betwixt the bed and the stair, but a piece of plaster and the timber of the bed, so that a person standing in the stair could hear distinctly what passed in the bed; she stood and listened, and from the motions that she heard, is positive that they were in bed together, and abusing their bodies together; by which she means, they were lying carnally together. Depones, That immediately after this she came up to the room where the pannels were, and walked to the end of the room, without looking into the bed: that she then turned and saw the lieutenant, one of the pannels, standing close by the side of the bed buttoning his breeches; and she observed his shirt at first out: that at this time she observed Mrs. Ogilvie was in the same bed; and that she saw her clothes which she had then on, which were a red and white callico bed gown and skirt. Depones, That the same evening she told Mrs. Ogilvie the pannel what she had seen and heard: that Mrs. Ogilvie made no answer. Depones, That upon the Monday the pannels repeated the same thing, which the deponent is positive of, because she saw them go out of the low room, and heard them enter the lieutenant's room, move towards the bed; and then the deponent listened at the stair, and heard the same motions repeated: that, upon the Tuesday and the Wednesday, she heard them again retire together

to that room, and move towards the bed; but she did not any of these two days go to the stair. Depones, That she told the deceased Mr. Ogilvie of Eastmilk's mother, the deponent's aunt, what she had heard and seen; this she told her Sunday night, Monday and Tuesday. Depones, That she heard afterwards from the deceased Eastmilk, that his mother had said to him, that the pannel, Mrs. Ogilvie, was troublesome to the other pannel the lieutenant: that, on occasion of this information, there was ill blood and high words between the two brothers, and at length Eastmilk, deceased, ordered the lieutenant out of his house; and that this happened upon the Thursday immediately subsequent to the Sunday aforesaid. And further depones, That upon the Sunday, Eastmilk, as she believes, was at Glenkilrie: that the other days he was at home; but as he went to visit his workmen every morning, when the pannels went together to the lieutenant's room as aforesaid, it was at the times that Eastmilk was out with his workmen. Depones, That lieutenant Ogilvie left the house of Eastmilk about three o'clock after noon of the Thursday aforesaid: that, upon his leaving it, the other pannel, Mrs. Ogilvie, went up to the room which had been his, and threw herself down upon a bed in that room, different from the alcove bed above-mentioned; and there fell a-tearing and crying; and that, when her husband came to the room, she ordered him to go out of it: that Eastmilk, upon that occasion, told his wife, that her conduct was improper, and that she would ruin her reputation, by intermeddling in the differences betwixt him and his brother. And being further interrogate, depones, That before the Sunday above-mentioned, the deponent has frequently seen improper familiarities between the two pannels; particularly she has seen them kissing one another, and him having his hand down her breast. Depones, That when the lieutenant went off, as above-mentioned, and Mrs. Ogilvie was in the above disposition, Eastmilk, as he had frequently upon former occasions, when he and his wife differed about the lieutenant, expressed his desire to go and leave his own house; and the deponent, who at that time saw little prospect of harmony between them, proposed to Mrs. Ogilvie, that she should agree to this scheme, which she seemed very well pleased with; but that next day both seemed to have changed their mind. And being further interrogate, depones, That about a fortnight or three weeks after the deponent went to Eastmilk, the two pannels and the deceased Mr. Ogilvie of Eastmilk having gone to pay a visit at Glenkilrie, they all of them returned, as the deponent thought, in very bad humour; and, in particular, Mrs. Ogilvie the pannel was so, and expressed her dissatisfaction with her husband, and said, if she had a dose, she would give it him; but the deponent at that time did not think Mrs. Ogilvie serious in what she said: that thereafter, but she cannot precisely specify the times, Mrs. Ogilvie did frequently

signify to the deponent, that she was resolved to poison her husband; and told the deponent, she intended to get poison either from Mr. Robertson, a merchant in Perth, or Mrs. Eagle who keeps a seed-shop in Edinburgh, upon pretence of poisoning rats: that the deponent, seeing Mrs. Ogilvie intent at that time upon that project, endeavoured to divert her from it by gaining time, and signified, that if she applied to these people for the poison, she would be brought to an untimely end; but that she the deponent would go to Edinburgh, and get a brother of the deponent's who lived there to buy the poison: that Mrs. Ogilvie approved of the deponent's proposal; but complained, that the deponent was long in putting it in execution, and therefore proposed to the deponent to speak of it to lieutenant Ogilvie the pannel, as he could get it more expeditiously; and this the deponent declined to do. Depones, that upon the day that the lieutenant was put from the house, she, Mrs. Ogilvie, told the deponent, that with much difficulty, she had prevailed upon lieutenant Ogilvie the pannel to undertake to furnish her with poison. Depones, that upon a Wednesday, which was the day immediately before Eastmilk's death, Mrs. Ogilvie the pannel told the deponent, that she had received a letter the day before from the lieutenant, which was brought to her hand by Elizabeth Sturrock; and in this letter he had acquainted her, that he had got the poison the length of Alyth, but did not chuse to trust Elizabeth Sturrock with it; and that he would send it by Andrew Stewart his brother-in-law, whom he was to send with it next day; so that she expected it there that night. Depones, that, upon this occasion, she told Mrs. Ogilvie, she never believed it would come to that pitch, and exhorted her most earnestly against the proposal, saying, it would not only bring her to misery, both in this world and the next, but would be bringing a disgrace upon the family she was come of, and upon that into which she was married: that upon this occasion, Mrs. Ogilvie said to the deponent, to let her alone, for the conversation was disagreeable to her, as the deponent knew, and she was determined to put her resolution in execution, whatever might be the event. Depones, that the reasons given by Mrs. Ogilvie for coming to this strange resolution, and for rejecting all the proposals the deponent made for her living in friendship with her husband, were, that she did not love her husband, and never could love him; and that he had used lieutenant Ogilvie ill upon her account; and said, How happy could they live at Eastmilk, if there were none there but the lieutenant, she, and the deponent! That, upon one occasion the deponent, in remonstrating against these wicked proposals, told Mrs. Ogilvie, that, although her husband were dead, she and the lieutenant could not enjoy one another. Mrs. Ogilvie answered, That they could go and live in some of the countries where he had been. And being further interrogate, depones, that when she was

remonstrating to Mrs. Ogilvie against poisoning her husband, she specially mentioned to her, that as she had been guilty of adultery and incest, it was a dreadful thing to crown all with murder. Depones, that upon the Wednesday's night aforesaid, immediately preceding Eastmilk's death, Mrs. Ogilvie the pannel, and the deponent went out together, Mrs. Ogilvie having expressed her impatience for Andrew Stewart's arrival: that they did not meet with Andrew Stewart; but when they returned to the house, found him sitting with the old lady Eastmilk, he having come in another way: that Mrs. Ogilvie the pannel immediately carried Andrew Stewart up stairs with her, who staid with her about half an hour, and then came down stairs by himself: that the deponent asked him, if he had brought any thing with him? He answered, Nothing, at first; but, upon her pressing, and saying, She was sure he had brought something with him, he then said he had brought some drugs for Mrs. Ogilvie, which, at that time, he described as being in two phial glasses: that the deponent, on this occasion said, they were black drugs: that Mrs. Ogilvie the pannel having come down stairs very soon after, the deponent did not get an opportunity at that time to explain to Andrew Stewart what she meant by calling them black drugs: but Mrs. Ogilvie and Andrew Stewart having gone out towards the Kirkton, and left the deponent and her aunt lady Eastmilk by themselves, the deponent told her aunt, that she believed what Andrew Stewart had brought was poison; for that Mrs. Ogilvie the pannel had told her, the deponent, that Andrew Stewart was to bring the poison. Depones, that the old lady Eastmilk was present when the deponent said to Andrew Stewart, they were black drugs, as above-mentioned: that the deponent, after acquainting the old lady as above, asked her, if she should inform the deceased Mr. Ogilvie of Eastmilk of the particulars? That the old lady said it would be improper; for that Mrs. Ogilvie would persuade her husband, that it was but laudanum for her own use, and would resent it against the deponent: and that the only method that occurred to her proper was, that both she and the deponent should caution Eastmilk against taking any thing from his wife in private. Depones, that after this she went to the Kirkton with a view of being advised by the minister, what was fit to be done in such a case; but had the misfortune to miss him, he not being at home, the door locked, but the key in it: that Eastmilk, and his wife the pannel, and Andrew Stewart, were all in the Kirkton at that time, in the house of Fergus Ferguson, a tenant of Eastmilk's, who keeps a public house: that they having come away from the Kirkton, Mrs. Ogilvie and Andrew Stewart walked on like a pistol-shot before Eastmilk; and the deponent joined Eastmilk, and signified to him, that it would be very proper and necessary for him to leave his own house, for that she believed his life

was in danger; but did not tell him, that she suspected the danger was from his own wife: that Eastmilk said, He could not leave home at that time, because of his labourers. She having signified, that there was danger in a delay, Eastmilk answered, He understood what she meant; but that he was determined he would take nothing she gave him, and so would put it out of her power. Depones, that her aunt, that same night, both before and after supper, told her, that she likewise had cautioned Eastmilk to take nothing from his wife. Depones, that the same evening she informed Andrew Stewart, that she believed it was poison he had brought, and told him her reasons for believing so; that Andrew Stewart appeared to give credit to what the deponent said. After Eastmilk and his wife had gone up stairs to bed, Andrew Stewart, the old lady the deponent's aunt, and the deponent, had a long conversation how to disappoint Mrs. Ogilvie's design; and particularly, she remembers, that Andrew Stewart proposed, that as he knew the drawer wherein she had put the things that he had brought her, means should be used in the night time to get Mrs. Ogilvie's keys to open the drawer, and take out the things; or, if that would not answer, that they might get a tradesman next day, or as soon as they could get an opportunity, to open the back of the chest of drawers, and so get into the particular drawer to get out the things. Depones, that Mrs. Ogilvie, as Andrew Stewart told that night, received a letter from lieutenant Ogilvie, which he Andrew Stewart brought along with him; and that the lieutenant had desired him to deliver that letter with the drugs privately to Mrs. Ogilvie the pannel. Depones, that she never insinuated to Eastmilk any suspicions she had of his life being in danger, till that night above-mentioned, which was the one immediately preceding his death; but that she frequently told the old lady his mother of the danger she apprehended Eastmilk was in, from the disposition his wife appeared to be in; and the old lady said, that she likewise was suspicious, because she thought her daughter-in-law would stick at nothing; but that the deponent did not explain to the old lady the affair of the poison, till after the lieutenant was turned away from Eastmilk, when she advised her to warn her son of his danger. And being further interrogate, depones, that from the time that the deponent went to his house in March last, Eastmilk appeared to be under great distress of mind on account of the difference between him and his wife; but she did not hear him complain of any bodily indisposition, excepting sometimes of a pain in his breast, which she thinks happened twice; but he never kept his bed one day, nor even an hour extraordinary. That the day immediately before his death, there had been a quarrel between him and his wife; and the quarrel was, that Mrs. Ogilvie had given the deponent some cambric to make into ruffles for the lieutenant, who, she said,

had sent the cambric to her, Mrs. Ogilvie; whereas Eastmilk said, a chapman had come that day to the house, and craved him for the price of it, and that he had refused to pay it: that upon this quarrel Eastmilk had gone out in bad humour, and, as the deponent thinks without his breakfast, and the deponent heard, that he spent the day among his tenants over the hill; that he returned in the evening, and said he was not well, and went to bed without supper. Depones, that Eastmilk never had at this time, or at any time, so far as she knows, any violent vomiting, purging, or convulsions; and, so far as she knows, nobody else ever heard of any such thing. Depones, that next morning Mrs. Ogilvie the pannel made the tea for breakfast somewhat earlier than usual: that the deponent having come into the breakfasting room, heard Mrs. Ogilvie the pannel say, that the laird and Elizabeth Sturrock were well off that morning, for they had got the first of the tea: that the deponent before this had been sitting with her face to the window, and her back to the table, but did not take any notice what Mrs. Ogilvie had been doing; but upon Mrs. Ogilvie's expressing herself as above, turned about and asked, What! has the laird got tea? And Mrs. Ogilvie answered, He had; upon which the deponent said nothing. Depones, that she does not know the reason why Mr. Ogilvie had not come down to breakfast that morning. Depones, that she said to the old lady, as she thinks, that she was frightened about the tea the laird had got; but said nothing to Andrew Stewart of it, and this she means of the time before the laird was taken ill. Depones, that Mrs. Ogilvie the pannel, during the time of breakfast, went out of the room twice or thrice, and at length came in, and told the laird was taken very ill: that the deponent overheard a report among the servants, that he was troubled with a purging and a vomiting: that the old lady desired the deponent to go up and see Eastmilk, which she did in about half an hour after breakfast: that she continued very short while in the room, she looked to him, and he appeared to her to be in a dying condition: that she came off very soon, crying; Mrs. Ogilvie the pannel met her, and asked her if she was daft? That the deponent answered, in way of surprise or derision, O! ay! and Mr. Ogilvie is dying. Depones, that after she had come down stairs, and staid half an hour or so, the old lady desired her to go up stairs to her son Eastmilk, to keep him from these two women; by which the deponent understood she meant Mrs. Ogilvie and Elizabeth Sturrock, who were then sitting with him: that the deponent accordingly went up stairs before mid-day, as she thinks, and continued with him till his death, which happened betwixt 11 and 12 o'clock that night: that Eastmilk, as the deponent has above expressed, was seized, as she heard, with a purging and vomiting: that after she went up stairs to him, he had for some time some purging, but

not near so violent as she had been informed it was before: that he had a most severe vomiting, and called always to give him a cold drink: that he drank great quantities of cold water: that the deponent having mixed it with milk, he complained of that, and insisted to have cold water by itself, and then drank some small ale; but upon his brother-in-law Glenkilrie's coming there, which was in the evening when it was almost dark, he dissuaded him from taking more ale; that the deponent tried him once with a glass of wine and a piece of sugar in it, which he drunk, and for about an hour after taking it vomited none: that the deponent got the glass of wine from Mrs. Ogilvie the pannel: that Eastmilk immediately after taking the water or the ale threw it up again; but after he had drunk the glass of wine, as aforesaid, there was an intermission of the vomiting for about an hour; and though he drank both water and ale after that, he kept it longer than before. Depones, that Eastmilk complained of a burning at his heart, as he called it; and complained bitterly of pains in the brawns of his legs, and said they would rent, and desired the deponent to bind them up for him, which the deponent accordingly did: that there was a severe heaving at his breast and a strong caw, and he cried to keep open the windows to give him breath: that he was constantly in motion, moving his head, his legs, and his arms: that she observed in the afternoon he did not speak plain, which she supposed was owing to his tongue having swelled; but she did not see his tongue: that about an hour, or an hour and a half before his death, he had an intermission of the vomiting; but that at length he was again attacked with a most severe press of vomiting, after which he fell back upon the deponent, who was sitting behind him in the bed supporting him, and expired. Depones, that she heard Eastmilk during his distress say to James Millam his tenant in the mill, who was attending him, that it was either strong poison, or rank poison, that was killing him. Depones, that before one o'clock she heard the old lady Eastmilk say to Eastmilk, that he had broke his promise to her in taking any thing from his wife: that he answered, It is too late now, mother; but she forced it on me: that at this conversation there were none present but the old lady and the deponent. Depones, that she knows nothing about sending for any surgeon to attend upon Eastmilk, further than that she herself sent Annie Robertson, one of the servants of the house, to tell Andrew Stewart, who she understood had then gone off for Alyth, to desire Mr. Meik the surgeon at that place to come to Eastmilk; and that this happened the forenoon of the day on which Eastmilk died: that she thinks, before she sent off Annie Robertson herself, she heard some conversation about sending for a surgeon; and thinks that it was Andrew Stewart and the old lady who were talking of it. Depones, that after Eastmilk's death, she was told by James

Millam, that he had got orders from Mrs. Ogilvie the pannel, to take a horse and go and acquaint lieutenant Ogilvie of his brother's death; but that thereafter it was concerted, that at Glenkilrie, in whose house the lieutenant then staid, was going home from Eastmilk, that he should acquaint the lieutenant: that next morning the lieutenant arrived about six o'clock, as she thinks. Depones, that the day on which Eastmilk died, Mrs. Ogilvie the pannel came in for a very little to him in the forenoon: that thereafter she frequently proposed to come back to him, if the deponent were dismissed; but Eastmilk would not agree to this, and she came no more near him. And being further interrogate, depones, that the morning after Eastmilk's death, she told the lieutenant the pannel, that she knew the whole affair of the poison, and asked him how he could send it to Mrs. Ogilvie? That the lieutenant appeared to be under great concern and confusion, and told, that suppose he had sent it to her, he did not think she had so barbarous a heart as to give it. And three missive letters marked by the deponent and the lord examiner's subscription, being shewn to her, depones, that the letter which begins Dr Captain, and is not subscribed, and has no date, and another letter which begins Dr Sir, and is dated Glenkilry, Weensday, and signed Ketty Nairn, are both very like Mrs. Ogilvie the pannel's writing, but the first she is sure is her writing; and the third letter, which bears date at Glenkilry, and addressed to Thomas Ogilvie, esq. of Eastmilk, depones, that she does not know whose hand-writing it is. Depones, that she did not, either the day of Eastmilk's death, or the day after, acquaint any body, by letters or otherwise, of her suspicions and belief that Eastmilk died by poison. And being interrogate for the pannels, depones, that upon the Monday, Tuesday, and Wednesday above-mentioned, when she has deponed, that the two pannels were together, in manner above described, the old lady and the deponent were in the house, and some servants, who were at the other end of the house. And being interrogate, from what place the pannels went when they went to the room above stairs for the said three days? depones, they went from the low room in which the deponent was all these days: that she is positive the old lady Eastmilk was in the low room with them upon the Monday; but has been informed from her, that she observed nothing: that she desired the old lady, on the Wednesday, to observe the motion of their feet in the room above; but the old lady said she did not hear it, which the deponent imputed to her being dull of hearing: that when the deponent heard as above, these last three days, it was after breakfast, and, as she thinks, about eleven o'clock before noon. Depones, that when she went into the room where the two pannels were upon the Sunday, the door of the room was open. Depones, that she did not meet Eastmilk upon the road that day she came to his house; but she saw

him the day before at the boat of Bermeny, but did not speak to him, he having passed before she knew it was him: that when she came to Eastmilk, she found none in the room that she came into but Eastmilk and his mother: that after she came to Eastmilk, she slept with her aunt the old lady. Depones, that she does not know where the servants lay; but has a notion, that Katharine Campbell and Elizabeth Sturrock lay in the kitchen. Depones, that she has seen Elizabeth Sturrock several times in her bed in the kitchen; and that she does not remember to have seen Katharine Campbell in her bed, though she slept in the kitchen: that the servant-maids had no place to sleep in, in the house, but the kitchen; but the third maid slept out of the house. Depones, that lieutenant Ogilvie slept in the room she has formerly mentioned; but she never knew him sleep in any of the beds, but the alcove bed, except when his brother was lying a corpse. Depones, that she had once a conversation with one Mr. Dougal a surgeon, upon the nature of laudanum, which Mr. Dougal had been speaking of the day that lieutenant Ogilvie was put from Eastmilk: that Mr. Dougal had been telling that he took it for the gout; and she asked, If it was not dangerous? He told her, that there had been instances of fatal effects that it had; but said, if it was cautiously taken, there was no danger: that she asked, how much one might take with safety? which he told her; but that she did not ask, how much of it would do a man's business. Depones, that from her own knowledge she cannot say whether Eastmilk was abroad on the morning of that day on which he died; but that she heard it reported by others, particularly by Anne Sampson, that he had been out that morning; and heard it reported, that it was after he had got the bowl of tea; and that he was seized with a vomiting before he got in again. Depones, that she knows there was once a dose of salts sent from Edinburgh to Eastmilk for Mrs. Ogilvie's use; but never heard of any more salts coming into the family. Depones, there was nobody present when the old lady desired her to go up stairs and attend Eastmilk, and keep these two women from him. Depones, that Alexander Ogilvie, one of Eastmilk's brothers, came to Eastmilk upon the Tuesday forenoon after his death. Depones, that when the deponent once asked Eastmilk when he was dying, If he did not chuse that his wife should be with him? his answer was, Miss Clark, I chuse a drink; and that either Glenkilrie, or James Millam, or both, was present at this time: that what Eastmilk vomited was much of the colour of squeezed eggs, or greenish-yellow: that Alexander Ogilvie aforesaid came to Eastmilk upon the Monday eight days after she came there; and that she came on a Friday; and that he stayed there till his sister was married: that she never heard of any report of the indecent familiarities between the pannels before she came to Eastmilk: that she never knew Mrs. Ogilvie the pannel, till the

deponent went to Eastmilk as aforesaid. Depones, that she never had any difference with any of the family of Eastmilk while she staid there: that she never heard that Eastmilk had employed James Millam to turn her away from Eastmilk, or borrow money from him to give her to go away from the house: that after Eastmilk's death, she got a message from Mrs. Ogilvie the pannel, by Martha Ogilvie, Eastmilk's sister, to dismiss from the house. Depones, that the conversation she had with lieutenant Ogilvie the pannel, about his sending the poison to the other pannel, was at the burn-side, upon the east side of Eastmilk. And, upon the prosecutor's interrogatory, depones, that she does not know that Mrs. Ogilvie the pannel took any salts after her husband's death. Depones, that when she saw Eastmilk, in coming to his house, at the boat mentioned above, she was informed he was returning from Dunsinnan. And being further interrogate, upon the part of the pannels, depones, that she was informed the drawers into which the things were put that Andrew Stewart brought, stood in the lieutenant's room. Depones, that after the pannels were committed to prison at Forfar, she the deponent went back to Eastmilk, and staid for a few nights: that at this time, Alexander Ogilvie, Eastmilk's brother, had a roop of the cattle at Eastmilk. *Causa scientie patet.* And this is truth, as she shall answer to God. And being further interrogate, upon the part of the prosecutor, depones, that when Mrs. Ogilvie the pannel was carried prisoner from Eastmilk, Alexander Ogilvie took up some small keys of hers, and asked her, If he should take care of them? And that she answered, She did not care who took care of them. Depones, upon recollection, that Alexander Ogilvie had the keys in his hands when he asked the above question: that Alexander Ogilvie locked all the rooms in the house, except the laigh room; and put the keys in a drawer of that laigh room, which he locked, and took the key with him. And this is also truth, as she shall answer to God.

(Signed) ALEX. BOSWELL. ANNE CLARK.

Elizabeth Sturrock, late servant to the deceased Thomas Ogilvie of Eastmilk, aged 33 years, unmarried, purged of malice and partial counsel, and interrogate, depones, being solemnly sworn, that about the end of last harvest, she entered as a servant to the deceased Thomas Ogilvie of Eastmilk, and continued in that service till the said Thomas Ogilvie's death: that about Candlemas last, the said Thomas Ogilvie was married to Mrs. Ogilvie, at which time the said Mrs. Ogilvie came home to Eastmilk: that much about the same time lieutenant Ogilvie the pannel came likewise to reside at Eastmilk, where he continued till about a fortnight before the said Thomas Ogilvie's death: that during lieutenant Ogilvie's residence at Eastmilk, she had occasion to observe too great a fondness betwixt the said lieutenant and Mrs. Ogilvie the pannels, which proceeded

even to indecencies, she having frequently seen them kissing and hugging each other in and about the house of Eastmilk: that the late Thomas Ogilvie used frequently to be from home, particularly about his workmen: that during his absence, she has frequently observed the two pannels retire by themselves to the upper rooms of the house, both the easter and wester room, when she believed there was nobody in these rooms but themselves. Depones, that one night about sun-set, during the time aforesaid, the deponent having occasion to speak to Mrs. Ogilvie the pannel, about what she the deponent should bring from Kirkton, the deponent went up stairs to the east room, where the lieutenant used to lie, to see for her mistress: that she found the door of the room open; and upon looking into the room, she observed the two pannels lying in the bed in which lieutenant Ogilvie usually lay: that she suspected them to be there, by hearing them breathing: that upon discovering them, she immediately turned back without speaking to them, and run down to the first flat of the stair, where she stopt, and called up to her mistress to see if she was in the foresaid room; upon which her mistress answered her from that room, as she apprehended it, that she was there: that lieutenant Ogilvie the pannel likewise spoke to her from the same place at that time. Depones, that at another time, and before the time above-mentioned, and soon after Mrs. Ogilvie the pannel's marriage with the late Eastmilk, and while the late Eastmilk was at Dunsinnan, she was told pretty early in a morning by Anne Sampson, a neighbour-servant, that she, Anne, believed lieutenant Ogilvie the pannel was gone into her mistress's room: that upon this the deponent went up to her mistress's room to see into the truth of it; and when she went into the room, she observed lieutenant Ogilvie the pannel going from the bed-side towards the window, in his night-gown: that she is sure her mistress was then in bed in that room, as she was not got up by that time in the morning, nor had she come down stairs, nor was she in the only other room above stairs, which the deponent immediately went and looked into. Depones, that at several other times, when the deponent had occasion to be sitting at her wheel in the kitchen, which is immediately under Mrs. Ogilvie the pannel's room, and where one can easily hear any noise, even to a laigh word, that is made in Mrs. Ogilvie's room, the deponent heard the feet of the two pannels in the room, and shuffling at the side of the bed: that the reason why she believed it to be the feet of the pannels which she heard there, was, that she saw them go up together to that room just before she heard the noise as aforesaid. Depones, that she believes lieutenant Ogilvie the pannel was put away by the late Eastmilk from the house, upon Eastmilk's suspicion, that the lieutenant was too great with Mrs. Ogilvie the pannel: that her reason for believing so is, that about the time lieutenant

Ogilvie went away, the deponent, as she was going to her bed in the kitchen, overheard the late Eastmilk, when he was going to bed with his wife in the room above, say to his wife, That she was too great with lieutenant Ogilvie the pannel; and that they were as frequent together as the bell was to ring on Sunday. Depones, that Anne Sampson was in the kitchen at the same time; and the deponent believes she heard what passed betwixt Eastmilk and his wife, as aforesaid, and the deponent challenged her for listening. Depones, that after lieutenant Ogilvie the pannel had left the house of Eastmilk, the deponent observed the other pannel Mrs. Ogilvie in tears and crying; upon which occasion Mrs. Ogilvie said to the deponent, That she was sorry, or grieved, lieutenant Ogilvie had left the house. Depones, that upon the night of the day that lieutenant Ogilvie left the house, as aforesaid, Mrs. Ogilvie the pannel gave the deponent a letter to be carried to lieutenant Ogilvie at Little Forther, about three miles from Eastmilk: that Mrs. Ogilvie desired the deponent to let nobody know she had got such letter: that the deponent did not know what were the contents of the letter: that Mrs. Ogilvie desired the deponent to tell lieutenant Ogilvie, that she had been bad since he went away; and that her husband was not owning her: that she delivered the letter accordingly to lieutenant Ogilvie at the water-side near Little Forther: that the lieutenant, in answer, bid the deponent tell Mrs. Ogilvie, that he was very well, and that she should keep up a good heart; and that he was to go to baron Reid's. Depones, that afterwards Mrs. Ogilvie the pannel gave her another letter to carry to lieutenant Ogilvie at Glenkilrie, and to deliver it privately, which the deponent carried accordingly; and she received an answer in writing from the lieutenant to Mrs. Ogilvie, which the lieutenant likewise desired her to deliver privately; and she did so. Depones, that upon another time, being the Tuesday immediately before the late Eastmilk's death, Mrs. Ogilvie the pannel sent the deponent with another letter to lieutenant Ogilvie at Alyth, likewise with orders to deliver it privately. Depones, that she delivered the letter to lieutenant Ogilvie accordingly, and then went and did some other business in the town of Alyth, and returned and received an answer from lieutenant Ogilvie to the last-mentioned letter, which he desired her to take care of, and deliver privately; when he likewise told her, that he had a packet of linens lying at a house near by, and a letter with them, which the lieutenant desired the deponent to call for, and take to Eastmilk with her: that the deponent returned straight to Eastmilk with the lieutenant's answer; and Mrs. Ogilvie not being then at home, the deponent went and fetched a bundle of linens, and the other letter, all which she delivered to Mrs. Ogilvie at the same time. Depones, that the answer she received last from the lieutenant, as aforesaid, was a large thick letter, bigger than a sheet of

paper; but she did not think there was any thing in it but paper. Depones, that Eastmilk appeared to be in his ordinary health upon the Tuesday before he died, and that he usually had very good health, the deponent having never known him to be in bad health while she was in his service: that upon the Wednesday before his death, he was likewise in good health: that upon the Thursday morning upon which he died, the deponent knew little about Eastmilk, as she herself was confined to bed by sickness, except that she heard that Eastmilk had been taken ill: that Mrs. Ogilvie the pannel came into the kitchen where the deponent was lying, and told the deponent in a low voice, or a whisper, that she, Mrs. Ogilvie, had given the laird his breakfast that morning, and she desired the deponent to say, that she had likewise got her breakfast, although the deponent had then got none: that some time thereafter Mrs. Ogilvie sent Anne Sampson with some tea to the deponent in a bowl, which the deponent drank: that the deponent commonly got tea in the morning when she was indisposed. Depones, that after the deponent had got out of bed on the said Thursday morning, and before she got the tea as aforesaid, she observed the late Eastmilk come in at the outer door, and come forward to the kitchen where the deponent was: that he was then very ill, and vomited much: that at this time she believes the rest of the family were at their breakfast, Mrs. Ogilvie the pannel having come into the kitchen for some cream to the tea. Depones, that Mrs. Ogilvie, seeing Eastmilk so ill, desired him to go up to his bed; which he did, and the deponent helped him to go up stairs, and to throw off his cloaths: that after he had been a little while in bed, he said, he thought himself some easier. But depones, that in a short time he turned very ill again, fell a-vomiting and purging, and complained of every part of his body; said his heart was broken or riven, and he tossed very much. Depones, that Eastmilk, during his illness, called frequently for cold water, and drank often of it. Depones, that about ten or eleven o'clock that forenoon, when old lady Eastmilk, Andrew Stewart, and the deponent, were in the room together attending the late Eastmilk, Eastmilk said, in the deponent's hearing, 'That he was poisoned, and that woman had done it. Depones, that by that woman, the deponent understood Eastmilk meant his wife: that the old lady seemed to understand it in the same way, and reproved her son Eastmilk for saying so. To which Eastmilk answered, That it was very true, and his death lay at her door. Depones, that upon the day Eastmilk was ill, as aforesaid, Mrs. Ogilvie the pannel came pretty often up to his room to see him in the

and not come near him at
at, in the afternoon,
toss by Eastmilk,
own and tell Mrs.
aid see her hus-
and said, No!

no! I do not want her: that Anne Clark told the deponent, she might go down and bid her come up for all that: that the deponent accordingly went and told Mrs. Ogilvie; but Mrs. Ogilvie refused to come up, saying, She did not like to see dying people. Depones, that, during her husband's illness, Mrs. Ogilvie did not chuse that the people in the neighbourhood that came to see him should get access to his room, for fear of disturbing him: that the deponent went and brought the precentor in the afternoon, or rather about dinner-time, when the precentor went and prayed by Eastmilk; Mrs. Ogilvie, who had sent the deponent for the precentor, went up stairs with him to Eastmilk's room. Depones, that Mrs. Ogilvie was not very dull, or shewed great marks of grief upon her husband's death, till Alexander Ogilvie, Eastmilk's brother, the doctor, came to the house upon the Tuesday thereafter; when Mrs. Ogilvie having ordered the deponent to desire Alexander Ogilvie to speak with her, and he having refused to do so, Mrs. Ogilvie fell a-crying, and wringing her hands, throwing herself back upon the bed, and saying, What could be the meaning of this? Depones, that Alexander Ogilvie stopped the burial, and sent for doctor Ogilvie of Forfar, and doctor Ramsay, and doctor Meik of Alyth, to inspect the dead body of his brother: that at this time, Mrs. Ogilvie behaved very ill, weeping and crying, and wringing her hands, and tearing herself; but the deponent does not know the cause of this behaviour. Depones, that lieutenant Ogilvie at the time of his brother Eastmilk's death, lived at Glenkilrie's house; and Glenkilrie having been at Eastmilk when Thomas Ogilvie died, he went home and desired lieutenant Ogilvie to go to Eastmilk upon that event: that lieutenant Ogilvie came to Eastmilk next morning, and the deponent seeing him approach the house, told Mrs. Ogilvie that he was coming: upon which Mrs. Ogilvie went out, and desired the deponent to tell lieutenant Ogilvie to speak to her in the stable: that the deponent went accordingly and delivered the message to lieutenant Ogilvie, who was then walking with Dr. Meik, and the lieutenant went to Mrs. Ogilvie in the stable, as desired. Depones, that after the late Eastmilk's death, and after Mrs. Ogilvie heard the sheriff of Forfar was coming to examine them at Eastmilk, Mrs. Ogilvie desired the deponent to say to the sheriff, that the deponent had seen Mrs. Ogilvie mix up the bowl of tea, which she, Mrs. Ogilvie, had given her husband the morning of the day on which he died; and that the deponent had drunk some of it before Eastmilk tasted it; and that she likewise drank off what Eastmilk left of it; she likewise particularly desired the deponent to say, that the deponent was in the closet with her, Mrs. Ogilvie, when she mixed up the bowl of tea; and that she, Mrs. Ogilvie, gave her husband some short bread with it: that Mrs. Ogilvie told the deponent, that if the deponent would say as thus directed, she would

stand by the deponent, that no harm should happen to her; that the deponent should go with her wherever she went; and while she, Mrs. Ogilvie, had a half-penny, she should have the half of it. Depones, that Mrs. Ogilvie spoke to the deponent in this manner several times: that lieutenant Ogilvie was present upon these occasions, heard what Mrs. Ogilvie desired the deponent to say, and he himself desired the deponent to say as Mrs. Ogilvie directed her. Depones, that some time before Eastmiln's death, the deponent knows Mrs. Ogilvie took a dose of salts, the deponent having got a part of them: that she never knew Mrs. Ogilvie taking salts but that time. Depones, that before Eastmiln's marriage, she lay in the laigh room with old Mrs. Ogilvie and her daughter: that after the marriage, she continued to lie with the old lady, till Anne Clark came to Eastmiln: that after that Anne Clark lay with the old lady, and the deponent lay in the kitchen with Katharine Campbell: that at this time, Anne Sampson lay in an outhouse till Katharine Campbell went away. Depones, being interrogate for the pannels, that what she has above deponed, concerning the pannels kissing and hugging one another, happened at different times, sometimes when they were by themselves, and at other times when they were in company with others. Depones, that when she saw the captain in Mrs. Ogilvie's room in his night-gown as above, the door was in part open, so that she could see into it, and that she did not go into the room. And being interrogate for the pannels, that number of persons, not of the family, got access to the room in which Eastmiln was, after his being taken ill as above? depones, that, to the best of her remembrance, the persons who got access, were, Mr. Spalding of Glenkilrie, William Froster, Anne Froster, James Millam, and David Watson: that James Millam, William Froster, and Anne Froster, were brought in by the deponent, without the knowledge of Mrs. Ogilvie. Depones, that she did not hear Alexander Ogilvie give orders to the persons who were sent for the doctors, to inspect Eastmiln's body; but she afterwards heard of it from the persons who had been sent, and who on that account had come to get meat in the family; but that she the deponent was forbid by Mrs. Ogilvie to give them meat. Depones, that when the deponent was first brought to town, she was lodged, for about the space of twenty days, in the house of one Mr. Gardiner at the head of the Cowgate, by Mr. Murison the macer: that from thence she was carried to the castle of Edinburgh, where she has remained since that time: that the deponent, Anne Clark, Anne Sampson, and Katharine Campbell, were lodged in the same room till Thursday or Friday last, when Anne Clark was put into another room in the castle, where she remained a day and a night, and was thereafter put into the room with the deponent, and the other persons above-mentioned. Depones, that while the deponent, and the other persons above-

mentioned, were at the house of one Gardiner, and in the castle, they had some, though not much, conversation upon the subject of this trial: but that in these conversations, all of them declared, that they considered it as their duty to tell nothing but the truth. Depones, that upon the morning of the day after Eastmiln's death, Anne Sampson told Mrs. Stewart, Eastmiln's sister, in presence of the deponent, that the bowl out of which Eastmiln was said to have drunk the poison the day before, was below in a press in the kitchen: that the deponent having taken out the bowl, observed something greasy in the bottom of it; and intending to try if there was any thing poisonous in the grease, she put some broth into the bowl, and gave it to a dog, who eat it up; but was nothing the worse of it: that the deponent made this experiment of her own accord, and not on the suggestion or desire of any other person whatsoever. And depones, that Anne Sampson has often told the deponent, that she had filled the said bowl with water, and offered it to Eastmiln, that day on which he died; but that he had refused to drink out of it, damning the bowl, and saying, he had already got his death out of it. *Causa scientia patet.* And this is truth, as she shall answer to God. And being further interrogate, depones, that while the deponent was in Eastmiln's service, she never heard of his being troubled with vomitings, purgings, or cholics, before that day on which he died; and that she never knew of his being indisposed, except by slight colds. Depones, that when lieutenant Ogilvie went into the stable where Mrs. Ogilvie was, as has been above deponed, he did not remain there above four or five minutes. And this is also truth, as she shall answer to God: and depones she cannot write. (*Signed*)

AND. PRINGLE.

Anne Sampson, late servant to the deceased Thomas Ogilvie of Eastmiln, aged 19 years, unmarried, purged of malice and partial counsel, sworn and interrogate, depones, That she entered servant to the family of Eastmiln Whitsunday was a year: that after being some time absent, she returned a few days before Miss Clark came to the house: that after her return, she had more than once occasion to observe Mrs. Ogilvie and lieutenant Ogilvie kissing one another; particularly once in the kitchen before the deponent and another servant maid: that she has seen them embrace and hug one another: that when the laird was out of the house, she has known them retire to a room by themselves, but not staying above an hour at a time. Depones, That one morning when the laird was at Dunsinnan, she heard the two pannels speaking together in bed in the room above: that she was in the kitchen, the ceiling of which is not plastered, and where she could hear the lowest voice in the room above: that upon this, she desired her fellow-servant, Elizabeth Sturrock, to go up stairs and see what was going on; and that Elizabeth, upon her

return, told the deponent, that the lieutenant had got out of the bed before she was got to the door; and that she saw him going from the bed towards the window in his night-gown. Depones, That this was about sun-rising. Depones, That the lieutenant left the house a fortnight before his brother's death; and before that time, the deponent being in the kitchen with her fellow-servants, Elizabeth Sturrock and Annie Robertson, they all heard the laird and lady talking together in bed in the room above: that the talking begun with the lady's scolding her husband; upon which the laird bade her hold her tongue, for that she and the lieutenant were as common as the bell that rings on Sabbath. Depones, That the morning the lieutenant left the house, she saw Mrs. Ogilvie weeping: that this was before he went away; and that she saw her also weep after he went away. Depones, That Eastmill was a healthy man; and that, before the day he died, she never heard him complain, if it was not sometimes of a head-ach; and that the night before he died, he was in health, so far as she knows. Depones, That the night before her master died, she saw Andrew Stewart in the house of Eastmill; and that she was told by Elizabeth Sturrock and Miss Clark, the night thereafter, that the said Andrew Stewart had retired with Mrs. Ogilvie into a private room. Depones, That the morning of the day her master died, breakfast was ready betwixt eight and nine, a little sooner than ordinary: that she saw her mistress make up the bowl of tea in presence of her mother-in-law and Miss Clark, for Andrew Stewart was not then up: that she followed her mistress up stairs, wanting some beef out of the beef-stand, and saw her go into a closet adjoining her master's room: that the deponent followed her into the closet, demanding the beef; but that her mistress bade her go down stairs, as she was not ready yet; and that she was always wanting something; and that Mrs. Ogilvie appeared to be in a passion at her: that her master was at that time in bed; and that, when the deponent was in the closet, she saw Mrs. Ogilvie stirring about the tea, with her face to the door; and that, upon what her mistress said to her above, she went out of the closet down to the kitchen; but that she did not see her mistress, when in the closet, put any thing into the tea. Depones, That at this time she saw Alexander Lindsay, a servant-lad in the house, standing upon the stair-head, near the closet-door, at the time her mistress was in the closet. Depones, That her master got up between nine and ten, and first went to the stables to see his horses feed, and then to the Shilling-Hill, where with some of his tenants: that, towards the house, she saw him more when he came into it, when he was there, Mrs. Ogilvie in the kitchen, and ordered him to help him up stairs, and self. Depones, That some time was ordered to carry up

some clean water for her master for drinking, which she did in the same bowl that he got his tea in from Mrs. Ogilvie; but that she first synded the bowl with some water: that she went up stairs with the bowl into her master's room, and found him in bed; but that upon seeing the bowl, he cried, Damn that bowl, for I have got my death in it already; and bid her at the same time, carry it down stairs out of his sight; and that she carried up water to him in the tea-kettle, which he drunk of. Depones, That the reason for her synding the bowl was, that it appeared to be greasy and white; and that she knew the bowl to be the same as above, because Mrs. Ogilvie, after giving her master his tea, came down stairs with it, and set it down in the kitchen, on the fore-side of the press. Depones, That, after synding the bowl, as aforesaid, the grease did not come wholly out of it. Depones, That the day her master died, about mid-day, she was sent by Mrs. Ogilvie two miles to clip some sheep. Depones, That Mrs. Ogilvie frequently went to see how her husband was in the forenoon, but not once in the afternoon; and that, when the deponent was going up stairs to see him between twelve and one o'clock, she was turned back by Mrs. Ogilvie. Being interrogate on behalf of the pannels, depones, That when Mrs. Ogilvie made up the bowl of tea in the breakfasting-room as aforesaid, the deponent saw her put in milk and sugar; but whether she put in any honey, the deponent does not perfectly remember, nor whether she saw any honey upon the table. Depones, That the family seldom breakfasted without honey; but that the day deponed upon, she rather thinks there was none; because, she believes, at that time the house was out of honey. And being further interrogate in behalf of the pannels, depones, That, at the time deponed upon, when she carried up the fresh water to her master to drink, she synded the bowl with water, and not with broth out of the pot. Depones, That the next day thereafter, the bowl was synded with broth out of the pot, and given to a dog; and that it was the deponent that did so by the direction of Elizabeth Sturrock; and that Elizabeth Sturrock gave her no reason for doing so. Further depones, That she took the bowl for carrying water to her master, because it was at hand; and that she had no notion at that time of her master being poisoned, nor till after his death. Being interrogate in behalf of the pannels, when she returned from the sheep-clipping; depones, That it was about nine at night. Upon which being again interrogate, how she came to depone as above, that Mrs. Ogilvie did not once visit her husband in the afternoon? answers, That was, because she was told so by the other servants, who added, That her master did not want Mrs. Ogilvie up, for fear of doing her harm. Depones, That after she saw her mistress make up the bowl of tea in the breakfasting parlour, as aforesaid, she went into the kitchen, and made up the fire, before she followed her mistress to the closet, as above de-

pooned to. *Causa scientie patet.* And this is truth, as she shall answer to God.

(Signed) HENRY HOME.

Andrew Stewart, merchant in Alyth, aged thirty, married, purged of malice and partial counsel, sworn and interrogate, depones, That upon the evening before Mr. Ogilvie of Eastmilk died, being a Wednesday, the deponent was at the house of Eastmilk, when, upon his coming into the house, Mr. Ogilvie told him, that he had forbid his brother the captain the house, on account of suspicions he had, that his wife was too much taken up in doing things for his brother the captain, and not for himself; and that at the same time he mentioned some differences he had with his brother concerning money-matters. Depones, that on the Monday before Eastmilk, the deponent's brother-in-law, died, lieutenant Ogilvie (who is above designed captain) came to the deponent's house in Alyth on horseback; and that the horse he rode belonged to Mr. Ogilvie of Eastmilk. Depones, that on the day thereafter, being the Tuesday, Elizabeth Sturrock, a former witness, came to the deponent's house, and bought some things for the family of Eastmilk: that he does not know that she brought with her any letter for lieutenant Ogilvie; nor does he know if lieutenant Ogilvie gave her any letter for Mrs. Ogilvie the pannel. But depones, that he did that day inform lieutenant Ogilvie, that he the deponent was to be at Eastmilk next day. Depones, that upon the day thereafter, he accordingly went to Eastmilk, and before he went off, lieutenant Ogilvie delivered to the deponent a small phial glass containing something liquid, which he said was laudanum; and also a small paper packet, which he said contained salts; and that the morning of the day preceding, the deponent saw the lieutenant working among some salts, at least which appeared to the deponent to be salts, which were in a chest belonging to the lieutenant: that the phial glass was round, and knows that there was another phial glass in his own house which was square: that he is positive, as he has already deponed, that one phial glass was delivered to him by the lieutenant; and cannot say, with certainty, that two might not have been delivered to him by the lieutenant; but rather thinks he got only one; and that at the time when the above particulars were delivered to the deponent, the lieutenant desired him to deliver them privately into Mrs. Ogilvie's own hand: that he did not see the packet made up, nor did he open it to see what it contained. Depones, that on the aforesaid packet, there was a letter directed for Mrs. Ogilvie of Eastmilk, which letter was sealed both with wax and a wafer; and that round the packet there was a loose paper of directions, in what manner the laudanum was to be used. Depones, that when he came to Eastmilk in the Wednesday afternoon, he was carried into a room where old lady Eastmilk was; and that, within a short time thereafter, Mrs. Ogilvie the pannel,

and Miss Clark came into the room: that, at the desire of Mrs. Ogilvie, he followed her up to the eastern room, where Mrs. Ogilvie having asked him, If he had brought any word to her from the lieutenant? he delivered to her the several particulars above-mentioned, which the deponent saw her immediately put into a drawer in the room: that he did not see her read the letter at that time; but that she put the whole together into the drawer: that soon thereafter Miss Clark asked the deponent what he had brought with him {from the lieutenant to Mrs. Ogilvie? Or if he had brought any thing with him? He at first said he had brought nothing; but, upon Miss Clark's pressing him with great earnestness, he at last informed her of the particulars he had brought: that, upon this, Miss Clark said, that she was afraid Mrs. Ogilvie might poison her husband. Depones, that soon thereafter Miss Clark, in presence of the deponent and the old lady, desired Eastmilk not to take any thing out of his wife's hand, except at the table; to which he answered, That he would not: that the old lady joined with Miss Clark in desiring Eastmilk to take nothing out of his wife's hand; but that the deponent was at that time very much displeased with both, as he then had no suspicion that Mrs. Ogilvie had any design against the life of her husband. Depones, that that same night he heard Mrs. Ogilvie say, that she lived a most unhappy life with her husband; that she wished him dead; or, if that could not be, she wished herself dead. Depones, that the deponent supped with Eastmilk and the rest of the family that night: that he then appeared to be in his ordinary state of health; but that sometimes before, that same night, he told the deponent and the rest of the company then at Kirkton, that he had swarfed or fainted on the hill: that, for that reason, he could drink no ale: that, upon this, they called for a dram, which he took, and thereafter seemed hearty, and in good spirits; and Eastmilk then said, that the swarf had happened to him on the hill that same day. Depones, that that night the deponent told, that he intended to go off from Eastmilk early next day, which occasioned their getting breakfast more early than usual: that Eastmilk did not breakfast along with the family, the only persons present at breakfast being Mrs. Ogilvie's elder and younger, Miss Clark and the deponent being then only present: that the deponent saw Mrs. Ogilvie making a bowl of tea, by filling it out of the tea-pot, and putting sugar and milk in it; and that she said, in presence of the company, that she was to give it to her husband, who was then in bed; and that the deponent saw her go out of the room with the bowl in her hand: that, about an hour and a half after they had begun to breakfast, they were told that Eastmilk had been suddenly taken ill; upon which Miss Clark immediately run up to the room in which he was, and soon thereafter returned weeping, and told them, that Eastmilk had got a bad breakfast.

Depones, that the deponent immediately run up stairs, where he found Eastmilk vomiting and purging violently; that he heard him say that he was all wrong within; and that he had got what would do his turn: that Eastmilk called very much for drink: that they offered him milk; but that he would drink nothing but water: that he complained much that he was burning within. Depones, that he proposed to Mrs. Ogilvie that a surgeon should be called to his assistance, to which she would not agree, saying, That he would be better: and upon the deponent's renewing this proposal, she said, she would not for any money that a surgeon should be called, as the consequence of this would be, to give her a bad name, from what Miss Clark had said of her: that, upon this the deponent told Mrs. Ogilvie, that Mr. Meik, surgeon in Alyth, whom the deponent had recommended, was a discreet person: that he would come; and that he would tell none but her what he thought of him: that upon this, the deponent left her, she having previously agreed that Mr. Meik should come: that the deponent thereafter set out on his journey; but, before he had got far from the house, one of the girls, whose name he thinks was Robertson, came up to him, and desired that Mr. Meik might be sent with all haste: that after supper, the deponent had a conversation with Miss Clark concerning the suspicions she had of Mrs. Ogilvie's intentions against her husband, in which the deponent proposed, that they should either take Mrs. Ogilvie's keys out of her pocket, or break open her drawers at the back, in order that they might satisfy themselves, if the particulars brought by the deponent were poison or not; and that this was the only method by which mischief would be prevented: that Miss Clark did not seem to agree to either of these proposals, and the deponent himself had at that time no suspicion, that there was any foundation for Miss Clark's fears; and the deponent was confirmed in this opinion from his having been told, by the old lady, that she had gone up to the room-door, after her son and daughter-in-law were in bed; and that there was then more kindness between them than usual. Depones, that his wife had frequently told him, before the death of Eastmilk, that he was a tender man; and that he never heard of his having been troubled with violent vomitings, or purgings, before the day on which he died: that he had the appearance of a tender man; and that the deponent has heard his wife say, that he would not be a long liver. Depones, that at the conversation above-mentioned at Kirkton, he heard Eastmilk say, that he had been ill of a cough and sore breast; and that for some time past, he had been thinking of writing to doctor Ogilvie at Fortar, to send him some things: that the deponent ~~harbored~~ ^{harbored} at him for talking in that manner, and

take a draught. Depones, that the which Mrs. Ogilvie put the parti-
ed to her by the deponent, stood

in that room in which the deponent slept that night. Depones, that at the time when Alexander Ogilvie the deponent's brother-in-law a rested the corpse, the deponent advised lieutenant Ogilvie to make his escape, if guilty; which he answered, That God and his own conscience knew that he was innocent. Depones, that the two paucis lived at the house of Eastmilk, from the time of Eastmilk's burial to the time that Mrs. Ogilvie was apprehended; and that for some time after the paucis continued to live there; but how long he cannot say. Depones, that Mrs. Ogilvie had been blooded the day before Eastmilk's death, or the day before that; and that she had been ill, and taking drugs for some time before, as the deponent had heard. *Cum scientie patet.* And this is truth, as I shall answer to God. And at reading over the oath, depones, that at the time when lieutenant Ogilvie delivered the particulars above-mentioned to the deponent, he desired him to put them into Mrs. Ogilvie's own hand: but did not mention the words 'privately,' or 'by herself' and that his reason for denying at first to Ann Clark, that he had brought any parcel from lieutenant Ogilvie, was, because he considered Miss Clark as a person given to raise dissension in families; and because that he had been desired by the lieutenant to put the particulars into Mrs. Ogilvie's own hand. And this is all truth.

(Signed) AND. STEWART.
GEO. BROWN.

James Carnegie, surgeon in Brechin, married, aged about 10 and upwards, being solemnly sworn, purged of malice and partiality, depones, That in the end of May last he got a message from lieutenant Ogilvie the paucis, with whom he is acquainted, desiring him to meet him at Colin Smith's, victuener in Brechin: that the deponent having gone there, found him in company with one lieutenant Campbell of the same regiment, and one Mr. Dickson: that lieutenant Ogilvie told the deponent aside, and told him, that he was troubled with gripes, and wanted to buy some laudanum from him, and at the same time told him he wanted to buy some arsenic, in order to destroy some dogs that spoiled the game: that the deponent told him, that he was uncertain whether he could furnish him with these things or not; but that he should look when he went home: that the deponent, when he went home, found he had some of both, and put up a small phial glass of laudanum, and betwixt half an ounce and an ounce of arsenic both which he delivered next day to the lieutenant, after the deponent had dined with him and lieutenant Campbell next day in Smith's that lieutenant Ogilvie took the deponent into another room, away from lieutenant Campbell when he was to receive the laudanum and the arsenic, and there the deponent delivered them to him: that the price of both was a shilling: that the arsenic was pulverized; and lieutenant Ogilvie having asked how it

prepare it, the deponent gave him directions; Depones, that he had sold of the same arsenic formerly to people for poisoning of rats, and heard that it had the desired effect. Depones, that he has been accustomed, when he sold arsenic, to take receipts from low people who bought it, but never from gentlemen; and as the deponent knew lieutenant Ogilvie, and had a good opinion of him, the deponent did not ask a receipt from him, although, when the lieutenant spoke about it first, the deponent said to him, We use to take a receipt for arsenic: that the lieutenant answered, See first if you have it: adding at the same time, Very good. Depones, that he got his arsenic from a druggist in Dundee; but how long ago he cannot say, there being a small demand for arsenic at any time. *Causa scientie patet.* And all this is truth, as he shall answer to God. Depones, that he wrapped it up in the form of a pennyworth of snuff under three paper covers. Depones, that the arsenic which he sold as above was white arsenic. Depones, that he cannot take upon him to say, from looking at arsenic, whether it be arsenic or not; nor can he say from the taste, for he never tasted it; but that he bought this as arsenic, had the name marked upon it upon the package, and heard from those he sold it to that it had killed rats, as above-mentioned. Depones, upon a further interrogatory, that he heard of Mr. Ogilvie of Eastmiln's death after the time that he sold the arsenic to the lieutenant. *Causa scientie patet.* And this is also truth, as he shall answer to God.

(Signed)

ALEX. BOSWELL.

JA. CARNEGIE.

Lieutenant George Campbell, of the late eighty-ninth regiment, unmarried, aged about twenty-two, being solemnly sworn, purged of malice, partial counsel, and interrogate, depones, That he has known lieutenant Ogilvie the pannel these five years past: that in the beginning of June last, as he thinks, the pannel called for the deponent at Phinhaven, and desired him to go along with him to Brechin, because he wanted to see his old landlord William Finlay, vintner there: that they accordingly went to Brechin, and put up at Colin Smith's, vintner, and the pannel called for James Carnegie, surgeon there, but had no conversation at that time apart from the deponent; the pannel invited Mr. Carnegie to dinner, after he and the deponent should return from the fishing, which they were going to next day. And accordingly he came to dinner, and the pannel and Mr. Carnegie went out after dinner to another room, and had some private conversation for some few minutes, and then returned back to the deponent; and the deponent and the pannel went to Phinhaven that night, it being Friday's night, and he staid with the deponent Saturday and Sunday nights, and left him on Monday; and on the Saturday after the deponent heard of Mr. Ogilvie of

Eastmiln's death. *Causa scientie patet.* And this is truth, as he shall answer to God.

JAMES FERGUSON.

(Signed)

GEO. CAMPBELL.

Patrick Dickson, merchant in Brechin, married, aged sixty and upwards, being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That when the pannel Mr. Ogilvie was in prison at Forfar, the deponent went to visit him; and he desired the deponent to go to James Carnegie, surgeon in Brechin, and talk to him, that he might not be imposed on by any body; and the deponent accordingly went and conversed with Mr. Carnegie, who informed him that he had sold the pannel some laudanum and some arsenic, for both which he received a shilling; and the deponent returned to Forfar, and communicated to the pannel what Mr. Carnegie had said; upon which the pannel seemed to be under some concern, and seemed desirous to speak with Mr. Carnegie, without either confessing or denying to the deponent that he had bought the arsenic, for he had only acknowledged buying the laudanum on the Saturday before, when the deponent had been with him in prison; and the deponent told him that he had some business on hand which hindered him to send Mr. Carnegie to him; and the pannel desired the deponent to tell the sheriff that he wanted to see him, to amend something in his declaration with regard to the laudanum which the pannel received from Mr. Carnegie. *Causa scientie patet.* And all this is truth, as he shall answer to God.

(Signed)

AND. PRINGLE.

PAT. DICKSON.

Peter Meik, surgeon in Alyth, unmarried, aged about twenty-seven, being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That upon the day that Mr. Ogilvie of Eastmiln died, the deponent was sent for as a surgeon to him: that he was dead before he came, as the deponent was informed, about two hours: that immediately upon the deponent's arrival, he was carried up by a servant to Mrs. Ogilvie the pannel's room, where she was sitting, and she appeared to be in great grief and concern for her husband's death, and desired the deponent, that whatever he might think he discovered to be the cause of her husband's death, that he would conceal it from the world. And depones, there was nobody else present with the deponent and the pannel at that time: that, upon going to the room where the corpse lay, and afterwards going out of the house, he met with Mr. Ogilvie the pannel, who went up with him to the room where the corpse lay, and appeared to be in great grief and concern for his brother: that five or six days after, he was called upon to inspect the body of Eastmiln; and, upon inspecting it, he observed the nails and a part of the breast discoloured, and his tongue swelled beyond its natural size, and cleaving to the roof of his mouth, and no part of his tongue was beyond his lips, though it did come out

beyond his teeth : that he has observed the symptoms of the nails and the breast to occur after a natural death, but never that of the tongue at the same time, though he has observed the tongue swelled without the other symptoms. And being interrogate, Whether he understood these symptoms to be the effect of poison? depones, that he is not so much acquainted with the effects of poison as to have formed a judgment whether that was the cause in this case; but he was led to make that conjecture from the notice given him by Andrew Stewart, who had told him that the defunct was thought to be poisoned, and from the caution given him by Mrs. Ogilvie the pannel, to conceal any thing that might discover the manner of her husband's death. Depones, that Alexander Ogilvie, the defunct's youngest brother, told the deponent, that he was sent for to open his brother's body; and Gilbert Ramsay, surgeon in Coupar, being also there, the deponent and he agreed to open the body; but Alexander would not agree to it, unless doctor Ogilvie at Forfar was there; and as the deponent and Mr. Ramsay could not stay till he came, it was laid aside. Depones, that neither of the pannels made any objection to it; and that Alexander desired them to take a superficial view of the body; which they did, and discovered the symptoms aforesaid. *Causa scientia patet.* And all this is truth, as he shall answer to God. (Signed)

AND. PRINGLE.

PETER MEIK.

Gilbert Ramsay, surgeon in Coupar of Angus, married, aged about 38 years, being solemnly sworn, purged of malice and partial counsel, and interrogate, depones, That he was sent for to Eastmilk about five or six days after the laird's death, and was desired by Alexander Ogilvie, his youngest brother, to inspect his body along with the preceding witness; and, upon looking at it, they observed the nails and part of the breast discoloured, and his tongue swelled: that he has observed the first two symptoms to happen in a natural death, in consequence of putrefaction; but has not observed the last symptom: that these symptoms are owing to something very acrid, and made the deponent suspect that he died of poison: that his lips were very little swelled, but more discoloured than by a natural death: that the deponent had heard suspicions of poison before he came there. And being interrogate for the pannels, depones, that he had observed the tongue swelled even in a natural death, but not to that degree it was in this case. And depones, that if he saw a dead body with these symptoms, there

if any suspicion of
these appear-
Whether all
a bilious
g in the
ould not
a pan-
of poi-
is he

cannot answer that question with any certainty, never having seen the body of any other person who died of poison. And being further interrogate, depones, that the usual symptoms that occur in poison by arsenic, are vomiting, and evacuating downwards, and a great swelling in the tongue, and the blackness in the breast. And being further interrogate, depones, that there was no appearance of ulcers, in this case, either in the tongue or the lips. Depones, that the deponent proposed to open the body; but he was opposed by Alexander Ogilvie, on account that doctor Ogilvie from Forfar was not there; but, as far as the deponent knows, it was not opposed by either of the pannels. And further depones, that he believes every thing in the body would, after being so long dead, be in a state of putrefaction; so that he doubts if the poison would have been certainly discovered, though the body had been opened. *Causa scientia patet.* And this is truth, as he shall answer to God. (Signed)

JAMES FERGUSON.

GILBERT RAMSAY.

Doctor *John Ogilvie*, physician in Forfar, aged 48 years, married, being solemnly sworn, purged of malice and partial counsel, and interrogate, depones, That he heard, that the late Eastmilk died upon the 6th of June last; and that a few days after that, the deponent was desired by the sheriff-substitute of Forfarshire, to go to Eastmilk to inspect the corpse of the defunct: that the deponent forthwith obeyed their order, and arrived at Eastmilk upon the 12th of June last, about noon: that upon his arrival, Alexander Ogilvie, the defunct's brother, desired the deponent to go and inspect the corpse, which were then lying in an out-house: that he found the corpse in its grave-clothes, and in a coffin; and having inspected the body he observed, that the face, the arms, and several other parts of the body, were black and livid, and that the nails were remarkably black; and as to the tongue, it was locked fast by the jaws, so that he could only observe a small part of it, which projected beyond the teeth, which part being the tip of the tongue, he observed to be white and rough, and of a very unusual appearance: that the breast was white, and the lips pretty much of a natural colour: that from the appearances above described, he could draw no conclusion as to the cause of the defunct's death; as almost all these appearances might have arisen from the putrid state the body was then in; and that the only thing that appeared extraordinary to him, was the appearance of the tongue above described: that the deponent had some inclination to have opened the body, and if the two surgeons, who he heard had left Eastmilk that morning, had been there, he believes he might have done so; but as they were gone, and as the deponent, in his own opinion, thought the body too much putrefied, to be opened with safety to the operator; and as he was likewise of opinion, that in such a state of putrefaction, no certain signs could have been discovered of the cause of the death by opening

the body, the deponent declined to do it.* Depones, that the appearance of the tongue before described, was not such as happens in common deaths, but such as occurs from convulsions, or other strong causes. Depones, that lieutenant Ogilvie, the pannel, neither desired nor forbid the deponent to inspect the corpse; but he was present with the deponent when he inspected it as aforesaid. *Causa scientie patet.* And this is the truth, as he shall answer to God. (Signed)

AND. PRINGLE.

JOHN OGILVIE.

Robert Smith, surgeon in Edinburgh, aged 50 years and upwards, a widower, who being solemnly sworn, purged of malice and partial counsel, and examined, depones, That he had once occasion to attend a patient, being a woman, near Ormiston, who had got arsenic and died of it, as the deponent verily believes: that the deponent went and saw the woman about two hours after she had taken the arsenic in some pottage, as she told him: that the deponent, when he came, found her seized with a violent vomiting and a purging: that she complained of a burning heat in her stomach and bowels, and had a great thirst, and drank frequently of milk and water: that the deponent, after staying some time with her, went away, and after a few hours, returned to her again, when he was informed, the before-mentioned symptoms had continued upon her, that is to say, the vomiting, purging, pain, and drought: that she soon thereafter died, having lived, as the deponent thinks, about nine hours after she took the arsenic. Depones, that the deponent next day inspected the dead body of the fore-said woman, and could discover nothing externally upon the body different from the appearances after a natural death; but that, upon opening the body, he discovered the stomach and guts to be red and inflamed, and the stomach appeared to be gangrened, and in parts of the stomach he discovered some arsenic. Depones, that at the time the woman had received the arsenic, as above deponed, a child had likewise taken a spoonful or two of the pottage, which occasioned the child to vomit, and thereby throw up the arsenic, as he believes, so that the child recovered. Being interrogate for the pannels, depones, that a person may be seized with a vomiting, internal pain and drought, without having received arsenic; as these symptoms may occur in a bilious colic and other cases. *Causa scientie patet.* And this is the truth, as he shall answer to God. (Signed)

AND. PRINGLE.

ROBERT SMITH.

George Campbell, sheriff-substitute of Forfar, aged seventy and upwards, *solutus*, who being solemnly sworn, purged of malice and

partial counsel, and examined, depones, That upon looking at the two declarations now exhibited to him, emitted before him by Mrs. Ogilvie the pannel, and other two by Patrick Ogilvie pannel, that all these were emitted freely before him, and faithfully taken down from their own mouths, and subscribed by them before the deponent. And also, that the deponent's name adjoined thereto, is his subscription. Depones, that he, as sheriff-substitute of the county of Forfar, went to Eastmills upon the first of July last, in order to search for papers or letters belonging to any of the pannels: he the deponent did find in a trunk, or drawer, he cannot say which, the letter now exhibited to him, marked by his hand, and that of John Ure his clerk, on the day aforesaid. And another letter being exhibited to him, without date or subscription by the writer thereof, and with a docquet on the back, signed George Spalding, and another docquet below, signed Anne Clark and Alexander Boswell, depones, that to the best of his memory, he thinks he received the said letter inclosed in one wrote by Alexander Ogilvie, the pannel's brother, addressed to the deponent. And a third letter being exhibit to him, signed Ketty Nairn, with a docquet on the back, signed Anne Clark, Alexander Boswell, depones, that he found the said letter in one of the repositories at Eastmills, when he made the search above-mentioned. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)

GILB. ELLIOT.

GEO. CAMPBELL.

John Ure, sheriff-clerk of Forfar, aged forty years, married, being solemnly sworn, purged of malice and partial counsel, and interrogate, depones, That the four declarations now exhibited to him, two by Mrs. Ogilvie pannel, and two by Patrick Ogilvie pannel, were all freely emitted before the preceding witness, and in presence of the deponent, and all signed by him the deponent, by the sheriff-substitute George Campbell, and the pannels. *Causa scientie patet.* And this is the truth, as he shall answer to God. (Signed)

GILB. ELLIOT.

JOHN URE.

The three Letters and four Declarations before deponed to were read to the Court and Jury, and of which the tenor follows:

First Letter.

"Dr Captain

"I was sorrie I missed you this day, I sat at the water-side a long time this forenoon; I thought you would have comed up here; if you had as much mind of me as I have of you, you would have comed up, tho' you had but stayd out-by as there was no use for that, there is more rooms in the house then one. God knows the heart that I have this day and instead of being better its worse, and not in my power to help it. You are not minding the thing that I said to you, or you went out here and what I wrote for. Meant I have not tasted

* See Mr. Burnett's observations on this case, in his Treatise on various branches of the Criminal Law of Scotland, chap. 22, p. 545, and see a note to the Case of Mary Blandy, ante, vol. 12, p. 1118.

since yesterday dinner, nor woot or you com here, tho' I should never eat any it lyes at your door. Your brother would give any thing you would come, for God's sake come."

Second Letter.

"Dr S"

"I received yours just now; I am very glad to hear that you went safe home, no thing could give me great-r pleasure then to here of you being well; Mrs. Spaden was sassely delivert of a daughter last night, and is in a very good way; Mr. Spaden thought it needless to write you as I have wrote you: as for that you write me about any body clattring any noncens you need not be afraid of that about any thing, for I am detrimind not to mind any thing; we shall send to you when Willie and Chairele comes up, but in the mean time I think you may send one Sunday to see and to let us here how you are; the pain will not write for me: I have no more time to write, but my best respects to your mother is all from,
—Dr S^r yours while, KETTY NAIRN."

"Glenkilrie Weensday.

Third Letter.

"Dr S"

"I recved yours, and as you propose coming this day eight days, Mr. Spalding thinks it proper that hi runs an express to Edinburgh to my uncle, which I think very right, and till you heare the consequence thereof, I think you better not trust any writer, which you shall hear the moment the express comes back; as I see you mean nothing but what is genteel, you may expect nothing else at my hand, and tell wee see you heare is all with comp^u to you and feamily—Dr S^r your most humble serv
KETTY NAIRN."

"Glenkilry, Jan. 4, 1765."

Addressed on the back, "To Thomas Ogilvy, esq. of Eastmilm."

FIRST DECLARATION BY KATHARINE NAIRN.

Forfar, 14 June, 1765. In presence of George Campbell, esq. sheriff-substitute, Compeared *Katharine Nairn*, lawful daughter of the deceased sir Thomas Nairn of Dunsinnan, baronet, and relict of the deceased Thomas Ogilvie of Eastmilm, who being examined, declares, That lieutenant Patrick Ogilvie was at Eastmilm when she was married to his brother, and continued there as his proper residence till within these three or four weeks, when he left same, as his brother and he did not agree. That the evening Patrick Ogilvie left Eastmilm, the declarant wrote him a letter, which she sent by Elizabeth Sturrock, one of the maid-servants, to Little Forther, as she was going there, at least about a gun-shot from Little Forther for some whisky from one Robert Easson. Declares, that she did not write any letter to said Patrick Ogilvie when at Glenkilrie, nor to be sent him to one John Spalding's, nor to Glenkilrie. Declares, that on Tuesday before her husband's death she was sending said Elizabeth Sturrock

to Alyth with some yarn, when she wrote a letter by her to deliver to said Patrick Ogilvie relative to some of his shirts she had been mending to him, and the letter was directed to the care of Andrew Stewart, and that she got no return by Elizabeth Sturrock; but that next day she got a return to her letter by said Andrew Stewart, a merchant in Alyth, who was coming to Eastmilm however, and that it was the afternoon of the day before her husband died. That Andrew Stewart, beside the letter, brought her two doses of salts, and a small phial glass with a little laudanum; and that the letter was but a quarter of a sheet of paper, containing mostly directions about the salts, and how much of the laudanum to take; but whether the letter was opened or sealed she does not remember. That before Patrick Ogilvie left his brother's house, she asked him, any time he was at Alyth, to buy for her and send to Eastmilm two doses of salts and a little laudanum, as she slept very ill: that when Andrew Stewart delivered the letter, she read same, being only a direction as above, and after laid the salts and laudanum into a drawer, till she should use same; and that she took one of the doses of salts on the Friday after her husband's death, and the other on the Saturday; and on the Sunday and the Monday nights she took laudanum each night, and as she did not use the whole laudanum, she delivered back the glass, and the remainder of laudanum, to the said Patrick Ogilvie on his return to Eastmilm, after his brother's death. That on Thursday morning the sixth of June, her husband being distressed the night before, and many days preceding; and that morning he complained of a shortness of breath, and that through the night he had been distressed with it; she therefore gave him his tea in his bed; and that when the rest of the family were at their tea, she filled up a bowlful for her husband, which, with a bit of hard bucket from Dundee, she carried straight from the low room, where they were at breakfast, up stairs to her husband's room, and gave him; and that she took the basket out of a basket standing on a by-table in the room, aside the family then sitting at breakfast; but that she did not go into any closet with the tea, before giving it to her husband: that she never heard from her husband, nor any person else, that he blamed the tea for his illness. Declares, that Elizabeth Sturrock got so much of the tea Mr. Ogilvie left, as he did not drink it out, and also got another bowl of tea after, both which she gave her out of her own hands. And this she declares to be truth.
KETTY OGILVIE.

GEO. CAMPBELL. JOHN URE, Clk.

SECOND DECLARATION BY KATHARINE NAIRN.

Forfar, 15 June, 1765. In presence of the said George Campbell, esq. sheriff-substitute, Compeared the said *Katharine Nairn*, alias Ogilvie, who being re-examined, declares, that before the lieutenant left Eastmilm, she heard him say that he had both salts and

laudanum in a chest that he brought from the East-Indies, and that she said she would be obliged to him for a little of the salts and laudanum, as she had much need thereof.

KETTY OGILVIE.

GEO. CAMPBELL.

JOHN URE, Clk.

FIRST DECLARATION BY PATRICK OGILVIE.

Forfar, 14 June, 1765. By George Campbell, esq. sheriff-substitute of Forfarshire, Compeared lieutenant *Patrick Ogilvie*, of the eighty-ninth regiment of foot, who being examined, declares, That so far as he remembers, he came to this country from abroad in January last, and that his principal residence was at the Eastmilk of Glenylla, his brother Thomas Ogilvie's house, and that he left that place about three weeks ago. That the reason he left it, was on account of some dryness betwixt his brother and him, occasioned by some surmises or reports in the country; but though these had not happened, he was determined not to stay longer about his brother's. That since leaving same he has had no fixed residence, but has been going about seeing his friends and old acquaintances. Declares, that evening he left his brother's house, he went to Mr. Shaw's house at Little Forther, and when walking by the water-side there with George Shaw, Elizabeth Sturrock, a servant of his brother Thomas Ogilvie's, brought him a letter from Mrs. Ogilvie his brother's lady, the contents of which were desiring him to return to his brother's house; and that he sent a verbal message, he was not to return at that time, as he then intended going the length of baron Reid's on a visit. Declares, that the next day, when at Little Forther, he received another letter from his brother by James Millam, the contents of which were to the same purpose as Mrs. Ogilvie's which James Millam knew. That some days after, when at Glenkilrie, he received another letter from said Mrs. Ogilvie; but who was the bearer of it he does not remember, nor does he remember if he wrote any answer to that letter. Declares, that he was in Alyth the Tuesday before his brother's death, when he received a third letter from Mrs. Ogilvie by the aforesaid Elizabeth Sturrock, but to which he returned no answer in writing. That the said evening of Tuesday, he gave to Andrew Stewart, merchant in Alyth, his brother-in-law, a small open note, by way of wrapper or direction round a small phial glass in which were some drops of laudanum, and in the wrapper two doses of salts folded close by the glass; and that the write in the note or wrapper properly contained directions for Mrs. Ogilvie how to use the laudanum, and, so far as he remembers, was to take fourteen or fifteen drops at a time. That all this he told to Andrew Stewart, and that it was for Mrs. Ogilvie's own proper use, and to deliver it to nobody else; but did not desire him to do it privately, or to let nobody see him deliver it, only desired him to be sure to deliver it to herself. Neither did he deliver

a sealed letter to Andrew Stewart at the time for Mrs. Ogilvie. That the said laudanum and salts he brought from the East-Indies with him, as a remainder of what he used when his health was bad there, and on his passage home, having done the same by his surgeon's directions both at land and sea. And this he declares to be truth.

PAT. OGILVIE.

GEO. CAMPBELL.

PATRICK ORE, Clk.

JOHN URE, Witness,

SECOND DECLARATION BY PATRICK OGILVIE.

Forfar, 15th June, 1765. By George Campbell, esq. sheriff-substitute. Compeared the said lieutenant *Patrick Ogilvie*, who, being re-examined, declares, That it consists with his knowledge, that of the laudanum he sent as mentioned in his last declaration, there was not above thirty drops or gutts of it used, so far as he can recollect, from the quantity he sent, and what remained in the phial glass the day after his brother's death. That the declarant came to Eastmilk, when Mrs. Ogilvie returned him the glass, and the remainder of laudanum therein, and which he instantly produces, and is immediately sealed up with the declarant's own seal, and lodged in the sheriff-clerk's office. And that when the declarant delivered the glass to Andrew Stewart, he shook the same to him, and shewed him betwixt him and the light the quantity of laudanum therein, who, upon looking at the same just now, must be sensible that there is no more out thereof than about the quantity of thirty gutts as above; and that Mrs. Ogilvie told him she had used about that quantity, and also made use of the salts. Declares, that within these two weeks he was at the town of Brechin, and in company with James Carnegie, surgeon of that place, but that he received from him no laudanum or any other medicine whatever. That when he was at Eastmilk, in the course of conversation with Mrs. Ogilvie, he happened to say that he had some salts and laudanum, that he used when at the East-Indies, in his chest at Dundee, which would be very soon at Alyth; when Mrs. Ogilvie desired to have some of both salts and laudanum, as it might give her rest when uneasy, and could not procure sleep. And this he declares to be truth.

PATRICK ORE, Clk.

PAT. OGILVIE.

JOHN URE, Witness.

GEO. CAMPBELL.

Mr. *James Balfour* of Pilrig, sheriff-substitute of the shire of Edinburgh, aged fifty and upwards, married, who being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, and two declarations or examinations being now exhibited to the deponent, depones, That, at the desire of the lord advocate, the deponent, upon the 22nd of June last, went to the laigh council-house of Edinburgh, where Patrick Ogilvie pannel being brought before him for examination, depones, that the declaration now exhibited to him, signed by the deponent and the said Patrick Ogilvie pannel, is what was emitted by the pannel before the

deponent at that time: that, on the Monday thereafter, the deponent, at my lord advocate's desire, went to the Tolbooth of Edinburgh, in order to examine Katharine Ogilvie the other pannel. The paper now exhibited to him, and signed by him before William Dunbar and John Stewart, both writers in Edinburgh, witnesses subscribing thereto, contains a faithful narrative of what passed on that occasion. *Causa scientie patet.* And this is truth, as he shall answer to God. (Signed) J. A. BALFOUR.

GILB. ELLIOT.

William Dunbar, writer in Edinburgh, aged 44, unmarried, who being solemnly sworn, purged of malice, partial counsel, examined, and interrogate, depones, That the examination of Patrick Ogilvie pannel, mentioned in the deposition of the preceding witness, was emitted in the deponent's presence, and he saw the said pannel and the sheriff-substitute subscribe the same. Another paper being exhibited to him, containing what passed on the examination of Mrs. Ogilvie pannel, by Mr. James Balfour, sheriff-substitute of the shire of Edinburgh, in the Tolbooth thereof, depones, That the said paper contains a faithful account of what passed on that occasion; and that the deponent is a signing witness to the said James Balfour's subscription thereto annexed. *Causa scientie patet.* And this is truth, as he shall answer to God. GILB. ELLIOT. WILL. DUNBAR.

The two Papers before deponed to were read to the Court and Jury, and the tenor thereof follows:

Edinburgh, the 22d day of June, 1765 years.

In presence of Mr. James Balfour of Pilrig, sheriff-substitute of the shire of Edinburgh, compared Patrick Ogilvie, late of colonel Morris's regiment; and being interrogate, Whether he sent any salts to Mrs. Ogilvie of Eastmilk, his sister, or any medicine, or any thing wrapt up in a paper? Refuses to answer this question.

Being interrogate, Whether he was in use to take laudanum and purging salts in one and the same day for his health? Answers, That he was not.

Being interrogate, Whether he had in his possession a bottle of laudanum during his voyage home from the East-Indies? He refuses to answer this question.

Being interrogate, How many gutts or drops of laudanum he was in use to take at a dose? He refuses to answer this question.

Being interrogate, Whether laudanum was in use to bind or loose him while at sea? He refuses to answer this question.

Being interrogate, What was the bulk of each dose of salts he took? Refuses to answer this question.

Being interrogate, Whether he sent a bottle to the said Mrs. Ogilvie by the hands of Andrew Stewart? and whether he told Andrew Stewart that there were salts along with the bottle? Refuses to answer this question.

Being interrogate, What was the nature of

the surprises and reports, which occasioned a dryness betwixt him and his brother Eastmilk? He refuses to answer this question.

Being interrogate, What were the contents of any letters sent to him by the said Mrs. Ogilvie, after that the declarant had left his brother's house this summer? and what were the contents of the answers he made to them? Refuses to answer this question.

Being interrogate, When he first heard of his brother's illness, and from whom? Refuses to answer this question.

Being interrogate, Whether he had any conversation with his mother, or any of the family, or in the family, as to the nature of his brother's distemper, or cause of his death? Refuses to answer this question.

Being interrogate, Whether he slept in the house of Eastmilk after his brother's death? for how many nights, in what room, and who slept in the room with him? He refuses to answer any of these questions.

Being interrogate, In what room the said Mrs. Ogilvie slept during the nights between the death and burial of her husband? He refuses to answer this question.

Being interrogate, Whether he did ever send for any medicines from one Dongal, a surgeon in Kerriemuir? or did ever hear any body send for any medicines from him? He refuses to answer this question.

Being interrogate, Whether he has had any conversation with any of his brother's servants concerning the circumstances which happened on the day of his brother's death? He declines answering this question.

Being interrogate, Whether, while he was in the prison of Forfar, he sent any messages by word or writing to the said Mrs. Ogilvie? He refuses to answer this question.

Being interrogate, Whether he is acquainted with one Mr. Carnegie, a surgeon in Brochin? or whether he ever bought any medicines or poison from the said Mr. Carnegie? He refuses to answer this question.

Being interrogate, Whether he recollects what time his deceased brother was married? Answers, He does not recollect just now.

Being interrogate, Whether he the declarant was present at the marriage? Answers, That he was.

Being interrogate, Whether he was acquainted with the said Mrs. Ogilvie before her marriage with his brother? Answers, That he was not.

Being interrogate, Whether he absolutely refuses to answer the above questions, which it is said above he refuses, or declines to answer? or whether he declines at present to answer them? He now answers, That he absolutely refuses to answer them to-night; but he does not know, whether he may hereafter answer some of them or not.

And being interrogate, Whether he inclines to give any reason for this refusal? Answers, That he does not think it necessary to give any reasons.

This Declaration and Answers were emitted in presence of William Dunbar and William Campbell, writers in Edinburgh.

J. A. BALFOUR. PAT. OGILVIE.

Edinburgh, the 24th day of June 1765 years.

In presence of Mr. James Balfour of Pilrig, advocate, sheriff-substitute of this sherriffdom of Edinburgh, Compeared Mrs. Katharine Nairn, widow of the deceased Thomas Ogilvie of Eastmilm; and a copy of two several Declarations emitted by her, upon the 14th of June instabt, before George Campbell, esq. sberiff-substitute of Forfar, and subscribed of this date by the said Mr. James Balfour, being read over to her, she was asked, If there was any thing in the said Declarations which she now desired to correct or alter? She refused to answer this or any other question put to her, having been so advised by her friends and counsel: and the following questions were separately put to her.

In what drawer and in what room in the house did she put the medicines and letter which were delivered to her by Andrew Stewart, the day before her husband's death?

Did she read the letter? What were the contents? Has she the letter? or how has she disposed of it?

By whose advice did she order the above medicines to be sent to her?

What was her ailment? Did she mention such ailment to any in the family? Did she mention her ailment to lieutenant Ogilvie? If she did, how came she to take his advice about her health?

Did she sleep with her husband the night before her death? When did she first see and speak to him next morning, the 6th of June?

Was she in use to give him tea in his bed? Did he desire tea that morning? Did any body see her make the tea and fill the bowl for her husband? Did she carry up the tea from the place where it was made straight to his room? Did he refuse or shew any unwillingness to take it? Did she give any of the tea which her husband had drunk to any other person?

Did any body propose sending for a surgeon when her husband was taken ill? Did she oppose the surgeon being sent for? And what was the reason for so doing?

Where did she sleep from the time of her husband's death, till the time of her commitment to the prison of Forfar?

Where did lieutenant Ogilvie sleep during that time?

How many letters did she write to lieutenant Ogilvie from the time he was dismissed from her husband's family? If she sent any letters, mention how many, by whom sent, and to what places sent, and what were the contents, and what answers she received. Does she know what is become of these letters and answers?

To all and each of which questions, put separately to her, she refused to give any answer. And further refuses to adhibite her subscription hereto.

In witness whereof, the said Mr. James Balfour, William Dunbar, writer in Edinburgh, and John Stewart, writer there and hereof, have adhibited their subscriptions, time and place foresaid.

(Signed)

Witnesses

J. A. BALFOUR.

WILLIAM DUNBAR.

JOHN STEWART.

James M'Kenzie, session-clerk of Glenylla, aged forty years, married, who being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That some time after the late Eastmilm's death, the deponent was in the house of Eastmilm, where Alexander Ogilvie, brother of the late Eastmilm, likewise was: that he saw the said Alexander Ogilvie have several papers in his hand, one of which, he said, he was to send to Forfar; as it might be evidence against Mrs. Ogilvie the pannel; and that the deponent looked at that paper, and saw that it was in the form of a letter without a subscription; but the deponent did not read it, nor hear it read: and a letter libelled upon, beginning Dr Captain, and indorsed on the back by the names of George Spalding and George Campbell, being now exhibited to the deponent, he depones, that he cannot now say positively whether or not that is the letter shewn to him by Alexander Ogilvie as aforesaid; but thinks it is like it. *Causa scientie patet.* And this is truth, as he shall answer to God.

(Signed)

AND. PRINGLE.

J. A. M'KENZIE.

James Millan, tacksman of the Eastmilm of Glenylla, aged thirty-six years, married, and being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That, during the late Eastmilm's illness, upon that day on which he died, the deponent was sometimes in the room with him, particularly about two o'clock in the afternoon, when the deponent asked the late Eastmilm, how he was? To which Eastmilm answered, That he was very ill: and the deponent further asked him, What he thought was the matter with him? To which Eastmilm answered, I am gone, James, with no less than rank poison! *Causa scientie patet.* And this is the truth, as he shall answer to God.

(Signed)

AND. PRINGLE.

JAMES MILLAN.

George Spalding of Glenkilrie, aged thirty and upwards, who being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That he is married to a sister of Mrs. Ogilvie the pannel, and has had frequent occasion of seeing Mrs. Ogilvie's hand-writing; and a letter, without a subscription, beginning Dr Captain, and indorsed on the back by the subscriptions of George Spalding and George Campbell, being exhibited to the deponent, he depones, that he thinks that letter is of the hand-writing of Mrs. Ogilvie the pannel; but cannot be quite positive, as he has seen her write sometimes better, and sometimes worse, according as her pen was. *Causa*

scientie patet. And this is truth, as he shall answer to God. (Signed)

AND. PRINGLE.

GEO. SPALDING.

Alexander Lindsay, late servant to the deceased Thomas Ogilvie of Eastmilk, aged twenty-one, unmarried, who being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That he came to be a servant at Eastmilk about six o'clock of the morning of that day on which Eastmilk died: that, about nine o'clock that morning, he saw Mrs. Ogilvie the pannel standing in a closet up stairs between the two bed-rooms: that the deponent was going up to the garret to take down a wheel: that the door of the closet was open; but the deponent did not go into the closet; and that he did not then observe any thing that Mrs. Ogilvie was doing, nor that she had any thing in her hand; and that, when the deponent went up to the garret, Mrs. Ogilvie called up to him not to walk over the closet for fear of shaking down something. Depones, that when he was in the garret, he saw Anne Sampson standing at the stair-head, near the closet where Mrs. Ogilvie was. *Causa scientie patet.* And this is truth, as he shall answer to God. (Signed)

AND. PRINGLE.

ALEX. LINDSAY.

His Majesty's Advocate declared he concluded his Proof.

The following Witnesses were adduced by the pannels, for proving their exculpation.

List of Witnesses summoned for Katherine Nairn.

The witnesses so marked * were examined.

- 1 * George Spalding of Glenkilrie.
- 2 Andrew Stewart, merchant in Alyth.
- 3 Martha Ogilvie his wife.
- 4 Lieutenant George Campbell, late of the 89th regiment of foot, at Phinhaven.
- 5 Patrick Dickson, merchant in Brechin.
- 6 Colin Smith, vintner there.
- 7 James Rattray of Kirkhilllocks.
- 8 Anne Robertson his wife.
- 9 Alexander Lindsay, late servant to the said deceased Thomas Ogilvie of Eastmilk.
- 10 * George Campbell, esq. sheriff-substitute of the county of Forfar.
- 11 John Ure, sheriff-clerk of Forfar.
- 12 Fergus Fergusson, in Kirkton of Glenylla.
- 13 * Margaret Rait his wife.
- 14 * James Millam, tacksman of the Eastmilk of Glenylla.
- 15 David Spalding of Whitehouse.
- 16 Isobel M'Kenzie, widow of the deceased Thomas Ogilvie sometime of Eastmilk, and mother of the said last deceased Thomas Ogilvie of Eastmilk.
- 17 David Watson, miller at Eastmilk of Glenylla.
- 18 Thomas Farquharson, eldest son of Paul Farquharson of Persie.
- 19 John Farquharson at Formall.

- 20 Gilbert Ramsay, surgeon in Coupar of Angus.
- 21 * Jean Wallace, servant to George Spalding of Glenkilrie.
- 22 * John Paterson, son of James Paterson, in Clocknecater in Glenylla.
- 23 Andrew Paterson, also son of said James Paterson.
- 24 * Margaret Paterson, daughter to the said James Paterson.
- 25 Katharine Fergusson, daughter of Fergus Fergusson, in Kirkton of Glenylla.
- 26 Ja. M'Kenzie, schoolmaster at Glenylla.
- 27 James Dougal, surgeon in Kerriemuir.
- 28 * Elizabeth Fergusson, spouse to John Breach, portioner of Inverarity.
- 29 Alexander Robertson at Binscan.
- 30 Alexander Ramsay at Bridge-end of Lintrathen.
- 31 Janet Irons, spouse to William Glass at Burnside of St. Martin's.
- 32 * Isobel Douglas, at Wardhead of Formall.
- 33 Mr. James Wardon, schoolmaster at Alyth.
- 34 Patrick Ramsay at Achmuir.
- 35 * Thomas Jack, tenant in Kirkton of Glenylla.
- 36 Thomas Ogilvie, in Little Krauy.
- 37 John Ramsay of Kinalty.
- 38 James Manson, servant to Colin Smith, vintner in Brechin.
- 39 Thomas Morgan, vintner in Dundee.
- 40 Helen Knight, his servant.
- 41 Helen Sinclair, spouse to Robert Dow in Dundee.
- 42 Charles Farquharson, watchmaker there.
- 43 Patrick Ogilvie, shipmaster there.
- 44 James Kay, jun. mariner there.
- 45 James Dickson, stabler at Cowgate-Head of Edinburgh.
- 46 Robert Horon, shoemaker there.
- 47 John Gardiner, stabler there.
- 48 — Gardiner, his wife.
- 49 Anne Younger, spouse to Charles Ramsay, barber in Edinburgh.
- 50 David Murray, stabler there.
- 51 Joseph Baron, porter at the foot of Merlin's-Wynd, Edinburgh.
- 52 Christian Ogilvie, his wife.
- 53 Andrew Murison, macer to the Court of Justiciary.
- 54 — Murison, his wife.
- 55 Robert Gibb, coachmaster in Cannongate-Head.
- 56 Mary Dallas, his wife.
- 57 Thomas Miller of Barnkimming, esq. his majesty's advocate.
- 58 John Davidson, writer to the signet.
- 59 Mrs. — Hay, widow of — Cuthbert of Castlehill.
- 60 Donald Farquharson, cadie or council-post, and residenter in Edinburgh.
- 61 John Laing, journeyman wright, foot of Old Assembly-Close, Edinburgh.
- 62 Francis Shaw, carpenter, son of Duncan Shaw at Cortachie.
- 63 — Robertson, son of John Robertson of Cray.

- 64 — Farquharson, wife of — Wallace, porter and indweller in Edinburgh.
- 65 John Farquharson, some time in Sheithie, now in ground of Dirie.
- 66 Elizabeth Sturrock, late servant to the deceased Thomas Ogilvie of Eastmilk.
- 67 Anne Sampson, late servant to the said deceased Thomas Ogilvie.
- 68 Dr. Robert Menzies, physician in Coupar in Fife.
- 69 — Moir, wife of the said Dr. Robert Menzies.
- 70 — Hay, relict of — Bruce of Bunszean.
- 71 George Rodger, sawyer of timber in North Leith.
- 72 John Rodger, his son.
- 73 Mrs. Sarah Young, late boarding-mistress in Edinburgh, now in —
- 74 James Rattray, porter or workman in Edinburgh.
- 75 Margaret Spalding, his spouse.
- 76 Anne Rattray, spouse to Alexander Ogilvie, brother to the said deceased Thomas Ogilvie of Eastmilk.
- 77 Thomas Black, late surgeon in Dundee, now in Perth.
- 78 Mr. James Hill, preacher of the gospel, residing at Wester Gowrdie.
- 79 John Sword, merchant in Edinburgh.
- 80 John Ballantyne in Kirkton of Glenylla.
- 81 John Shaw, tenant in Downie.
- 82 James Rob, tenant in Tullich.
- 83 John Farquharson at Dikehead, in ground of Dirie.
- 84 * James Scott, late druggist in Edinburgh, now in Alloa.
- 85 Dr. James Christie, late of Keith.
- 86 George Jaffray, writer in Edinburgh.
- 87 James Smith, writer in Edinburgh.
- 88 Anne Cameron, spouse to Alexander M'Gregor, stabler there.
- 89 Henry Walker, late servant to Peter Fyfe, stabler in Edinburgh.
- 90 Jean Haig, widow of John Allan, baker in Edinburgh.
- 91 Charles Stewart, taylor in Edinburgh.
- 92 John Armstrong, writer there.
- 93 Francis Carlyle, writer there.
- 94 John Fenton, journeyman painter in Edinburgh.
- 95 James Rae, writer in Edinburgh.
- 96 John Pearson, writer there.
- 97 James Corrie, writer there.
- 98 James Harrower, writer there.
- 99 Gilbert Stewart, writer there.
- 100 Janet M'Laughlan, servant to John Gilloch in Dalnakebock.
- 101 Isobel Robertson, wife of Alexander M'Kenzie in Inverdry.
- 102 Bethia Nairn, spouse to George Spalding of Glenkilrie.
- 103 Dr. Adam Austin, physician in Edinburgh.
- 104 Dr. — Clerk, physician in Edinburgh.
- 105 Dr. Stewart Threipland, physician there.
- 106 John Scott, son to Dr. James Scott, physician in Alloa.

- 107 James Carnegie, surgeon in Brechin.
- 108 Mrs. Margaret Murray, relict of Archibald Eagle, seed-merchant in Edinburgh.

The List of Witnesses summoned for lieutenant Patrick Ogilvie is the same as the above, with the omission of the 108th.

N. B. The List of Witnesses summoned for the Prosecutor, the List of Assize given out in the Indictment, and the List of Witnesses summoned for the Pannels, are not engrossed in the Record.

George Spalding of Glenkilrie, aged 30 and upwards, married, who being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That in February last, he wrote a letter to the lady Nairn, pressing her ladyship that infestment should be taken in favour of Mrs. Ogilvie of Eastmilk, upon her contract of marriage, because her husband Eastmilk appeared to be in a bad state of health. Depones, that for some years past, Eastmilk appeared to him to be in an indifferent state of health, complaining often of a heart-cholic, or a pain in his stomach, attended with a short cough, which was not continual, but which seldom left him. Depones, that he wore a plaiden jacket, and a belt round his middle, much broader than ever he saw another wear, with lappets of leather hanging down his haunches: that, upon his marriage, he took off these happenings. Depones, that before he got the said broad belt, he wore a striped woollen night-cape upon his breast, the lower end of which reached near his breeches; but never observed him wear it after he got the belt. Depones, that about six years ago, the deponent was told, that Mr. Ogilvie of Eastmilk had an ulcerous fever; after which the deponent saw him frequently, but never saw him look so well as formerly. Depones, that the old lady Eastmilk told the deponent, that her son Eastmilk was about 40 years of age when he died. Depones, that Eastmilk was married the 30th day of January last. Depones, that when Eastmilk was complaining of the said pain of his stomach, in the deponent's house, he the deponent has frequently given him a dram to comfort him; and particularly a little before Eastmilk's marriage, Eastmilk being ill of the said disease in the deponent's house, he got hot ale and whiskey, with a scrape of nutmeg in it, and was put to bed without any supper. Depones, that he does not certainly know how old Mrs. Ogilvie the pannel is, but believes her to be about twenty-one. *Causa scientia patet.* And this is truth, as he shall answer to God.

(Signed) GEORGE SPALDING.

HENRY HOME.

James Millam, tacksman of the Eastmilk of Glenylla, formerly sworn this day on the part of the prosecutor, and now examined on his said oath, on the part of the pannels, depones, That the very next day after lieutenant

Ogilvie had left the house of Eastmilk, Eastmilk employed the deponent to carry a letter to his brother, and he read this letter to the deponent, the contents of which the deponent has forgot, further than that it contained a request to the lieutenant to return to Eastmilk: that upon this occasion the deponent was informed by Eastmilk of indecent familiarities which his mother told him had passed betwixt the lieutenant and his wife Mrs. Ogilvie; but that for his part he did not believe them: that the deponent delivered the letter according to his instructions, and received an answer from the lieutenant, which was also read to him by the lieutenant, importing the lieutenant's declining to return to the house of Eastmilk, because of the reports that were raised against him. Depones, that reports were in the country of indecent familiarities betwixt the two pannels: that he knows not what gave rise to these reports; but that for his part he never saw any indecencies betwixt them. Depones, that his dwelling-house is within a penny-stone east of the house of Eastmilk, and that he has been frequently in that house. Depones, that he was very well with Eastmilk; and that if any thing concerned Eastmilk, he would have imparted it to the deponent as soon as to any other. Depones, that Eastmilk, four days before his death, complained to the deponent of a gravel, and a cholic: and that he could not live, if he got not the better of it: that on the evening of the Tuesday before his death, he went into the deponent's house, saying he was cold, and ordered some shilling seeds to be set on fire for warming him: that he complained of his being ill, refusing to eat, and saying he would have no other supper but the fire; and that he was fading as fast as dew goes off the grass. Depones, that the same night was not cold. Depones, that Eastmilk, the night before he died, was again in the deponent's house, and said he was no better. Depones, that the day after Eastmilk died, he saw the lieutenant sitting on a bed-side of the house of Eastmilk, with his mother on the one hand, and Dr. Meik on the other; and that he could not be pacified: that Mrs. Ogilvie was in another room, and did not see her: that the lieutenant, in the situation above-described, was gushing out of tears. Depones, that he does not know whether there was any quarrel betwixt Mrs. Ogilvie and Anne Clark before Eastmilk's death; but that Eastmilk complained to him, that he could not get peaceable possession of his own house for Anne Clark: that he wished her away; and that he got from the deponent a ten-shilling note for the expence of her journey. Depones, that upon the Monday after Eastmilk's death, Anne Clark left the house of Eastmilk; and that the deponent saw her get money from Mrs. Ogilvie the pannel immediately before her departure. Depones, that when the mournings came home upon occasion of Eastmilk's death, Anne Clark commanded to the deponent for want of a mourn-

ing apron, adding, that she should make it as dear to them as if it was a gown, meaning the pannels, as he understood; and his reason for understanding so, was, that it was the lieutenant who sent for the mournings. Depones, that the day Eastmilk died, he was sent for to see him; and that he came about 12 o'clock, at which time there was no person with him but Anne Clark: that upon that occasion he staid but a very short time: that he returned about an hour thereafter, and several other times till Glenkilrie came: that he saw several persons in the room besides Glenkilrie, who came to see Eastmilk; but that he does not remember their names. And being interrogate for the prosecutor, depones, with respect to the letter which he got from Eastmilk to deliver to his brother the lieutenant, that he now recollects a passage in it, importing, that Eastmilk was to go to Edinburgh, to stay there a fortnight, perhaps a month, or six weeks. Depones, that the said letter, which the deponent carried from Eastmilk to his brother the lieutenant, was inclosed by the lieutenant in the said letter which the lieutenant wrote in return, and which letter the deponent put in his pocket without looking at the direction: that he offered the said letter to Eastmilk, which Eastmilk, without opening it, bade the deponent give to his wife—because it was directed to her; and which he did accordingly. And being further interrogate for the prosecutor, How it came, that when the lieutenant's letter was read over to him, that he did not know it was addressed to a woman? depones, that he took no notice of this, but only of the lieutenant's refusing to return to the house, because of the reports raised against him. Depones, that before the day on which Eastmilk died, the deponent never heard that he was ever troubled with any violent vomitings or purgings. Being interrogate, Whether, to the deponent's knowledge, Eastmilk did not continue in the same state of health after his marriage that he was for a year before? depones, that he never heard him complain before his marriage; but has heard him often complain after it, though he was as intimate with Eastmilk before his marriage as after it. *Causa scientia patet.* And this is truth, as he shall answer to God. And being further interrogate, depones, that the Monday after the pannels were put in Fofsargaul, Alexander Ogilvie, youngest brother to Eastmilk, roused the stocking upon the farm of Eastmilk that belonged to his deceased brother: that he gave it out, that he did this by authority of a letter from his brother the lieutenant: that he received the ready money got at the roup; and that the bills were taken payable to him at Martinmas next. And this is also truth, as he shall answer to God. (Signed)

HENRY HOME.

JAMES MILLAM.

Jean Wallace, servant to George Spalding of Glenkilrie, unmarried, aged 30 and upwards, being solemnly sworn, purged of malice and partial counsel, examined, and interro-

gate, depones, That she was servant in the deceased Eastmilk's family for three years, and left it, as she thinks, about six years ago: that the last year she was in his service, as she thinks, Eastmilk had an ulcer, and was attended by Dr. Ogilvie: that since that time the deponent had little occasion to see Eastmilk, and did not hear him make any complaints of his health; but that the deponent from his looks did not think he was in good health. Depones, that while he was bad of the ulcer, he was confined, as she thinks, for six weeks, and she herself sat up frequently with him. *Causa scientie patet.* And all this is truth, as she shall answer to God. And depones, she cannot write. (Signed) ALEX. BOSWELL.

Isobel Douglas at Wardhead, dismissed of consent of the pannels.

Thomas Jack in Kirkton of Glenylla, married, aged 40 and upwards, being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That about ten o'clock of the day upon which Eastmilk died, the deceased Eastmilk told him, that he had been out the day before visiting some of his tenants biggings; and that he was very bad that day, and had been obliged to rest himself three times; but told the deponent, that he was better that morning; and that he told the deponent, that he had been a mile, or a mile and a half, from home the day before. *Causa scientie patet.* And all is truth, as he shall answer to God. (Signed)

ALEX. BOSWELL.

THOMAS JACK.

Elizabeth Ferguson, spouse to John Bre-sack, portioner of Invercarity, aged 35, or thereby, being solemnly sworn, purged of malice, examined, and interrogate, depones, That the day before Thomas Ogilvie of Eastmilk died, the deponent saw him in her own house, which is, as she thinks, about three miles from Eastmilk: that he was on foot: that he told her he was not very well; and that he had been taken ill, as he said, when he was going home some time before that, and had not got the better of it, or was not much better yet. *Causa scientie patet.* And all is truth, as she shall answer to God. And depones she cannot write. (Signed) ALEX. BOSWELL.

John Paterson, son of James Paterson in Clocknocator of Glenylla, married, aged 22 years and upwards, being solemnly sworn and interrogate, depones, That he saw Eastmilk the day before he died about a mile from his own house: that he was going west to see some of his tenants biggings: that Eastmilk complained to the deponent that he was sick: that he said his bowels were all sore; and that he had not been so ill for six years: that he lay down and took a sleep upon the ground: that the deponent's sister, Margaret Paterson, was with the deponent at this time, and none other. *Causa scientie patet.* And all is truth, as he shall answer to God. (Signed)

ALEX. BOSWELL.

JOHN PATERSON.

VOL. XIX.

Margaret Paterson, daughter of James Paterson in Clocknocator of Glenylla, unmarried, aged 30 or upwards, being solemnly sworn, purged, and interrogate, *ut antea*, depones and concurs with her brother the preceding witness in all things; with this addition, that Eastmilk likewise complained of sore bones. *Causa scientie patet.* And being further interrogate, depones, that Eastmilk after this went further west, and did not return home that she saw. And depones, all this is truth, as she shall answer to God. (Signed)

ALEX. BOSWELL.

Margaret Rait, spouse to Fergus Fergusson in Kirkton of Glenylla, aged about 60 years, being solemnly sworn, purged, and interrogate, depones, that she saw the deceased Eastmilk in her own house, which is about a quarter of a mile distant from his, the day before he died: that Eastmilk told her that he was not well, and he behaved to get Dr. Ogilvie to give him something to do him good: that Eastmilk was then walking, and had come from the hill. *Causa scientie patet.* And all is truth, as she shall answer to God. And depones she cannot write. (Signed)

ALEX. BOSWELL.

Doctor James Scott, physician in Edinburgh, married, aged about 40, being solemnly sworn, purged of malice and partial counsel, examined, and interrogate, depones, That he has made sundry experiments upon arsenic: that he knows it will not dissolve in warm water; and that the common arsenic that is to be met with in the shops, although pretty fine pounded, falls to the bottom of a vessel with water almost instantaneously: that it never puts on a greasy appearance. But being further interrogate upon the part of the prosecutor, depones, that if arsenic be put into a bowl of tea with milk and sugar, that, if it was stirred round, the arsenic would be suspended so long, that it would kill a person that had drunk it; and if there was honey in the bowl, the arsenic would be still more suspended thereby. *Causa scientie patet.* And all this is truth, as he shall answer to God. (Signed)

ALEX. BOSWELL.

JAMES SCOTT.

George Campbell, of Carsegownie, sheriff-substitute of Forfarshire, a witness formerly solemnly sworn, and examined on the part of the prosecutor, depones, That some time after the late Eastmilk's death, the deponent went to the house of Eastmilk to make a search for any thing that might appear there to clear up the cause of Eastmilk's death: that the deponent not having the keys of the drawers in the house, broke up several of them, and particularly the drawers of what was said to be the late Eastmilk's cabinet: that in one of these drawers he found some brownish white powder, wrapped up in two or three small parcels: that the deponent not knowing what that powder was, carried it away with him, and afterwards shewed it to James Carnegie, surgeon in Bre-

chin, and asked him, What kind of powder he took it to be? and particularly, Whether or not he thought it was arsenic? That James Carnegie, after looking attentively upon the powder, declared, that he did not know arsenic but by the effects of it; and could not say, upon sight, whether that powder was, or was not arsenic. Depones, that Alexander Ogilvie, brother to the late Eastmilk, was not present with the deponent either at the foresaid search at the house of Eastmilk, or when he shewed the powder to James Carnegie, as aforesaid. Depones and produces some of the powder foresaid which he found at Eastmilk; which powder, upon the opinion of Dr. Cullens, physician in Edinburgh, and Mr. James Russel, surgeon there, who tried it before the Court and the jury, he believes to be saltpetre. *Causa scientie patet.* And this is the truth, as he shall answer to God. (Signed)

AND. PRINGLE.

GEO. CAMPBELL.

The Procurators for the pannels renounced all further probation.

"Betwixt the hours of one and two o'clock in the morning of the 14th current,

"The Lords Commissioners of Justiciary ordain the assize instantly to inclose in this place, and to return their Verdict at four o'clock this afternoon, being the 14th day of August current, and appoint the hail fifteen assizers then to be present, and the pannels in the mean time to be carried back to prison; and continue the diet to that time."

CURIA JUSTICIARIE S. D. N. Regis, tenta in Nova Sessionis Domo de Edinburgh, decimo quarto die Augusti, anno millesimo septingentesimo sexagesimo quinto, per Honorabiles Viros Dominum Gilbertum Elliot de Minto, Baronetum, Dominum Justiciarium Clericum, Alexandrum Boswell de Auchinleck, Andream Pringle de Alameor, Jacobum Ferguson de Pitfour, et Georgium Brown de Coalston, Commissionarios Justiciarum S. D. N. Regis.

Curia legitime affirmata.

Intra'

Katharine Nairn and Patrick Ogilvie, pannels:

Indicted and accused as in the foregoing Sederunt.

The persons who passed upon the assize of the said pannels returned the following Verdict:

"At Edinburgh, the fourteenth day of August, one thousand seven hundred and sixty-five years. The above assize having inclosed, did make choice of the said sir George Suttie of Balgonie, baronet, to be their chancellor, and the said Alexander Sheriff of Craigleith to be their clerk; and having considered the criminal indictment

raised and pursued at the instance of Thomas Miller of Barskimming, esq. his majesty's advocate, for his majesty's interest, against Katharine Nairn, widow to the deceased Thomas Ogilvie of Eastmilk in the county of Forfar, and Patrick Ogilvie, lieutenant of the eighty-ninth regiment of foot, brother-german to the said deceased Thomas Ogilvie, pannels, with the lords justice-clerk and commissioners of justiciary their interlocutor pronounced upon the relevancy thereof, together with the depositions of the witnesses adduced by the prosecutor for proving the same, and the depositions of the witnesses adduced for the pannels in exculpation, they, by a great plurality of voices, find the pannels guilty of incest, as libelled, during the life of the now deceased Thomas Ogilvie of Eastmilk: and they further find, by a great plurality of voices, the said pannel Katharine Nairn guilty of murder, by poisoning the said Thomas Ogilvie her husband; and the said lieutenant Patrick Ogilvie, pannel, guilty art and part thereof. In witness whereof the said chancellor and clerk have subscribed these presents upon this and the preceding page, place and date foresaid, in their name and by their appointment.

(Signed) GEO. SUTTIE, Chan.

ALEX. SHERIFF, Clk.

Immediately upon the reading of the above verdict, his majesty's advocate judicially appeared in court, and craved that the lords might proceed to pronounce a sentence condemnator upon the said verdict.

Mr. Alexander Lockhart, as procurator for both pannels, represented, That, during the short space of time that he and the other counsel for the pannels have had to recollect the proceedings in the course of this trial, and upon hearing the verdict itself, as now read in court, sundry particulars have occurred to the counsel for the pannels, which they are humbly to insist upon as jointly and severally relevant why no judgment can pass against them upon this verdict; and as, in support of some of these, there will be occasion to refer to the records of the proceedings themselves, which till now have been in the hands of the jury; and as it is their earnest desire to state these in the most proper and becoming manner, he therefore moved the Court, in behalf of both pannels, that they be allowed a reasonable time to prepare, state, and support the particulars, of the heads of which they shall furnish a note to his majesty's advocate this very night.

Advocatus answered, That the record of the trial has been open, and subject to the consideration of the counsel for the pannels, during the whole course of the trial: that, if any objection is to be taken against the course of procedure during the trial, it is necessary that such objection should be taken and tried before the jury is discharged: but as the counsel for the pannels have moved no objection or plea in

arrest of judgment, and have only moved for a delay, in order that they may have further time to find out and move such plea, he insisted, That this is no plea; and therefore craved judgment upon the verdict, unless the counsel for the prisoners shall state a special and legal plea, why such judgment should not pass.

"The Lord Justice-Clerk and Commissioners of Justiciary, having considered the foregoing debate, declare, That they will proceed to give judgment upon the verdict, unless the procurators for the pannels will forthwith state special reasons in arrest of judgment.

(Signed) "GULB. ELLIOT, I. P. D."

"The Lord Justice-Clerk and Commissioners of Justiciary, having heard the procurators for both parties, upon the reasons for arrest of judgment, they appoint a minute of debate to be made up and ingrossed in the record of court; and supersede advising the said verdict and debate till to-morrow at eleven o'clock before noon; and continue the diet till that time; and ordain the pannels to be carried back to prison."*

CURIA JUSTICIARIE S. D. N. Regis, tenta in Nova Sessionis Domo de Edinburgh, decimo quinto die mensis Augusti, anno

* "The Court may either proceed forthwith on receiving the verdict, or they may adjourn for that purpose, at their pleasure, to some later day. If however they choose to proceed, and the prosecutor move them to that effect, it will then lie with the pannel immediately to propose his reasons, if he any have, in arrest of judgment. For although the Court may if they please, and always will when it is proper, allow his counsel full time farther to enforce and support any plausible objection which has once been stated; yet it cannot be asked, as matter of right, to give a delay for the purpose of scrutinizing the verdict, and searching for flaws, where none can be discovered at the time. Such a motion was overruled in the case of Nairn and Ogilvie, Aug. 14, 1765; where throughout the trial, the counsel for the pannels had conducted the defence in too zealous a fashion, and one which was somewhat disrespectful to the bench. On their moving to be allowed some time to digest and prepare reasons of exception to the verdict: "The lords, &c. having considered the foregoing debate, declare that they will proceed to give judgment upon the verdict, unless the procurators for the pannels will forthwith state special reasons in arrest of judgment." If such reasons are pleaded, it is also in the option of the Court either straightway to dispose of them, or to name a day for deliberating on the subject, and make an order, if they see cause, for laying the debate before them, in some written shape, for their more mature consideration." Hume's Comm. Trial for Crimes, vol. 2, c. 17, p. 332.

millesimo septingentesimo sexagesimo quinto, per Honorabiles Viros Dominum Gilbertum Elliot de Minto, Baronetum, Dominum Justiciarium Clericum, Alexandrum Boswell de Auchinleck, Andream Pringle de Alemoor, Jacobum Ferguson de Pitfour, et Georgium Brown de Coalston, Commissionarios Justiciarum dict. S. D. N. Regis.

Curia legitimè affirmata.

Intran'

Katharine Nairn, and Patrick Ogilvie, present prisoners in the Tolbooth of Edinburgh; pannels:

Indicted and accused as in the preceding Sederunts.

Lockhart, Rae, Crosby, and Dundas, for the pannels, by this minute, represented, That no judgment ought to pass on this verdict, in respect that, so far as any thing is found against the pannels, the same is void and null; the proceedings in the course of this trial having been most informal and irregular. Particularly, between the hours of three and four of the afternoon of Monday the 12th instant, the jury arose from their seats, and dispersed into different corners of the house; some of them, on that occasion, even going out of the room where the Court sat; and continued so dispersed, eating and drinking, and conversing in private with different persons, and particularly, with the counsel for the prosecutor, for the space of half an hour and better, a witness being then under examination, and a part of her deposition reduced into writing before they had so dispersed; till at last the clerk, at the desire of one of the judges, called over the list of assize, when they again assembled and took their seats, one or more persons having conversed in private with the witness then under examination, during the time the jury had been dispersed; the said witness being Anne Clark, against whom objections had been proposed by the pannels, but over-ruled, and a protest for reneid of law taken thereon. This, it is apprehended, was an actual adjournment of the trial; at least, it had all the bad effects of an adjournment, an opportunity being given to converse with the jurymen in private, to solicit them, and to offer evidence, which the pannels and their counsel had no opportunity to see or hear; an event which the law of this country has been particularly careful to avoid; and has considered the preventing such things, and giving absolute security against them, to be a fundamental point in a trial by jury, as appears by the act 1587, chap. 91, whereby, "Our sovereign lord, considering the wrangles alledged sustained by diverse noblemen and others, lieges of this realme, being accused of treason, be sollesiting, boasting, and menacing of the assize, after they were inclosed, the accusers and others persones, their favourers, having liberty to pass to the said assize, and to produce to them sick writs and witnesses,

and uther probation, as they pleased, to verify the crime outwith the presence of the partys accused; quhairby the just defence of their lives, lands, and honours, was taken away; therefore our said sovereign lord, with advice and consent of the estates of this present parliament, has statuted, declared, and ordained, That in all times coming, the hail accusation, reasoning, writes, witnesses, and uther probation, and instruction whatsoever of the crime, shall be alledged, reasoned, and deduced to the assize in presence of the party accused, in face of judgment, and no otherways."

From which statute it is plain, the legislature meant effectually to guard against every opportunity of making any impression upon the minds of jurymen, excepting by what was said and done in open court, and in presence of the pannels; and all the salutary effects of this statute must be eluded, if opportunity is given for the counsel for the prosecutors, or others, to sollicite, practise upon, or argue with the jurymen, during the course of the trial, in private, by permitting them to leave their seats, disperse through the house, and converse privately with whatever person they think proper: that, in like manner, about four of the clock in the morning of Tuesday the 13th of August, at least, between the hours of three and five of the morning of that day, the jury dispersed again in the same manner; and, in their absence, part of the deposition of Elizabeth Sturrock, one of the witnesses, was taken down: that, about that time, the Court likewise broke up, no quorum of the judges continuing on the bench, the lord Kaims only remaining there, the rest retiring and conversing in private with sundry of the jury and others; and, upon that occasion likewise, the jury eat, drank, and conversed in private with different persons, and in particular, with the counsel for the prosecutor; whereby the trial was again interrupted: that no roll was called; nor was it any ways ascertained that they re-assembled, the lord Kaims only calling out, Gentlemen of the jury, are you all there? and the depute clerk of judiciary answering, I see fifteen; but no answer was returned by the jurymen themselves. That, in this case, the Court was most unquestionably adjourned, as no quorum of the judges remained sitting on the bench; and, though no act of adjournment appears in the record, yet, it is humbly apprehended, that that, instead of mending matters, renders them worse; for an adjournment *via facti*, is unquestionably as much an adjournment as one made by an order of court, having all the bad consequences of it, and many more. That it is an adjudged point, that, after a jury is charged with a pannel, the Court cannot be adjourned till the jury is inclosed. This was solemnly determined in the case of Janet Ronald, who was tried, in May 1763, at the circuit-court of Perth, for the crime of giving poison to her sister; in which case, after the proof was concluded, and while his majesty's advocate was addressing the jury, one of the

jurymen happened suddenly to be taken ill, and appeared incapable of doing his duty at that time; for which reason the Court was adjourned till next morning, when that jurymen being recovered, the jury again re-assembled, were inclosed, and returned a verdict against the prisoner, finding her guilty art and part of the crime libelled. It was moved in arrest of judgment, that the Court having been adjourned before inclosing the jury, and the jurymen dispersed, and an opportunity given to sollicite and practise on them in private, the verdict was void and null, and no sentence could follow in consequence thereof. The matter, on account of its importance, was referred to the Court of Justiciary at Edinburgh, where it was solemnly debated in presence of the whole judges; and, after informations had been given in on this point, and recorded in the books of adjournal, the Court being of opinion, that this adjournment vitiated the whole proceedings, did not pronounce any sentence on this verdict, but assoilized the pannel, and dismissed her from the bar: that the adjournment of the Court in the present case ought to have the same effect to vitiate all the subsequent proceedings, and to procure an Absolvitor to the pannels; since every bad consequence that can be figured or imagined to result from an adjournment by act of the Court, must result also from an adjournment, *via facti*. That about three o'clock of the afternoon of Tuesday the 13th of August, at least, some time between the hours of two and four of the afternoon of that day, the jury again dispersed, and conversed in private with sundry persons in different parts of the house, and continued dispersed for the space of half an hour or upwards; after which they again returned to their seats: that all these various adjournments and dispersing of the jury, it was out of the power of the pannels, or their counsel, to prevent; the jury being actually dispersed, on all these several occasions, before they were aware, no motion having been made publicly for leave of the Court to disperse, and the pannels and their counsel being intent upon the business that was going on, and that attention first interrupted by the noise the jurymen made when actually dispersing: that it is in vain, in the present case, for his majesty's Advocate to plead the necessity of the jury being refreshed in such a case; for they were refreshed on several other occasions besides those above-mentioned, at which times the refreshments were always given them in their seats; and it is apprehended that ought always to be the case, as it is a material point, that the quality and quantity of the refreshments they take, particularly the wine, and other strong liquors, should be regulate by the Court, under whose immediate inspection every thing of that nature should be given them; but by jurymen dispersing, and drinking liquors, in what quantity and of what quality they please, in private, and while removed from the inspection of the Court, there is a hazard of their becoming intoxicated with the

Liquors they drink, which may be of the most dangerous consequences to the security of those who are tried, and consequently to the lives and liberties of the subjects in this country in general. That the bad effects of all these several adjournments were severely felt by the pannels in this case; they served to protract the trial, and what impressions were communicated to the jurymen, when dispersed, or what quantities of liquors they swallowed, are circumstances which cannot be known to the pannels or their counsel: but after the last time the jurymen were dispersed, and when the evidence on the part of the pannels began to be adduced, several of the jury shewed a very great impatience, and insisted, that that evidence which the pannels thought material for them should be cut short. And some of them particularly disputed the relevancy and propriety of the questions put by the counsel for the pannels with great heat, insomuch that some of the judges, and other jurymen, were obliged to interpose, in order that the exculpatory proof might go on; and the counsel for the pannels were obliged to pass from many witnesses, in order to procure attention from those assizers. Hence, though thirty-three hours were spent in hearing calmly the proof adduced for the prosecutors; yet the proof for the pannels, after being heard by those jurymen with great impatience, was put an end to in about three hours. By this means the whole proof relative to the conduct of Alexander Ogilvie, which the pannels had insisted much upon in their defences, was prevented; some of the jurymen saying, that they had nothing to do with Alexander. That at one period of the trial, one of the jury retired from his place, and continued absent a considerable time; yet the proof went on in the mean time, the witnesses were examined, and their depositions taken down in writing in the mean time, he paying no attention thereto, nor was he capable of doing so at the time; so that he could no more judge of what was said or done at that time, than if he had been twenty miles absent: that on sundry occasions jurymen did retire without leave asked or given, and went out of the room where the Court was sitting: that it is in vain for his majesty's Advocate to plead the necessities of nature as an excuse in such cases; for there is a remedy known and commonly practised, when those necessities oblige the jurymen to withdraw, viz. Leave is asked of the Court, which orders a mace to attend the jurymen, that no person may have any private intercourse with him during the time he withdraws, and the trial is stopt till he returns.

That, by the act concerning the regulation of the judicatories, passed in the third session of the second parliament of king Charles the Second, in the 10th article concerning the Justice-Court, it is enacted, "That, in all criminal Pursuits, the defender, or his advocates, be always the last speaker, except in case of treason and rebellion against the king." Which act, though altered as to prosecutions not extending

to the loss of life, or to demerement, before the Court of Justiciary, or in circuit-courts, and where the evidence is not taken down in writing, by the act 21 Geo. 2, chap. 19, § 18, yet remains in full force as to all other criminal courts, and as to all trials brought in this court, which may extend to the loss of life or limb, and when the evidence is taken down in writing. That this statute notwithstanding, after the advocates for the pannels had concluded their speeches to the jury, and nothing remained, by the forms of court, but to inclose that jury for the purpose of returning their verdict, one of the judges did address himself to the jury, in a speech concerning this trial, and the credibility of particular witnesses, whereby the pannels were deprived of a legal and most material privilege, viz. The impression that must be left by the last pleader upon the minds of the jury in their behalf.

That, besides all these informalities committed during the course of procedure, the record is very defective, though the defects cannot at present be so particularly pointed out, as the counsel for the pannels have not yet had an opportunity of inspecting it. However, they do condescend on the following defects: that sundry admissions made by his majesty's Advocate, in point of evidence, favourable for the pannels, are not taken down; so that the record passed to the knowledge of the assize, without bearing these admissions. One of these admissions was, passing from the crime of incest during a part of the time libelled; another was relative to the conduct of Alexander Ogilvie: that the protests for remeid of law taken for the pannels at different parts of the trial are not engrossed in the record, though that was specially insisted for at the time they were taken, and precedents pleaded on and produced; neither is the condescendence relative to the malice of Anne Clark, which was made for the pannels, but found not relevant by the Court, mentioned in the record; and this is the more material, that the omission of this condescendence was used as an argument with the jury for the credit of Anne Clark's testimony, by the judge who was the last speaker on this trial, though it will be remembered, that when the counsel for the prosecutor had concluded the rest of his proof, he gave notice to the Court, That as the counsel for the pannels had charged malice against Anne Clark, one of the most material witnesses for the prosecutor, and meant to adduce witnesses for proving that malice, he judged it necessary, on his part, to adduce some witnesses in order to obviate that objection, and to shew that this witness was so far from bearing malice against the pannels, that, after she had been once precognosed, she had withdrawn and secreted her person, when a warrant by this Court was out against her, in order to avoid her being brought as a witness in this cause.

That the verdict appears to be informal; and the counsel for the pannels apprehend it will be found a special one, when applied to

the interlocutor of relevancy : that it does not bear that the jury considered the writs produced, but only the depositions of the witnesses, though writings were produced both by prosecutor and pannel ; particularly, the declarations of the pannels when examined ; the questions put to them by the sheriff of Edinburgh, which they are said to have refused to answer ; Anne Clark's letter to the lord advocate ; the alleged letters from one of the pannels ; a letter from lord George Beauchamp ; a letter from colonel Morris, in whose regiment the pannel Patrick Ogilvie served, attesting his good character. Therefore the verdict has proceeded on a partial consideration of the evidence. And the inattention of the jury to the whole evidence, appears from another particular, viz. in their finding the pannels guilty of the incest as libelled, which includes the whole month of January ; though it is in proof, that the late Thomas Ogilvie was not married till the 30th day of that month. That if time were allowed to the counsel for the pannels, to consider the verdict, and inspect the records, and prepare arguments in support of the positions they have now laid down, they apprehend there is a good cause why judgment should not pass on this verdict. They have set forth these objections in obedience to the Court's desiring them to condescend, and craved, that more time may be allowed them to state these objections more fully, or any other which may occur, and liberty given them to inspect the record, and have copies of the verdict ; which has been refused them by the clerk. And this demand, they apprehend, is the more reasonable, that they have only had a recess of fourteen hours, from the time that the jury were inclosed, after enduring the fatigues of a trial which lasted for forty-three hours ; so that they are not in a condition at present to argue their objections so properly, as they will be when more time is allowed them. All and each of the facts set forth they offer to prove, and they crave that a proof may be allowed accordingly.

His Majesty's Advocate and Solicitor General answered, That the conduct of the defence for the pannels in this trial has been extraordinary from first to last, as appears from the defences compared with the proof in exculpation. That after a trial of forty-three hours continuance, before a jury of the most respectable character, and after a verdict returned finding the pannels guilty, an attempt is now made to disappoint public justice, by a plea in arrest of judgment, unknown in the law, unsupported by any precedent, and in itself irrelevant and frivolous. That this plea has been introduced with a declamation upon the liberty of the subject, and of the importance of preserving a jury trial ; and yet the plea itself tends, if it has any meaning, to prove, that no trial of a capital crime in this country can be taken by a jury ; because the length of such trials must, in most cases, make it necessary for jurymen to refresh themselves, and to retire

for answering the necessities of nature ; and if these things cannot be permitted by the Court, the necessary consequence is, that no such trial can proceed by jury ; and in order to bring such criminals to justice, a new form of trial must be invented. That when a plea so groundless and frivolous is, for the first time, taken up in behalf of two pannels, whose rank and situation in life enable them to bring many learned counsel to argue and give countenance to such a plea, in behalf of two pannels convicted by their country of the most atrocious and dangerous crimes, it becomes the dignity of the Court to hear fully, and then to give such a judgment as will shew that the law knows no distinction of persons ; and that the criminal law in this country, upon which the security of the government, and the safety of the people depends, must have its course with equal effect against the greatest as well as the meanest of the subjects. That this trial has been conducted with more attention and favour for the defence of the pannels, than any trial that has occurred in the memory of any of the members of the Court. That the strictest orders were given, that no jurymen should retire, even for relieving the necessities of nature, without leave of the Court, and being attended by a macer of the Court ; which was accordingly punctually executed throughout the whole course of the trial. That when it became necessary for the jury to refresh themselves from time to time, for greater dispatch, and to prevent confusion, they left their bench, and were refreshed at a table immediately below, at, and under the eye of the Court ; and the insinuation, that some of the jury may have taken too much liquor, is false and injurious, to the knowledge of the Court, and was not so much as insinuated in the debate when the jury was present, and is now for the first time, thrown into this minute. One of the jurymen being indisposed, rose from his seat, and walked for some time behind the seat, but heard the whole evidence. That no criminal trial, where such refreshment of the jury has been necessary, was ever carried on in a manner so little exceptionable as the present ; and the tendency of the pannels' plea is to shew, that no criminal has been legally condemned in Scotland, in any case where the trial has continued for such a time as to require refreshment to the jury, or the retiring of any jurymen, or the relieving the necessities of nature. That during the time the jury were refreshing themselves the first day, Anne Clark was under examination, which lasted eight hours, and remained in her place, under the immediate eye of the Court, till her examination was resumed upon the return of the jury to their places ; and no person spoke to her, except the macer of Court, when he gave her some bread and wine. And during the whole course of the trial, upon notice given, that any of the jury had retired to ease nature, the proceedings stopped till his return ; so that though, from the necessity of the thing the

Court did, for some short intervals, stop proceeding in the proof, yet there was no adjournment of the Court; and this appears from the record of the Court, which the pannels cannot disprove; and the Court remained full, without one moment's interval, during the whole course of the trial; and as all the facts stated in the plea offered for the pannels passed in presence of the Court, and as it is not pretended that any wrong was done, or any exception taken, in behalf of the pannels, to any part of the procedure during the whole trial, far less after the jury was inclosed, no proof can be allowed of the facts upon which the plea is founded, and the Court must take them upon their own knowledge. The late case of Janet Ronald has no relation to the present case; for there the Court was adjourned, and the jury dismissed after they were charged with the pannel, which was found to be contrary to law. That the insinuation thrown out against the jury, that they were impatient to hear the evidence for the pannels, is likewise false and injurious, to the knowledge of the Court: that after the prosecutor concluded his evidence, which he abridged as much as possible, the counsel for the pannels proceeded to open their defence by a proof, that, after the pannels were committed to prison, the cattle at the house at Eastmilk were sold by Alexander Ogilvie; and it appearing clearly from their own evidence, that this rousp proceeded from an order of the pannel Patrick Ogilvie, it was observed by one of the jury, that this fact did not appear to be material to the issue; and as they found themselves much exhausted by fatigue and want of rest, they would not be able to attend to such evidence as might be material for the pannel's defence; which was submitted to the consideration of the pannel's own counsel: and they did accordingly declare, that they gave up that article of their proof.

The protest taken by the pannels for remeid in law, is extant in process, and makes a part of the record of this trial. The objection to the evidence of Anne Clark, founded upon malice, was clearly disproved before the jury by evidence: that she was so far from harbouring malice against the pannels, that on the contrary, after she was precognosed before the sheriff, she withdrew herself from the place of her abode, and concealed herself in different places about this city under a false name, in order to prevent her being adduced as an evidence in this trial; and although his majesty's advocate, perceiving the danger of protracting this trial to an unnecessary length, did not insist to have this part of the evidence taken down; yet it appeared so strong to the pannels own counsel, that, when they came to state the grounds of their allegation of malice, and to adduce their witnesses in support thereof, the judge examiner gave his opinion, that the condescendence, as stated by them, was not relevant; and they did not insist for the opinion of the Court; which was plainly giving up and passing from this objection of malice, or any proof thereof.

That the verdict is accurate and formal in all respects.—There is no necessity that the verdict should mention the evidence upon which the jury proceeded: that all the written evidence adduced before the jury was in behalf of the prosecutor, and no written evidence whatever was proved or adduced before the jury in behalf of the pannels; and if it can be supposed, that the jury did not take under their consideration this part of the prosecutor's evidence, it was so far favourable for the pannels; and he appeals to their lordships' knowledge, that, in most trials before this Court, the declarations of the pannels, and other written evidence, are referred to in the libel, and produced before the jury; and many verdicts have been returned, upon which execution passed, wherein no mention is made of their having considered such written evidence; for it is in their power to take that evidence under their consideration, as a ground of their verdict, or not, as they please.

That it is the undoubted right of the counsel for the pannel to be the last speaker upon the import of the evidence, and the prosecutor has no reply; but it is the inherent right of the Court, and essential to public justice, to correct mistakes in law or in fact, by which false impressions upon the jury may be made by the counsel on either side: that the verdict, with respect to the incest, is unexceptionable, and properly applies to the charge in the libel.

That no admission was made by his majesty's advocate, that is not properly entered upon the record: that he passed from the incest charged to have been committed after the sixth of June, in presence of the court and jury, and the verdict properly applies to the libel as so restricted: that the counsel for the prisoners had access to the record during the whole course of the trial, and since that time; and it is improper to move the Court for an arrest of judgment till they have further time to consider the record, in order to discover what objections they can there find in support of their plea. In respect of all which, judgment ought to be pronounced.

After reading over the foregoing minutes judicially, in presence of the pannels and court, the lords proceeded to advise the same, and pronounced the following Interlocutor:

"The Lord Justice-Clerk and Commissioners of Justiciary, having considered the foregoing debate, and knowing that the whole of this trial, from first to last, was carried on under the eye, and in presence of the Court; and that the whole of it was conducted with as much regularity and accuracy as ever was done in any trial before the Court, they find the reasons pleaded in arrest of judgment not relevant, and repel the same; and they also repel the objections made to the form or substance of the verdict."*

(Signed)

"GILB. ELLIOT, I. P. D."

* See 2 Hume's Commentaries, Trial for Crimes, 252.

On pronouncing of which Interlocutor, Mr. Alexander Lockhart, advocate, procurator for the pannels, protested for remeid of law; and thereupon took instruments in the hands of the clerk of court.

Then there was a Petition given in and presented to the Court by the said Katharine Nairn pannel, signed by Mr. Alexander Lockhart, and Mr. Henry Dundas, her lawyers, bearing, That the petitioner has the misfortune, in the criminal prosecution now depending against her in this court at the instance of his majesty's advocate, to have a verdict returned against her by a plurality of voices finding her guilty of the crimes of which she was charged: whereupon his majesty's advocate having moved for judgment, sundry objections were stated upon her part, why no judgment can pass against her upon that verdict: that, abstracting from these, she now begs to represent to the Court, that she is pregnant; and though she cannot take upon her, from her inexperience in these matters, positively to say how far she is advanced in her pregnancy, according to her best opinion, she judges she may be about three months gone with child.

Therefore praying, it might please their lordships, to direct the proper inquiry to be made into her present state and condition as to her alleged pregnancy: and upon the same being properly certified, to supersede judgment against her, if any judgment can pass upon the verdict, till after delivery.*

* "Another situation which requires a delay of passing judgment in capital cases, is that of a female convict who is pregnant; lest her child perish with her, and because it cannot be known with certainty, at what time her delivery shall take place. Upon any allegation of this sort (and I do not find that any distinction has ever been made, whether the woman were with quick child or not) the Court will order a report on oath of skilful persons, who shall visit the pannel, and verify her condition; and if their report be doubtful on their first visit, they may be ordered to see her again, from time to time, and to report anew by a certain day, to which the diet for pronouncing sentence may be adjourned. This course was taken in the case of Katharine Nairn, in August 1765, and in that of Mary Langlands, on the 17th Nov. 1735.† In this last instance, the respite was given by the lords Hailes and Henderson, the only two judges who were in Edinburgh at the time; and their deliverance being, that as no quorum‡ of the Court could be got,

† "Execution was delayed on account of the pannel's pregnancy long ago, in the case of Helen Geddes, convicted of incest, March 2, 1658. This is on authority of the alignment of the records, in the Advocate's Library; for the original record has perished.

‡ "By the act of the 3d sess. of the 21 parliament of Charles 2d, A. D. 1672, cap. 19, entitled, "Act concerning the regulation of

Which Petition being read in court, and judicially adhered to by her,

"The Lord Justice Clerk and Commissioners of Justiciary, having heard this Petition, they grant warrant for letters of diligence, at the instance of his majesty's advocate, for citing three or more skilful midwives to compare before their lordships against to-morrow, being Friday the 16th day of August current, at nine o'clock in the forenoon, to inspect the petitioner Katharine Nairn pannel, and make trial whether or not she the petitioner be pregnant or with child; and accordingly to give their opinion or judgment to the Court therein; and continue the diet against the petitioner until the said time; and appoint her in the mean time to be carried back to prison; and, for the purpose aforesaid, the said lords appoint the persons following, to wit, Mrs. Johnston, Mrs. Hamilton, Mrs. Duncan, and Mrs. Hall, known midwives, to be cited as above.

(Signed) "GILB. ELLIOT, I. P. D."

"The Lord Justice Clerk and Commissioners of Justiciary having considered the foregoing verdict of assize, dated and returned the 14th day of August current, against Katharine Nairn, widow of the deceased Thomas Ogilvie of Eastmill in the county of Forfar, and Patrick Ogilvie, lieutenant of the 80th regiment of foot, brother-german to the said deceased Thomas Ogilvie; whereby, by a great plurality of

they therefore proceeded on the necessity of the case," Hume's Comm. vol. 2, p. 343.

That the Court of Justiciary will after sentence respite execution on account of pregnancy, see 2 Hume, cap. 17, p. 348. For the law of England respecting this, see 4 Blackst. Comm. c. 31. As to the form of proceeding when a woman convicted of high treason pleads pregnancy, see Louthian's Form of Process before the Justiciary in Scotland, p. 214, edition of 1752.

the judicatories," it is required in the 1st section of that part which has for title "Concerning the justice court," that four of the whole number be always a quorum of that court, except at the circuit courts; and by § 5, that two of their number be appointed to go and keep each of three circuits therein mentioned. Doubts having been entertained whether the presence of the judges was under this statute necessary to hold a circuit court, a declaration was made under the sign manual of queen Anne, and an act of adjournal of the Court, of September 3, 1704, that either of the two judges appointed to any of the circuits, might proceed to business in the necessary absence of his colleague. It seems that doubts were entertained of the sufficiency of this declaration; to remove which an enactment to the same purpose was introduced into the statute Geo. 2, cap. 25, accompanied by a provision against the attendance of the justice generation on such occasions." See as to these points 1 Hume, Trial for Crimes, 17, et seq. 23, et seq.

voices, the said Katharine Nairn and Patrick Ogilvie are found guilty of incest as libelled, during the life of the now deceased Thomas Ogilvie of Eastwailn; and the said Katharine Nairn, guilty of murder, by poisoning the said Thomas Ogilvie her husband; and the said lieutenant Patrick Ogilvie pannel, guilty art and part thereof: in respect of the said verdict, they, by the mouth of Isaac Gibbs, dempster of court, decern and adjudge the said Patrick Ogilvie pannel, to be carried from the bar back to the Tolbooth of Edinburgh, therein to remain to be fed upon bread and water only, in terms of the act of parliament in the 25th year of the reign of his late majesty king George the 2d, intituled, 'An Act for preventing the horrid crime of murder,' until Wednesday the 25th day of September next to come; and upon that day to be taken forth of the said Tolbooth, and carried to the common place of execution in the Grass-market of Edinburgh, and then and there, betwixt the hours of two and four of the clock after noon of the said day, to be hanged by the neck by the hands of the common hangman, upon a gibbet, until he be dead; and his body thereafter to be delivered to Dr. Alexander Munro, professor of anatomy in Edinburgh, to be by him publicly dissected and anatomized, in terms of the said act; and ordain all his moveable goods and gear to be escheat and inbrought to his majesty's use; which is pronounced for doom. (Signed)

"GILB. ELLIOT.

"ALEX. BOSWELL.

"AND. PRINGLE.

"JAMES FERGUSON.

"GEO. BROWN."

CURIA JUSTICIARIA S. D. N. Regis, tenta in Nova Sessionis Domo de Edinburgh, decimo sexto die mensis Augusti, anno millesimo septingentesimo sexagesimo quinto, per Honorabiles Viros Dominum Gilbertum Elliot de Minto, Baronetum, Dominum Justiciarium Clericum, Alexandrum Boswell de Auchinleck, Andream Pringle de Ale Moor, Jacobum Ferguson de Pitfour, et Georgium Brown de Coalston, Commissionarios Justiciarie dict. S. D. N. Regis.

Curia legitime affirmata.

Intran'

Katharine Nairn, prisoner in the Tolbooth of Edinburgh; pannel:

Indicted and accused as in the former Sederunts.

"The Lord Justice Clerk and Commissioners of Justiciary, in respect that Grizel M'Queen, relict of Dr. Hamilton, and Agnes Ker, wife of William Hill, late one of the letter-carriers in Edinburgh, two of the four midwives named yesterday, and cited in consequence of the warrant then granted for to have

VOL. XIX.

appeared this day, do only compear; and that excuses are offered and sustained for the other two; therefore they grant warrant for citing Mary Crawford, wife of William Richardson, baker in Edinburgh; Mary Angus, widow of Hugh Sheills, wig-maker there; and Margaret Watson, widow of William Petrie, merchant there; all known midwives, to compear instantly before this Court, in order to the effect that they, or such of them as the Court shall appoint, may, upon oath, inspect the pannel Katharine Nairn, and make trial, whether or not she be with child, and accordingly to give their opinion and judgment thereupon. (Signed)

"GILB. ELLIOT, I. P. D."

Conform to warrant granted yesterday and this day, by the lord justice-clerk and commissioners of justiciary, for citing of midwives to inspect the pannel, compeared, in presence of the said lords, Agnes Ker, wife of William Hill, late one of the letter-carriers in Edinburgh; Margaret Watson, widow of William Petrie, merchant there; Grizel M'Queen, widow of Dr. Hamilton; Mary Crawford, wife of William Richardson, baker in Edinburgh; and Mary Angus, widow of Hugh Sheills, wig-maker in Edinburgh; being all solemnly swore, depone, that they shall faithfully try, and true report make to this Court, of their opinion and judgment, whether the pannel, Katharine Nairn, is with child, or not, as they shall answer to God. (Signed)

AGNES HILL,

MARG. PETRIE,

GRIZEL M'QUEEN,

MARY RICHARDSON,

MARY SHEILLS.

GILB. ELLIOT.

The said five midwives above named, having removed out of court with the pannel to another room, and re-entered into the same after some short space of time, depone unanimously, from what they have observed, they cannot give a positive opinion, whether the pannel is pregnant or not; and that they cannot depone that the pannel is with child; nor can they depone that she is not with child.

(Signed)

AGNES HILL,

MARGARET PETRIE,

MARY SHEILLS,

MARY RICHARDSON,

GRIZEL M'QUEEN,

GILB. ELLIOT.

"The Lord Justice Clerk and Commissioners of Justiciary, in respect of the foregoing Report, delay pronouncing of sentence against the said Katharine Nairn pannel, till the third Monday of November next to come at 12 o'clock before noon, in this place, and continue the diet till that time; and grant warrant to the five midwives before-named, along with Mrs. Johnston, another known midwife, and already cited for that purpose, and who, upon report, will be also put upon oath, that they by turns may visit and inspect the person of the said Katharine Nairn pannel; and ordain the said midwives to report their opinion and judgment to the Court the said day, anent

the said Katharine Nairn her pregnancy, or being with child; and appoint the pannel in the mean time to be carried back to prison.

(Signed) "G^{LB}. ELLIOT, J. P. D."

COPIES of the LETTERS mentioned in the Minute of Debate in Arrest of Judgment, p. 1323, which were produced in the course of the Trial, but were not proved, and did not enter the Record.

Letter by Anne Clark to his Majesty's Advocate.

"Lord Advocate;—Upon my coming to town, I am informed, that you have been searching for me. It would never bread in my breast to keep out of the way, had it not been for terror of imprisonment; but hoping you will be more favourable to me, I shall wait upon you to-morrow morning at 8 of the clock.

ANNE CLARK."

"Sunday evening, eight of the clock."

"To the Right Hon. Lord Advocate."

Letter from Lord George Beauclerk, Commander in Chief of his Majesty's Forces in North Britain, to Lord Justice Clerk.

"My lord;—By a letter I have just received from the lord advocate, I find notice has been taken in Court, that notwithstanding of the order of the Court for confining of Anne Clark in a separate room in the castle; yet, after being separated, she was again remanded back to the same confinement: it is very true; and I have the honour to acquaint your lordship, that it was done by my orders; as it was represented to me, that the room in the gunner's house she was by desire put into, was by no means a place to keep a prisoner in safety; and I am determined, that all prisoners intrusted to the care of the military under my command, shall always be put in places of security. I have the honour to be, my lord, Your lordship's most obedient humble servant,

"G. BEAUCLEK."

"Holyrood-House, Aug. 12, 1765."

"To the Right Hon. the Lord Justice Clerk."

Letter from Staats Long Morris, esq. to Mr. James Smith, Writer to the Signet.

"Huntly-Lodge, Aug. 3, 1765.

"Sir;—This day I received your letter of the 31st of July, requesting an attestation of lieutenant Ogilvie's behaviour while he was under my command. His conduct as an officer was unexceptionable; and he was always thought by myself and the other officers of the regiment to be an inoffensive, harmless man. I am, Sir, Your most obedient, and very humble servant,

STAATS L. MORRIS."

"To Mr. James Smith, writer to the signet, Edinburgh."

The Proceedings in this Trial being transmitted to London for the consideration of his majesty and his privy-council, the following signed OPINION of Mr. M^CARTY, an eminent English counsellor, was presented with them:

"I have read a great deal of the proceedings in the affair of the unhappy prisoners, Katharine Nairn and lieutenant Patrick Ogilvie, under sentence of death, for the heinous crimes of incest and murder. Crimes of so black a dye, charged on persons who, until that time, had preserved unblemished characters, should be attended with the most evident proofs to gain credit in the opinion of mankind, at least of the most judicious part of it. Among the vulgar, it is much to be lamented, every calumny, however ill-supported, finds an easy admittance.

"It seems to me extremely hard on the prisoners, that they should be tried at the same time for crimes of very different natures. [As to this see a note in p. 1252.] The indictment charges, That they have presumed to commit, and are guilty art and part of both, or one or other of the said crimes of incest and murder, &c. Adding the two crimes in one indictment, makes the prisoners be exposed to a greater odium, and creates a stronger prejudice against them. I think, in the law of England, a charge, that the prisoner at the bar was guilty of one or other of two crimes, would have vitiated the indictment. It is laid down as a rule in Co. Entr. 278, that the fact is never laid in the disjunctive. And in 5 Mod. 137, Rex against Stocher, it was ruled, that an indictment, setting forth, that the defendant 'murderavit, vel murderari causavit,' is not good; for these are different crimes.

"In the present case there is a further disadvantage; for, as I am informed, the trial for incest, and the trial for murder, are to be had in a quite different manner. In the first, the trial is 'januis clausis;' and in the other it is 'januis apertis;' the last method being more public, is less exceptionable. In the case of these unfortunate prisoners, the whole was carried on 'januis clausis;' every allegation and deposition in support of one branch of the indictment had an effect on both; but this, I think, was rather prejudice than real conviction.

"I am of opinion, that, if the crimes charged are considered severally, and the evidence produced to support one crime is taken singly, without the assistance of the other, no jury in England would have found the prisoners guilty.

"If the facts alledged as a proof of the incest were given as a proof of the carnal knowledge on an indictment for a rape, it is impossible a jury could find the defendant guilty. I think they would not be admitted as a proof of criminal conversation, to vitiate a husband to damage on an action of trespass. There is not one fact attempted to be proved, that may not be literally true; and yet the defendants be innocent of the crime of carnal knowledge,

The conjectures of women of very indifferent characters, and of very malicious dispositions, may naturally lead to the worst things; but these conjectures are not evidence, when there is a possibility that the parties may be innocent. I do not know that in our law any presumption of a criminal conversation operates in any circumstance, but that of being 'solus cum sola, et nudus cum nuda;' in all other circumstances a positive proof is required. It often happens, that a man is indicted for a rape, and acquitted; and yet the Court directs a prosecution for an assault with an intent to commit a rape. In cases of that nature, I doubt not but the witnesses in the present case would have boldly asserted, that a rape had been actually committed. The mind of the principal witness was strangely prepossessed; she could hear distinctly what the good lady Eastmole could neither hear nor see.

"If they were to be tried on the murder singly, the proof there will appear as defective. There is not one positive proof, that Thomas Ogilvie died of poison. The surgeons who attended, declare, that the symptoms might arise from natural causes, a violent bilious colic. It was proved, that Thomas Ogilvie, the day before his death, and some days before that, had complained of pains in his bowels, and had called for, and taken drams in several places, to procure ease. These most certainly were not the effects of poison taken on the morning of the day on which he died. Why might not these pains have increased the day on which he died, without the interposition of any poison? The matter might have been cleared up by opening the body. Surgeons were present, and ready to perform the operation, but were prevented by the person who has spirited up the prosecution, and who is to be the only gainer by the death of the prisoners.

"The great rule of evidence is, to have the best proof the nature of the case can admit. That certainly has not been produced in this case; it was not opposed by the prisoners, but it was opposed by the man who wishes their destruction. The incest is supposed to be certain, because the husband is supposed to have been poisoned; and, on the other hand, the man is believed to be poisoned, because there is a supposed proof of incest.

"Under these circumstances, it is difficult to find any means to prove the innocence of the prisoners, after a verdict and judgment. The 19th Article of the Union confirms the jurisdiction of the court of session; and in the same terms it confirms the jurisdiction of the Court of Justiciary. It mentions nothing of an appeal from the Court of Session to the House of Lords, yet those appeals are frequent. It mentions nothing for or against appeals from the Courts of Justiciary: it certainly does not exclude them. There lies an appeal from the Court of Exchequer in Scotland to the House of Lords. To admit an appeal from the two supreme courts in Scotland, where

property only is concerned, and not to admit an appeal from the third supreme court, where life, honour, property, and posterity are concerned, appears somewhat extraordinary. By the same Article of the Union, it is enacted, that no causes in Scotland be cognoscible, or any judgment from thence be recognoscied, received, or altered, by the Court of Chaucery, Queen's-Bench, or Common-Pleas, or any other court in Westminster-hall. This negative clause as to Westminster-hall, and the courts there, seems to imply a power of recognoscing and altering causes and judgments in the House of Lords. I think it is the common rule of construction.

"I believe there are few instances of appeals from the Court of Justiciary; but that is not a proof that such appeals cannot lie. I remember a petition of appeal was sent from Scotland in the affair of Barriedale: there was some difficulty made about presenting the appeal. Lord Bath was applied to; but he said, it was a branch of business he never meddled in, nor was he disposed to meddle for the future in any public affair, unless it was such as was of the highest importance to the nation; however, he would go to the house, and mention it to the chancellor: and in some days after, being called upon, he said, he mentioned the affair to the chancellor, but that it was unnecessary to struggle as to the petition, as the king, out of his gracious disposition, would give the same relief that was aimed at by the petition.

"If there is no way open from the Court of Justiciary to the House of Lords, it is the only court in Great-Britain which is not subject to that jurisdiction; for writs of error go from the King's-bench to the House of Lords, even in cases of high-treason. It is not a common practice, I confess; but yet it has been done. I see neither reason nor law why the proceedings of the Court of Justiciary might not fall under the review of the supreme court, as well as those of the Court of Session.

"Sept. 14, 1765.

A. M'CARTY."*

* "The reversal of judgment on review, in course of law, has relation to the sentences only of the inferior courts. For those of the court of justiciary are not subject to reversal in any form of process, either before themselves or any other tribunal, not excepting even the House of Lords, to which the judgments of all the other courts of justice, of both Scotland and England, may be carried. As was likely to happen, this interesting question has more than once been the subject of discussion; and more especially, it was so in the case of lieutenant Ogilvie, who, after his conviction and sentence, applied to his majesty for a respite, until he should have an opportunity, (parliament not being then assembled), of presenting a petition of appeal. On this occasion, a respite was granted accordingly, in the mean time; and a remit was made to the attorney-general for England, and the lord advocate for

In consequence of this, lieutenant Ogilvie was respited from time to time till the 13th of November, 1765, when (his majesty's fourth reprieve being expired) he was carried from

Scotland, for their opinion as to the competency of such review. And, on the part of the lord advocate, (at that time Mr. Miller, afterwards successively lord justice-clerk, and president of the court of session), a report was made in the negative, upon these, as they have generally been esteemed, and certainly to me appear, sound and sufficient grounds. 1. The absolute silence of all our books and authorities in law, with respect to any such right of appeal. 2. That there is no vestige of any such process, either in the records of the present Court of Justiciary, which was established in 1671, nor in those of parliament, which begin with the reign of James I. 3. The silence of the Claim of Right (1689, c. 15) on this head; though it asserts the privilege of protesting for remeal of law, against the judgments of the lords of session, the supreme judicature in civil or patrimonial affairs.* 4. That the Treaty of Union confirmed the Court of Justiciary in its constitution and privileges as they then stood;† and that there has been no instance [excepting a singular and irregular case about the church of Elgin] since that time, of any such appeal being received by the House of Lords. The opinion of the attorney-general for England coincided with this report; and in consequence, upon expiration of the respite, lieutenant Ogilvie was executed, agreeably to his sentence.

"The next attempt of this sort, was in the trial of George Dempster for bribery at an election; where the prosecutor offered a petition of appeal against the interlocutor of Court, sustaining the pannel's privilege as a member of parliament, in delay of trial. This was remitted to a committee, to report whether it should be received, (March 7th, 1768;) but the issue was, that instead of determining the general question, the House saw cause to pronounce an order, authorising the Court to reconsider their judgment, and proceed notwithstanding the appeal. [See the words of this

* The article of the 'Claim of Right,' which Mr. Hume here mentions, is expressed thus. "That it is the right and privilege of the subjects, to protest for remeal of law to the king and parliament, against sentences pronounced by the lords of session, providing the same do not stop execution of these sentences."

† In the 19th article of the Treaty of Union it is declared, "That the Court of Justiciary do also, after the Union, and notwithstanding thereof, remain in all time coming, within Scotland, as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the Union; subject, nevertheless, to such regulations as shall be made by the parliament of Great Britain, and without prejudice of other rights of justiciary."

the Tolbooth in Edinburgh, and was executed in the Grass-Market, amidst an innumerable concourse of people. The day before his execution he signed and delivered a paper, in order

order in MacLaurin's Criminal Cases, p. 417. There is also an entry relative to it in the books of Adjournal, Aug. 16, 1768. The Lords of Justiciary, in an interlocutor relative to this business, had inadvertently applied to this order, the term 'judgment.' The lord advocate, of the above date, represented to the Court, That he attended the Committee of the House of Lords, whose order of the 7th of March was made, 'of purpose to avoid the determination of the question as to the competency of an appeal from this Court;' and that he was apprehensive, that afterwards, when the *res gesta* was forgotten, this interlocutor might be quoted as evidence of the receiving of the appeal, and of a judgment given on it in the House of Lords. He therefore prayed to substitute the term 'order' for that of 'judgment.' The Court declare, their having used the term 'judgment' in the above-mentioned interlocutor, proceeded from their not adverting that there was any material difference betwixt the words 'order' and 'judgment,' and they hereby declare, that they there intended no more by the word 'judgment,' than by that of 'order;' and in respect of this declaration, they find no occasion to alter the former record.] A second appeal was entered in this case, after the interlocutor dismissing the libel; but this was remitted to a committee, who never reported on the matter.

"Soon afterwards, this question was, however, carefully considered, as far at least as relates to interlocutory orders, in the important case of Mungo Campbell; where an appeal was taken against the interlocutors of Court sustaining their jurisdiction, and finding the libel relevant. Lord Mansfield, on this occasion, entered fully into the several reasons for refusing such appeals, especially before the issue of the trial; and the petition was rejected accordingly.

"Nevertheless, it was thought desirable to bring this controversy to a solemn and decisive judgment, as relative to the case also of an appeal taken after conviction and sentence. A petition was therefore offered for Alexander Murdison and John Miller, two persons convicted of sheep-stealing, and under sentence of death. And this having been remitted to a committee, the House of Lords determined on their report, March 10, 1773, 'That the said petition and appeal is not properly brought, and that the same be and is hereby rejected.'

"That judgment, in itself decisive, has since been confirmed, with other two [see MacLaurin 531] to the same purpose: one in the case of Bywater, in spring 1781, who complained of a decision repelling an objection in arrest of judgment, and pronouncing sentence of death; the other in the case of Robertson and Berry, [May 8th, 1793, see it in this Col-

to be made public, of which the following is an authentic copy :

" I lieutenant Patrick Ogilvie, brother-german to the deceased Thomas Ogilvie of East-miln, considering myself upon the brink of this mortal life into eternity ; and as I have but few hours to live, would chuse to employ them in the way that would most conduce to my eternal happiness : and though my years be few, and my sins many, yet I hope, through God's grace, and the interposition of my blessed Redeemer, that the gates of Heaven will not be shut upon me, in whatever view I, as a criminal, may be looked on by the generality of mankind ; and I hope, those who best knew me, will do me justice when I am gone. As to the crimes I am accused of, the trial itself will shew the propensity of the witnesses, where civility, and possibly folly, are explained into actual guilt ; and which possibly had the greater effect in making them believed ; and of both crimes for which I am now doomed to suffer, I declare my innocence ; and that no persuasion could ever have made me condescend to them.

" I freely forgive every person concerned in this melancholy affair ; and wherein any of them have been faulty to me, I pray God to forgive them.

" My counsel and doers have done their duty for me, for which I thank them sincerely, considering the care they have taken of me, and

lection] two persons under sentence of imprisonment, for printing and publishing a seditious libel. On the former of these occasions, lord Mansfield again entered at large into the history of this matter, and detailed the reasons against receiving the petition : on the latter, it was attempted to be shewn, that the other precedents, being all in trials for felony and capital crimes, were not decisive of such a case as this, where the sentence was of imprisonment only, for what in England would be termed a misdemeanour.

" After detailing this series of high authorities, may I presume to add, in the close of all, that in the course of my researches, which I have carried back to the oldest date of which we have any genuine record of the proceedings of the Justiciar and his deputies, I have not met with any thing in the nature of an appeal to parliament, beyond a mere protest that never was prosecuted, or which tends in anywise to shake that opinion of our ancient course of practice [Mr. Arnot, in a note to p. 106 of his Collection of Criminal Cases, delivers a positive opinion for the competency of appeals, and this, he says, is founded upon his search into the books of Adjournment from 1536, to the present times. But he has not directed the reader to the particular cases or proceedings, which tend to the support of his opinion] on which the report of the Lord Advocate in the case of Ogilvie, and the judgments in the other cases, are bottomed." Hume's Commentaries, c. 18, § 2, vol. 2, p. 400.

am sorry it is not in my power to give them a better reward.

" The ministers of this city have been at great trouble about my eternal state, which I have always gratefully acknowledged, and will do to my last breath, for the care they have been pleased to take of me : I am sorry, time being so precious now, I have it not in my power to express my gratitude more so, for their goodness and attendance towards me ; and I hope their labours in my behalf will not be in vain.

" Captain James Robb, and the other keepers of the prison under him, have also shewn me great kindness since my confinement, for which I thank them, and thought it my duty to declare the same.

" I desire to die in peace with all men, even my greatest enemies, begging forgiveness to them, as I hope for it from that God, in whose presence I am soon to appear ; hoping for the pardon of my sins, and entrance into eternal bliss, through the merits and intercession of my Redeemer, to whom I recommend my spirit : Come, sweet Jesus, come quickly, and receive it!

(Signed)

" PATRICK OGILVIE."

" P. S. Mean time I beg leave to clear Mr. John Fenton of an affair laid to his charge ; such as his being guilty of keeping me from making a confession to the world before I died ; this, I hope, will be a warning for the future from such like mistakes to the world, and hope they will be sorry for their false suspicion now.

(Signed)

" PATRICK OGILVIE."

" Edinburgh, Tolbooth, Nov. 12, 1765."

On the 18th of November 1765, the High Court of Justiciary met, agreeable to their adjournment of the 16th of August ; when the consideration of the case of Mrs. Ogilvie was resumed, and the midwives appointed by the Court to visit her, having emitted their declaration upon oath, that they adjudged her to be in the sixth month of her pregnancy, the Court, in consequence thereof, again superseded the pronouncing of sentence until the second Monday in March.

Mrs. Ogilvie was delivered of a daughter, February 27, 1766, in the Tolbooth ; from whence she found means to escape on the 15th of March ; the Court of Justiciary, who met on the 10th, having, on account of her being so lately brought to bed, further adjourned to the 17th ; on which day she was to have received sentence.

I conjecture that the Opinion signed " A. M'Carty," which is printed above, was that of which the publication gave rise to the rebuke mentioned by Mr. Hume in the following passage :

" For preservation of the authority of courts, and promotion of the speedy and effectual ad-

vancement of justice, in Scotland every judge, of whatsoever degree, has power to punish summarily, and of his own motion, all such disorders or misdemeanours, committed in court during the progress of a trial, as are either a disturbance of the judge in the exercise of his functions, or a violation of that respect and deference which ought to be observed towards him, when proceeding in his office. The hindrance, therefore, or molestation of the magistrates or other officers of court in their duty: the use of any threatening or contumelious speech or gesture there with relation to the judge or the trial: any open expression of either censure or approbation of the proceedings of the judge or the jury, as by acclamation or otherwise; [see the case of a man fined for applauding upon the acquittal of Stone, A. D. 1796,] nay, the wilful and repeated breaking of silence in court: all these are examples of this sort of blameable contempt, for which the magistrate may reprove the delinquent of his own knowledge, and upon the spot. All wilful disobedience or gross neglect of the orders and precepts of court, in matters relative to any trial, is, in like manner, necessary to be subdued without delay: otherwise, the course of justice would be liable to be stopped by the refusal of jurors to serve, or of witnesses to appear, or to answer, and the like.

"It is equally indispensable to repress in the same speedy and effectual manner, all attempts which may be made with relation to any trial depending at the time, or which has recently been so, to slander the proceedings of court, or to depreciate the character, or sully the honour, of the judges; or to impose on their wisdom, and pollute the channels of justice, to the prejudice of a fair and unbiassed trial, between the parties. In former times they scrupled not summarily to inflict high corporal pains, for transgressions of the first of these kinds. As in regard to Donald Campbell, February 24th, 1673, who, in the course of a trial, when standing among the multitude by the court-house, had openly accused the earl of Athol, justice-general, of gross partiality and corruption with relation to that case: he had sentence on this account, to stand two hours upon the cuck-stool, and there make public confession of his fault, and to have his tongue bored by the common executioner." [As to the validity of precedents of mere acts of power, see vol. 8, p. 79.] "More lately, with relation to the trial

of Nairn and Ogilvie, and after those pannels had been convicted, certain printers were rebuked, and, on account of their submission, were dismissed without farther censure, for their fault in publishing an Opinion of English counsel on the case, accompanied with notes highly injurious to the Court and the Jury. In a still later instance, February 23, 1793, [see the Case of Anderson and others in that year] when an account had been published of a certain trial, equally slanderous of the proceedings of the Court, and contemptuous of the persons of the judges, and where the offence was not followed with the like symptoms of contrition, the culprits, Johnston and Drummond, were sent to gaol for three months, and till they should find surety for their good behaviour in time to come." Hume's Comm. vol. 1, p. 219.

As to writs of error in criminal cases in England, see in this Collection the cases of *sir Thomas Armstrong*, vol. 10, p. 103, and see pp. 116, *et seq.*; of *Ashby and White*, vol. 14, p. 695, 861, *et seq.*; of *Wilkes*, A. D. 1764, 1770, and Mr. Hargrave's learned collection concerning writs of error in criminal cases, *Juridical Arguments and Collections*, vol. 1, p. 403. In the preface to which volume that eminent lawyer notices that though he had not there offered his own opinion "he has often thought upon the subject; and it is not improbable, that he may hereafter commit to writing his sentiments, not only upon the nature of the claim of the subject in England to call the appellant jurisdiction over crimes into action; but also on the controversy, which has more than once been agitated, on the existence of such a jurisdiction over the supreme criminal court in Scotland." It is therefore to be hoped that the matter will receive a full discussion in his most valuable '*Jurisconsult Exercitationes*' now in course of publication. See some important matter concerning the right to a writ of error in criminal cases in England, in the *New Parliamentary History*, vol. 5, p. 445.

Note; By the Commons' Journal of Sabati, 4^o die Maii 1 Will. et Mar. it appears, that leave was given to bring in a Bill "for regulating construction upon the statutes for treason; and trials, and proceedings, and writs of error, in cases of treason." And it was recommended to Mr. Sacheverell to take care of the Bill.

547. The Trial of FLORENCE HENSEY, M. D. for High Treason ; holden at the Bar of the Court of King's-Bench, in Westminster-hall: Before the Right Hon. William Earl of Mansfield, Lord Chief Justice, Sir William Dennison, Sir Michael Foster, and Sir John Eardley Wilmot, knts. Justices of the said Court, on Monday the 12th day of June : 32 GEORGE II. A. D. 1758. [Burrow's Reports, temp. Lord Mansfield, vol. 1, p. 642.]

REX versus FLORENCE HENSEY, M. D.

ON Monday 8th of May 1758, the defendant was brought into court by the keeper of Newgate, upon a Habeas Corpus directed to him, commanding him "to bring up his body." He appeared (upon the reading of the return) to have been committed by warrant under the hand and seal of the earl of Holderness, one of his majesty's principal secretaries of state, for high-treason in adhering to, and aiding and corresponding with the king's enemies ; and to be detained in his custody, by virtue of a second warrant of the like kind.

Mr. Attorney General prayed that the return might be filed.

Court. Let it be filed.

Mr. Attorney General then informed the Court and the defendant, "That there was an indictment of high-treason found against the defendant:" (Which indictment was so found by the grand jury, by itself singly, and brought into court, singly, by them on Tuesday last.) With which indictment the defendant being now charged, and being called upon by the Secondary of the Crown-office to hold up his hand, the Court ordered the indictment to be read to him.

But the Court, (before it was read to him,) asked him, "Whether he desired counsel to be assigned to him;" and if he did desire to have counsel, then, "Whom, by name, he desired to have assigned to him."

He named, and accordingly the Court assigned to him, Mr. John Morton, and the honourable Mr. Thomas Howard ; and Mr. John Pierce for his attorney.

The indictment was then read *verbatim* to him, by the express direction of the Court: (although he had a copy of it five days ago; agreeable to 7 W. 3, c. 3, "for regulating of trials in cases of treason and misprision of treason.") Upon which indictment being thus read to him by Mr. Barlow, he was immediately asked (by Mr. Athorpe, secondary of the Crown-office,) "Whether he was guilty or not guilty of the high-treason therein charged upon him?" To which he pleaded Not Guilty.

The defendant, after he had pleaded "Not Guilty," intimated to the Court, "That he had

received hard and severe usage, during his confinement."

Mr. Attorney General absolutely disavowed his having received any severe treatment at all ; and assured him that he would be treated with all possible humanity, so far as was consistent with his being safely secured from escaping.

Then a day was fixed for his trial; viz. Monday, 12th June 1758.

Which being settled, without any sort of objection on any part, the defendant was remanded to Newgate.

On which Monday 12th June 1758, at the trial, the defendant's counsel took exception to the reading of two papers (N^o 1, 2)—being the rough draughts of letters written by himself, and found in a bureau where he kept his linen and papers ; and which were only introductory evidence ; not any part of the overt-acts, which were to support the species of the treason charged upon him. It was objected to them, that they were not sufficiently proved to be found in his custody ; nor sufficiently proved to be his hand-writing : for mere comparison of hands is not sufficient to support their being read against the defendant.

The Counsel for the Crown answered, That the papers being found in his custody, and his hand having been sufficiently proved by persons who had seen him write, it was sufficient to intitle the crown to read them ; though the jury are to judge of them. And they mentioned Laver's case [vol. 16. p. 93] ; and lord Preston's case [vol. 12. p. 645] ; and Francia's case [vol. 16. p. 897] ; and Sidney's case [vol. 9. p. 817.] ; and Buchanan's case in the north, in 1746 ; and Crosby's case, Skinner 578, 579, and 1 Ld. Raym. 59, 8. C. Rex. v Crosby alias Philips: where comparison of hands was allowed to be good evidence, if the papers are found in the custody of the person himself. Sir John Wedderburn's case [vol. 18, p. 425.] Sir Cholmeley Dering's case—for murder ; (i. e. Rex v. Thornhill.)

The Court unanimously over-ruled the objection. These papers were found in his cus-

body;* and they have been sufficiently proved by persons who have seen him write, to intitle the crown to read them.

Then the evidence for the crown being opened, and given; (which consisted chiefly of letters to and from the prisoner;) and being alleged to be a proof of overt acts of two different sorts of treason, viz. Of compassing and imagining the death of the king, and also of adhering to the king's enemies;

Mr. Solicitor General declined summing up the evidence; choosing to reserve himself for the reply.

Which the Court held to be within rule, if he so thought proper.

So the Counsel for the Crown rested it here.

Then the Counsel for the Prisoner (Mr. Morton and Mr. Howard) began upon his defence. They declined giving any evidence on the part of their client: but they insisted upon these two topics, in his defence; viz.

1st, That no one act was proved upon him in Middlesex; where the indictment is laid.

2dly, That the evidence, if it had been brought home to the defendant so as to affect him, yet would by no means have amounted to a proof of any overt-acts of either of the two before named species of treason.

For they were only letters of correspondence. And if a correspondence of this nature, either within or out of the realm, had been treason in general and in all the king's subjects, within 25 Edw. 3, it would never have been particularly enacted to be capital in a soldier, by the Mutiny Acts of 3, 4 Anne c. 16, § 35, fo. 266, and 30 G. 2, c. 6, § 1.

N. B. The former makes it treason, to do it either "upon land, out of England, or at sea:" the latter makes it capital, or such other punishment as a court martial shall inflict, to do it "upon land within or out of Great Britain, or upon the sea."

Mr. Yorke, his majesty's Solicitor General, then proceeded to reply: in doing which, he made only some general observations upon the evidence that had been given on the part of the crown, but did not sum it up particularly, (as the prisoner had given no evidence at all;) but confined himself to what the defendant's counsel had urged in his favour, in point of law and reason.

He answered thus, to the objections which they had insisted upon.

1st, That the 5th letter given in evidence bears date "from Twickenham," which is in Middlesex.† Which alone, is a full answer to the objection.

2dly, That the correspondence proved was, in point of law, an evidence of an overt-act, of each of the before mentioned species of treason.

* See East's Pleas of the Crown, ch. 2, s. 56, and the authorities there referred to.

† As to this, see East's Pleas of the Crown, chap. 2, § 58.

First—Of compassing and imagining the death of the king. To prove which, he cited 1 H. H. P. C. 167. Cardinal Pool's case 3 Inst. 14. S. C. And so Ld. Ch. J. Holt also held, in Gregg's case; [vol. 14, p. 1371,] (which he cited from a manuscript report of judge Tracy's) and baron Smyth and Mr. Just. Dormer seemed to agree to it. And in lord Preston's case, also, Ld. Ch. J. Holt so held.

Secondly—It is also an overt-act of adhering to the king's enemies. In Gregg's case—, it was agreed by all the judges, "That such letters, though intercepted before they arrived, were so."

Lord Mansfield—We have seen three reports of Gregg's case; viz. One by Ld. Ch. Baron Dodd; another by Mr. Just. Price; and this, by Mr. Just. Tracy: and they all three agree "That such letters, though intercepted, were overt-acts of each species of treason before-mentioned; and that all the judges agreed in this."

Mr. Solicitor General—And as to the statutes of queen Ann and the present king, the statutes of 7 Ann. c. 4, and the late Mutiny Act of 30 G. 2, c. 6, go further than the Act of 25 Ed. 3, does.

Lord Mansfield summed up the evidence. As to the law—levying war is an overt-act of compassing the death of the king: an overt-act of the intention of levying war, or of bringing war upon the kingdom, is settled to be an overt-act of compassing the king's death. Soliciting a foreign prince, even in amity with this crown, to invade the realm, is such an overt-act: and so was cardinal Pool's case. And one of these letters is such a solicitation of a foreign prince to invade the realm.

Letters of advice and correspondence, and intelligence to the enemy, to enable them to annoy us or defend themselves, written and sent, in order to be delivered to the enemy, are, though intercepted, overt-acts of both these species of treason that have been mentioned. And this was determined by all the judges of England, in Gregg's case: where the indictment (which I have seen) is much like the present indictment. The only doubt, there, arose from the letters of intelligence being intercepted and never delivered: but they held "that that circumstance did not alter the case."

As to the fact, in the present case—The jury are to consider whether they were written by the prisoner at the bar, in order to be delivered to the enemy, and with intent to convey to the enemy such intelligence as might serve and assist them in carrying on war against this crown, or in avoiding the destinations of our enterprizes and armaments against them.

Then his lordship went through the evidence particularly: and having finished his summing it up, he proposed to the counsel, and

they agreed to it on both sides, "That the jury should take the letters out with them."

As to the locality of the facts—He said, it is certain that some one overt-act must be proved in the county where the indictment is laid: indeed if any one be so proved in that county, it will let in the proof of others in other counties.

Now here, one of the letters is dated at Twickenham, which is in Middlesex.

The Jury went out, a little after eight, taking the letters, &c. with them; and soon sent to desire leave to have candles;* which the officer who brought in their message said he was sworn "not to let them have;" unless it should be so ordered.

Lord Mansfield asked the counsel, if either side objected to it. And the counsel on both sides agreeing to it—Leave was given accordingly: and they had them.

In half an hour the Jury returned, and brought in their verdict, "Guilty."

Lord Mansfield observed, as to the two acts of parliament of 7 Anne c. 4, and 30 G. 2. c. 6.—That they carried the matter further than the law extended to before: and, besides that, they were both of them declaratory, as well as enacting; which was calculated on purpose to avoid the very objection that has been now taken: (*v. ante*, p. 1343.)

The defendant was remanded to Newgate; and a rule made "to bring him up again on Wednesday."

And the prisoner being accordingly brought to the bar, on this day about 4 o'clock in the afternoon, by the keeper of Newgate,—

Mr. Attorney General prayed the judgment of the Court upon him.

Mr. Athorpe, Secondary of the Crown-office, called upon him to hold up his hand; and reminded him, "That he had been indicted of high treason, and thereto had pleaded not guilty; and for his trial had put himself upon God and the country, which country had found him guilty;" and then asked him "if he had any thing to say for himself, why the Court should not proceed to give judgment against him according to law."

The prisoner thereupon took out a written paper; and rather read, than spoke it. It con-

* Concerning the unanimity of jurors, see Emlyn's Preface, vol. 1, p. xxix, vol. 8, p. 730, vol. 12, p. 474, vol. 14, p. 617, and Mr. Barrington's Observations as there referred to. Mr. Barrington has collected some passages relative to trials in other countries by twelve men. As to "the unanimity of the twelve jurors in their verdict," he observes that it "must be admitted to be a very singular institution." For requiring this unanimity, he proceeds to suggest some conjectural reasons, none of which however are satisfactory.

Some particulars respecting the institution of Trial by Jury are to be found in Macpherson's Inquiry into the origin of the Anglo-Saxons.

sisted partly of an apology, and partly of a sort of defence against the charge; together with some objections to the proof of it upon him.

The substance of it was—that the correspondence with which he had been charged, as treasonable and giving intelligence to an enemy of his liege sovereign, was nothing more than writing letters to his own brother, who was so far from being an enemy, that he was in the service of the king's good brother and faithful ally, as his majesty himself had styled the king of Spain, in his speech to his parliament; and that these letters contained only coffee-house news and idle speculations; but gave no such intelligence as could be useful or even unknown to an enemy; nor did betray any of the secrets of this government to their enemies.

That he had no malignity in his heart, against the king or his government; nor had ever been guilty of any improper behaviour; but always conducted himself with decency and duty towards his king and country: for the truth of which, he appealed to his character and conversation.

And as to the papers which were seized by the messenger, at the house where he lodged—they might just as well be the woman's of the house, as his: for both of them had access to the bureau, in which the messenger found them.

That the statute of 7 W. 3, c. 3, § 2 & 4, directs that there shall be two witnesses to each overt-act of the same treason. Whereas his hand-writing had been proved only by one witness, who could pretend to know any thing of his hand-writing; for that the other three knew little or nothing of his hand, and could scarcely be said even to have ever seen him write.

[Note. The act directs "That either both the witnesses must be to the same overt-act, or one of them to one, and the other of them to another overt-act of the same treason." Burrow.]

And there was no witness at all, he said, to prove any act of treason committed by him in the county of Middlesex, where the indictment lays the offence to have been done.

He alleged, that this case of his was the first instance since the statute of Edw. 3, where giving intelligence has been holden to be high-treason. And he said, that as he had not had four days between his trial and his sentence, (as was usual,) his counsel had not had sufficient time to prepare themselves in arrest of judgment.

Therefore upon the whole, he prayed that the Court would either be so kind to him as to respite his sentence; or, if that might not be obtained, that they would be graciously pleased to recommend him to his majesty's mercy.

He was then asked "If he had any point of law to move in arrest of judgment?"

To which his answer was "That he had not."

Lord Mansfield then observed, that the pri-

soner had been convicted upon a very full trial, and upon very cogent proof; and that he appeared upon the evidence to have committed many overt-acts of treason.

He took notice, that the prisoner had even solicited this employment, from inclination; as well as undertaken for hire, to act as a spy against his own native country, and to reveal the secrets of the king and government to the open enemies of both; and to give them information and intelligence of the enterprises and designs of this kingdom against them; and all this, with intent and in order to aid and assist them in defending themselves against his king and country.

He observed that the enemy had manifestly shewn "that they themselves looked upon this correspondence to be an aid and assistance to them;" by their giving him a stipend, and paying him a stipulated monthly price, as the purchase and reward of it, under a penalty of his forfeiting 20*l.* for every omission of a weekly letter from him.

He also observed, that the prisoner appeared to have procured his information of the state of our navy and army and finances, and the other matters contained in his papers and memorandums seized in his bureau, with that very view and intention of communicating them to the enemy: and by his letter of the 22d of July last, he had even advised and invited the enemy to invade his native country; and to bring war and destruction into the heart of it. The guilt of this offence arises from the nature of the correspondence, which is calculated to betray the secrets of his king and country to the enemy, as a spy; a treason of a very dangerous kind, and which gives an enemy much more aid and assistance, than a person publicly and professedly declaring himself an open enemy to his own country could give them.

He laid it down as a point which was never doubted, "That this offence, of sending intelligence to the enemy, of the destinations and designs of this kingdom and government, in order to assist them in their operations against us or in their defence of themselves, is high-treason; even although such a correspondence should be intercepted, without ever coming to the enemy's hands." And so was the resolution of all the judges, in Gregg's case. [Vol. 14, p. 1371.]

And as to the witnesses to the prisoner's handwriting.—There are four of them that have seen him write, and swear to his hand, of their own knowledge: and these four witnesses are not contradicted by any evidence on his part; but, on the contrary, are confirmed by a variety of circumstances.

As to the point of locality.—He said that if there had been no evidence at all, of that particular letter which bears date at Twickenham (which is in Middlesex,) yet nevertheless the presumption was strong and stood unre-versed too, "That they were written in Middlesex, where the prisoner resided, and where his papers were seized."

As to mercy.—He told the prisoner, that that was in the king's breast; but was no part of their province: and therefore his application on that head, must be elsewhere.

The Lord Chief Justice (it being a case of high-treason) pronounced the sentence.

Mr. Attorney General then moved, that the Court would appoint a day for the execution.

Lord Mansfield desired him to name a day.

Mr. Pearce, the defendant's solicitor, said he hoped it would not be an early day.

Mr. Attorney General said, he was willing to give as long a day as might be proper.

Mr. Just. Foster mentioned, that Dr. Cameron [p. 734 of this volume,] had 3 weeks.

[N. B. Mr. Charles Radcliffe (vol. 18, p. 429,) had only a fortnight. Barrow.]

Mr. Pearce desired that this might be a month.

The Court and Mr. Attorney General very readily agreed to a month. Accordingly, it was ordered to be upon Wednesday the 12th of July.

The prisoner was remanded to Newgate; and bowed respectfully to the Court, and courteously to the bar and audience, on retiring.—

See De la Motte's Case *a. n.* 1781, and the cases in 1794 and 1796; also East's Pleas of the Crown, c. 2. ss. 16, 31, 36, 58, and Foster and the other authorities cited by Mr. East.

A more circumstantial account of Dr. Henry's Trial was published. Of this account I never saw any copy but one, which is incomplete. So far as it extends, it is as follows:*

The Court began to sit about ten of the clock in the forenoon, and after the usual proclamation was made the Clerk proceeded to call over a list of the special jury, who had been previously summoned for to try this important cause, to the number of one hundred and thirty gentlemen, or thereabouts,† all freeholders of the county of Middlesex. Which being done, twelve gentlemen were called and sworn:

They were all sworn well and truly to try the matters then depending between our sovereign lord the king, and the prisoner at the bar, and to give a true verdict, according to that evidence which should then and there be produced before them.

In the course of which eleven of the jury

* Wherever the following account (which manifestly is very incorrect, I have not altered it, is inconsistent with Sir James Burrow's report, doubtless the latter is to be preferred.

† In the Annual Register for the year (vol. 1. Chronicle, p. 98.) it is said, that one hundred and thirty one were summoned.

were challenged by the prisoner, and two on the side of the crown.

Clerk. Gentlemen, are you all sworn?

Officer. Yes.

Then the Clerk proceeded to read the Indictment against the prisoner at the bar, in the manner and to the effect following.

*Clerk.*²² Florence Hensey, doctor of physic, hold up your hand.

Which the prisoner did.

Clerk. Florence Hensey, you stand indicted by the name of Florence Hensey, doctor of physic, late of Arundel-street in the Strand, in the county of Middlesex; for that you not having the fear of God before your eyes, and that duty and allegiance you owe to your king and country, and being moved by the instigation of the devil, the evil suggestions of your own heart, and the wicked advices and counsels of the enemies of our sovereign lord the king, you did traitorously, villainously, and secretly carry on and hold by the means of divers letters and papers a treasonable correspondence with the agents and officers subjects of Louis the French king, and adhered to the enemies of his majesty king George, and you did invite a foreign enemy to levy war in these kingdoms, contrary to your allegiance and to all the ties of humanity. You have taken part with the French, the enemies of your king and country, and with whom you knew that our sovereign lord the king was now in open war, and did send to the enemies of our said sovereign lord the king, from time to time, and at all times, which lay in your power, and to the utmost of your power, a great number of letters, writings and papers containing a particular account and intelligence of what fleets or squadrons were fitting out, the number of men each ship carried, as also the number of guns and the weight thereof, and whereto they were severally destined; with the state of the nation with regard to the present disposition of the people, the public finances, and the like; and particularly in relation to the late expedition against Rochefort, in which you traitorously happened unluckily, in one of your letters, to guess on the very place to which that fleet was destined; all which you have wickedly, maliciously and designedly done to hurt and injure your own country, and to subvert the constitution thereof; you therefore stand indicted in two respects: First, For that you have wickedly, traitorously, and without the least provocation, or other motive, inducing you thereto, compassing the sacred life of our sovereign lord the king: And secondly, For that you have, contrary to that duty you owe to your country, kept a treasonable correspondence with the enemies of the said sovereign lord the king and his subjects, during the time this nation was at war with France.

To this Indictment you have pleaded, Not Guilty; and now you stand on your deliverance, and God grant you a good one.

The counsel for the crown were, Mr. Attorney-General, [Pratt, afterwards lord chancellor Camden] Mr. Solicitor General, [Charles Yorke, afterwards lord chancellor] sir Richard Lloyd, Mr. Norton, [afterwards lord Grantley] Mr. Perrott, [afterwards baron of the Exchequer] Mr. Gould, [afterwards successively baron of the Exchequer and justice of the Common Pleas] and Mr. Serjeant Poole; for the prisoner, Mr. Morton and Mr. Howard, who had been assigned the prisoner, by a rule of Court of last Easter term.

The Attorney-General opened the cause with so much elocution and humanity, that it must be allowed, in cases of this nature, he seems to have introduced a new and more agreeable method of pleading; which was to the effect following:

Counsel for the Crown. Gentlemen of the Jury; this is a trial at bar, between our sovereign lord the king, and the unhappy prisoner at the bar; and, gentlemen, I am of counsel against the prisoner. The prisoner at the bar is a native of the kingdom of Ireland, about, as I am informed, forty-four or forty-five years of age, and studied physic at the University of Leyden in Holland, and where he took his degree of doctor, and had a diploma given him for the practising that useful art. It seems, the prisoner, as you have already heard, is indicted for carrying on a treasonable correspondence by letters, papers and writings with the agents and officers subjects of the French king, who are the enemies, and, I may say, the open, avowed and inveterate enemies of his majesty, and of this nation; for compassing his sacred life; a life dear to every one, and the more so, by the great length Heaven has been graciously pleased to extend it to; and for sending letters of intelligence to the king's enemies, and keeping up a treasonable correspondence with those with whom this nation is at open war. In the first place, gentlemen, it becomes necessary for me to lay before you the nature of the offence the prisoner at the bar, Florence Hensey, doctor of physic, has been guilty of, and what constitutes his atrocious crime. In the year 1756, on the 17th day of May, his majesty issued out a declaration of war,* against France, and against all the

* His Majesty's DECLARATION of WAR against the French king.

"GEORGE R.

"The unwarrantable proceedings of the French in the West Indies, and North America, since the conclusion of the treaty of Aix la Chapelle, and the usurpations and encroachments made by them upon our territories, and the settlements of our subjects in those parts, particularly in our province of Nova Scotia, have been so notorious, and so frequent, that they cannot but be looked upon as a sufficient evidence of a formed design and resolution in that court, to pursue invariably such measures, as should most effectually promote their ambitious views,

subjects of that crown. From the time of the date of this declaration, the subjects of the French king became the enemies of our sovereign lord the king; and the statute says, that

without any regard to the most solemn treaties and engagements. We have not been wanting on our part to make from time to time the most serious representations to the French king upon these repeated acts of violence, and to endeavour to obtain redress and satisfaction for the injuries done to our subjects, and to prevent the like causes of complaint for the future: but though frequent assurances have been given, that every thing should be settled agreeably to the treaties subsisting between the two crowns, and particularly that the evacuation of the four neutral islands in the West Indies should be effected (which was expressly promised to our ambassador in France) the execution of these assurances, and of the treaties on which they were founded, has been evaded under the most frivolous pretences; and the unjustifiable practices of the French governors, and of the officers acting under their authority, were still carried on, till at length, in the month of April, 1754, they broke out in open acts of hostility, when, in time of profound peace, without any declaration of war, and without any previous notice given, or application made, a body of French troops under the command of an officer bearing the French king's commission, attacked in an hostile manner, and possessed themselves of the English fort on the Ohio in North America.

"But notwithstanding this act of hostility, which could not but be looked upon as a commencement of war, yet, from our earnest desire of peace, and in hopes the court of France would disavow this violence and injustice, we contented ourselves with sending such a force to America, as was indispensably necessary for the immediate defence and protection of our subjects against fresh attacks and insults.

"In the mean time great naval armaments were preparing in the ports of France, and a considerable body of French troops embarked for North America; and though the French ambassador was sent back to England with specious professions of a desire to accommodate these differences, yet it appeared, that their real design was only to gain time for the passage of those troops to America, which they hoped would secure the superiority of the French forces in those parts, and enable them to carry their ambitious and oppressive projects into execution.

"In these circumstances we could not but think it incumbent upon us, to endeavour to prevent the success of so dangerous a design, and to oppose the landing of the French troops in America; and in consequence of the just and necessary measures we had taken for that purpose, the French ambassador was immediately recalled from our court; the fortifications at Dunkirk, which had been repairing for some time, were enlarged; great bodies of

from and after the time of such declaration being made against the king and subjects of any foreign potentate or nation, and at any time during hostilities between the enemies of

troops marched down to the coast; and our kingdoms were threatened with an invasion.

"In order to prevent the execution of these designs, and to provide for the security of our kingdoms, which were thus threatened, we could no longer forbear giving orders for the seizing at sea the ships of the French king, and his subjects. Notwithstanding which, as we were still unwilling to give up all hopes that an accommodation might be effected, we have contented ourselves hitherto with detaining the said ships, and preserving them, and (as far as was possible) their cargoes entire, without proceeding to the confiscation of them; but it being now evident, by the hostile invasion actually made by the French king of our island of Minorca, that it is the determined resolution of that court to hearken to no terms of peace, but to carry on the war, which has been long begun on their part, with the utmost violence, we can no longer remain, consistently with what we owe to our own honour, and to the welfare of our subjects, within those bounds, which, from a desire of peace, we had hitherto observed.

"We have therefore thought proper to declare war, and we do hereby declare war against the French king, who hath so unjustly begun it, relying on the help of Almighty God, in our just undertaking, and being assured of the hearty concurrence and assistance of our subjects, in support of so good a cause; hereby willing and requiring our captain general of our forces, our commissioners for executing the office of our high admiral of Great Britain, our lieutenants of our several counties, governors of our forts and garrisons, and all other officers and soldiers under them, by sea and land, to do and execute all acts of hostility, in the prosecution of this war against the French king, his vassals and subjects, and to oppose their attempts: willing and requiring all our subjects to take notice of the same; whom we henceforth strictly forbid to hold any correspondence or communication with the said French king, or his subjects. And we do hereby command our own subjects, and advertise all other persons of what nation soever, not to transport or carry any soldiers, arms, powder, ammunition, or other contraband goods, to any of the territories, lands, plantations, or countries of the said French king; declaring, that whatsoever ship or vessel shall be met withal, transporting or carrying any soldiers, arms, powder, ammunition or any other contraband goods, to any of the territories, lands, plantations, or countries of the said French king, the same being taken shall be condemned as good and lawful prizes.

"And whereas there are remaining in our kingdom, divers of the subjects of the French king; We do hereby declare our royal inten-

this nation and the subjects thereof, if any one of the subjects of this nation shall keep any correspondence with the enemy, giving him or them notice of any public or private transactions that shall tend to give them any insight into the nature of our strength, either by sea or land, such person shall be deemed guilty of high-treason. These treasonable transactions have been made death by several acts of parliament; and this constitutes the nature of the offence of the prisoner at the bar; for were there no such laws there would be no such crime; the law was made to prevent the evil tendency of the prisoner's offence, which is that I am come now to speak to; and I am sorry for the prisoner's sake to say, that his offence is of so pernicious a nature that it tends to deprive his majesty of his crown and dignity, by endeavouring to shorten a reign of so glorious a length, and in which there has hitherto been uninterrupted peace and plenty; every man has also hitherto sat quietly under his own vine, drank thereof, reaped the fruits of his labour without oppression, and in which every subject may really be said to have received the fullness of joy, and in a sense pleasures for evermore: but on the contrary the unhappy prisoner at the bar has wickedly endeavoured to bring on the inhabitants of this island an invasion from the French king, and a total destruction of the lives, liberties and religion of every Englishman, and in its dreadful and horrid consequences make us a province to France; a design our enemies have long projected, and a design which the prisoner at the bar has, as far as lies in his power, forwarded. Now for your satisfaction, gentlemen, that the unhappy prisoner at the bar has been guilty of the heinous and detestable crime of which he now stands charged, we shall shew you, that he has wrote several letters to the French king's subjects, particularly several sent directed to Paris, giving them from time to time intelligence of what passed relative to our naval and other preparations made in this kingdom, in order to destroy the power of the French king our inveterate and natural enemy; an enemy who seeks to destroy our liberties, enslave our persons, rob us of the wisest of monarchs, ruin the best constituted nation upon earth, and abolish the Protestant faith: by sending the said letters he the prisoner has done to the utmost all that lies in his power. Indeed, it may be said, that several of these letters were intercepted, and so did not reach the persons to whom they were sent, and so no evil consequence resulted from them, from the writing of them, or from the sending of them; and therefore it may be objected, that these

tion to be, that all the said subjects who shall demean themselves dutifully towards us, shall be safe in their persons and effects.

" Given at our court at Kensington, the 17th day of May, 1756, in the 29th year of our reign.

" God save the King.

letters are no overt-act of the prisoner; but when we on the side of the crown shall come to read these letters, under the favour of the Court, and prove to you that they were sent by the prisoner at the bar, with an intent, with a very plain intent to be delivered to the enemies of our sovereign lord the king, then you will be of opinion that the sending of these letters was an overt act; and that every letter was at the time of its being sent an absolute overt-act. It is true, had these letters remained in the hands of the prisoner, and had not been sent by him, as far as lay in his power, to the enemies of his majesty, then in such case, though they would have been treasonable papers and letters, yet there would have been no overt-act in them, because they were not sent, yet such letters and papers being found in the possession of the prisoner would have shewn him to be a dangerous person. It is much the same as in case of treasonable thoughts, they cannot become no way an overt-act till they are uttered in the presence and hearing of a second or more persons, and then treasonable words become an overt-act, and by the law are justly deemed to be high treason. We shall prove to you by undeniable evidence, that many letters of treasonable correspondence were found in the custody and possession of the prisoner at the bar, both sent by him to the enemy, and received from the enemy by him, in several of which directed to Paris, he gives the French notice of several of our armaments, what number of ships the king our sovereign was fitting out to defend this nation and to annoy the subjects of the French king, what number of men and guns they contained, and on what services sent, and to what places destined. By letters, found in his possession, sent him, it will appear, that the prisoner at the bar received on the account of this treasonable correspondence, after the rate of an hundred guineas a-year of the enemy for carrying on this iniquitous correspondence. For so trifling a sum did he betray his country! But it will likewise appear, that the prisoner Doctor Florence Heneacy did not carry on this wicked correspondence so much for gain, as through inclination and principle, though indeed afterwards in a letter which was intercepted, directed to him, we find he had complained that the above sum of twenty-five guineas a quarter, or one hundred guineas a-year was not sufficient, and that he hoped and expected it should be doubled; and the same letter gives him hopes, that it would be soon. The prisoner gave the French the first account of admiral Boscawen's sailing to North America, and of the taking of the Alcide and Ly s, with every minute circumstance relating thereto. It might in a great measure be owing to the treacherous and treasonable correspondence of the prisoner at the bar, that the late well-concerted affair of the secret expedition miscarried, since we find, in one of his letters, though he could not know, for the least certainty, that that fleet was destined for Rochefort, he has unluckily hit on that for the

place of its destination, in these very express words: "You may depend upon it that the English fleet is designed against Rochefort, and Rochefort only:" and by this unlucky conjecture gave the enemy timely notice to stand on their guard, and by that means, as it did turn out, prevent the designs of his majesty in crushing the power and insolence of the French king, and his subjects. That the prisoner was by inclination more than interest an enemy to his present majesty, and our happy constitution will appear particularly from one letter we shall produce to you, in which he says, he had a great regard for the French nation, and that he offered his service not only from interest but inclination to promote the welfare of that country. Another letter is written on purpose to advise the enemy to invade this island; and by one blow to extirpate the British liberty; he tells his correspondent, that the English were generally dissatisfied, that their finances were well-nigh exhausted, that the public credit was totally destroyed, and that therefore now was the time to give the final blow. To advise the enemy at war with this kingdom to come and invade this island is high treason; it is endeavouring to dethrone his majesty, and it is compassing the life of the king; and we shall leave it with you, gentlemen, to consider how far, if his evil advice had been taken, and had succeeded, it might have affected every individual subject of his majesty, their lives, families, fortunes and liberties. Of these things you are the proper judges, how far they might probably have reached. But, gentlemen, notwithstanding all that has been said, against the prisoner at the bar, there rests for your consideration one or two things; the first is, whether the prisoner wrote these letters before the declaration of the war against the French king; for if he wrote them before and sent them before that event, then they are not treasonable, because not wrote and sent to the enemy in the time of open war; but if you should find they were wrote after the declaration of such war against the French king, then they are so many separate acts of high treason. Again, though these letters papers and writings were found in the custody and possession of the prisoner at the bar, it does not follow therefore, that they were wrote by him; and therefore it will be necessary for us, in order to satisfy you, that they were wrote by him, to prove his hand-writing by such persons who have seen him write, and who have been conversant with him for many years, that most of these letters, papers and writings are severally the hand-writing of the prisoner at the bar. One of these witnesses, particularly, has been intimately acquainted with doctor Hensley for ten years, has seen him during that time write several letters papers and other writings, and is now possessed of several letters sent to him by the prisoner. We shall therefore, in producing to you our evidence, first, make it appear, that the letters, papers and writings now in my hand, now about to be produced to you and the Court, were taken in the custody and possession of the pri-

soner; Secondly, that many of them are the hand-writing of the prisoner; Thirdly, that the prisoner did send several letters he wrote to the enemies of his majesty and his liege subjects. As to the subject of the letters and papers, you will not only hear them read in court, I mean the translation of them out of the French into the English, but both the originals and the translations of these papers letters and writings will be laid before you. When all this is done, you, gentlemen, will be proper judges of their destructive tendency; you, indeed, under the sufferance of the Court, are the only judges of this fact; and I do not doubt, I make no doubt, if the general tendency of these letters writings and papers be found to be destructive of the peace of the nation, thereby compassing the life of his most sacred majesty, our sovereign lord the king, and tend, as I think they plainly do, to the subversion of our happy constitution, you will find a verdict accordingly. We will now therefore proceed to prove the first thing we have undertaken, viz. That the papers and letters I have now in my hand were found in and taken out of the custody of the prisoner at the bar. Call Nathan Carrington.

Clerk. You shall true answer make to all questions asked you in the cause now depending in this court, between our sovereign lord the king and the prisoner at the bar. And the evidence you shall give, shall be the truth, the whole truth, and nothing but the truth. So help you God.

Nathan Carrington sworn.

Counsel for the Crown. Mr. Carrington, tell the Court and the jury sworn, what you know in relation to any letters papers and writings found in the custody and possession of the prisoner at the bar.

Carrington. Some of the prisoner's letters being intercepted by one belonging to the general post-office, and a strong suspicion of a treasonable correspondence appearing to be carrying on;—[Mr. Carrington speaking somewhat low, though very distinct, he was desired to speak out, so that all the jury might hear; and to that end, he was also desired to look towards the place in which the jury sat.]

On the 21st day of August last, I went, by virtue of a warrant directed to me by the secretary of state, with full power, to apprehend the prisoner at the bar, and search his house lodging and person, on suspicion of his carrying on a treasonable correspondence with the French, for letters, papers, writings, or other things relative to such negotiations, which might have passed, or was then transacting between the agents and subjects of the French king, and doctor Hensley, the party then suspected. Accordingly, taking with me proper assistants, I went early in the morning of the said 21st day of August last to doctor Hensley's lodgings in Arundel-street in the Strand. On sending my young man to ask, whether the doctor was at home, he was told by the servant-

maid, that the doctor was not within, but that he would not be long before he came home, for that he was only gone, as he was used to do every morning, to prayers to the Catholic church in Soho-square; and that he always came directly home, after divine service was ended, before he went to visit his patients, and before he went elsewhere about his other business. When I had received this answer, I soon concluded, that as one of my assistants knew the doctor well by sight, we would go from thence immediately to the Popish chapel in Soho-square; and see if we could pick him up. When we were come there, the mass was finishing, and the people soon after coming out, the doctor also coming out, my assistant shewed me the prisoner. On which I acquainted the prisoner with my business; which done, I conducted him to my own house; and then I acquainted the office that I had taken the prisoner at the bar, and the manner in which it happened.

After you had taken Mr. Hensey as he was coming out of the Popish chapel in Soho-square, and conducted him to your own house, what followed?—I took him into a back room, and assisted by two others, or rather while two other persons were present, I searched all his pockets, and the lining of his coat, waistcoat and breeches; all which I caused him one after another to pull off: I likewise searched his shoes, and the lining of his hat. In this search, I did not find so much as one letter, note, paper, or writing whatever.

When did you make this diligent search into the pockets and clothes of the prisoner? Was it before you went to the office or after?—It was immediately after I had brought him into my own house. It is customary to search prisoners, especially such as are suspected of having about them letters and writings of a treasonable nature, as soon as is convenient, lest they should find means, if they have any about them, either to destroy them, or to convey them away. But nothing of a treasonable nature was found about the doctor. And the search happened about an hour before I went to the office.

Take time:—Well, and what did you after all this?—I, with my assistants, went in the afternoon to the prisoner's lodgings in Arundel-street in the Strand. When I came there, I found the house was not the doctor's, but only that he lodged there; that he had a room up two pair of stairs, which was his bed-chamber, and a parlour in which was a bureau, a glass, and several chairs. I asked the mistress of the house, who is a widow-woman, whether the lodgings she had let doctor Hensey were ready furnished? and, whether the bureau which I then saw in the parlour where I was, was in the use and possession of the doctor? She replied, That both the rooms she had let doctor Hensey were ready furnished, and that the doctor used the bureau for to put his papers in, and the drawers for his linen. I asked for the key of the bureau, in order to see what kind of letters

they were which belonged to the doctor. But I was told, that the doctor had the key, and that it was not to be found. Whereupon I was thinking to send for two chairmen, and have the bureau carried by them to my house on one of their carriages, but recollecting that I had got about me my keys, I tried whether the key of my bureau would open the doctor's bureau, and upon trying it, it opened it; and then I took out all the writings, letters and papers I could find.

Then you are sure you took out all the letters, papers and writings then in the prisoner's bureau.—On such occasions I sweep all writings, letters and papers away whether they relate to the subject or not; for at such times we cannot stand to be very exact; and it is far better to take too much than to take too little; and afterwards what does not relate to the affair for which the prisoner is charged, is carefully returned him. This has always been the practice ever since I have had the honour to be one of his majesty's messengers. As for my own part, I always take particular notice of what letters, writings and papers I take in a prisoner's possession, and I mark them that I may know them again.

If you were to see those letters, writings and papers you took out of the bureau then in the possession and use of the prisoner at the bar, do you think you should know them?—Yes, I should; I am sure, that I should know them; they have all got my mark upon them.

Look on these letters and papers, and let the Court and Jury know, whether these are the very letters and papers you took out of the prisoner's bureau.

Carrington takes the letters and papers into his hand, and examines them, and then says, They have been numbered since they were in my hands; but here is my mark on every one of them; and these are the very letters, papers and writings, I took out of doctor Hensey's bureau.

Did any body see you take them out of the bureau?—Yes, several; there were present, besides Mr. Turner, the constable, my assistant, the woman of the house, who is a widow, and her maid.

Mr. Turner sworn.

Q. Were you with Mr. Carrington on the 21st day of August last, when he searched the prisoner's lodgings? What passed at that time?—Turner. I went with him to assist him, and I saw him take these very letters, papers and writings (looking on them) out of the doctor's bureau; I know them to be the same, I looked particularly on them, and afterwards I read one or two of them.

Do you understand French?—Yes.

The Constable sworn.

Coun. for Crown. Were you with Mr. Carrington on the 21st day of August, when he went to search the prisoner's lodging in Arundel-street? Tell what you know of the matter.

—*Constable*. I see Mr. Carrington take several writings, and letters out of a bureau at that time, but as to whether these are them, I cannot say, because I did not take any particular notice of them; but this I know, I carried home the bag in which I believe, nay I then knew, they were contained.

Where did you carry them to?—To Mr. Carrington's house in Jermyu-street, in the company of Mr. Carrington.

[Cross-examined.]

Coun. for Prisoner. How do you know that the papers and letters now in court are those Mr. Carrington took out of the prisoner's lodgings in a bureau in the parlour?—*Constable*. I no other ways know than that they look like to those I put into the bag, when I carried them to Mr. Carrington's house.

Mind what you say, Sir, you are upon your oath, and can you say upon that oath you have taken, that the papers and letters you now look on, are those very identical papers and letters the king's messenger took out of the bureau, on the 21st day of August last?—I take them to be the very same papers and letters, which were then taken out of the prisoner's bureau; I believe them to be the very same; and to the best of my knowledge, I am sure they are the very same, which I carried from the prisoner's lodgings in Arundel-street in the Strand, to the house of the king's messenger in Jermyu-street.

Do you on these occasions always carry the bag, that you are so very particular?—For many years past, I have gone with Mr. Carrington to make these searches and seizures, and ever since I have been so employed, I have brought all the things seized and taken away, unless the bulk and number of them required other assistance.

To the *Constable*. Stand by.

Thomas Clark sworn.

Coun. for Crown. I think you werewith Mr. Carrington, in order to assist him, when he went to search the prisoner's lodgings. Give an account of what you then saw and heard.—

Clark. Though we had got the prisoner, I went and asked for him that afternoon as though I knew no accident had befel him, but the maid knew me again, and said, she had not seen the doctor since I was there in the morning. I told her, I wanted the doctor much, that my mistress was taken very ill, that my master was afraid she would die, and the like; and I seemed very urgent to see him, and pretended great uneasiness and concern for his absence. But the maid said, she could not tell where he was, that she had long expected that, wondered he would never get us before. I said, Mr. Carrington was with me in the room, and I was talking to him, and she said, that was all.

—

him the doctor's apartments, which she somewhat unwillingly did, but not before her mistress came; when he proceeded as Mr. Carrington has already related; and I saw him take many papers, writings, and letters out of the doctor's bureau, by the help of his own key. Which if he had not done, I had proposed to him the breaking of it open, which I could easily have done.

Do you believe these to be the papers, writings and letters Mr. Carrington took out of the prisoner's bureau on the 21st day of August last?—I think them to be the same, they look to me to be the same; and I have seen them two or three times since.

[Cross-examined.]

Coun. for Prisoner. Pray, how and when did you see these papers, letters, and writings a second or third time?—*Clark*. The next day after the papers and writings were brought home, my master and another gentleman looked over them, sorted them, marked them, and read them, in the dining-room, and I attended to and fro most of the time.

What then you are Mr. Carrington's footman?—Rather his servant, or assistant; I am not a hired servant, but come and wait occasionally, when I am wanted.

Officer. Stand by.

Sarah Wilson sworn.

Co. for Crown. What is your name?

Wilson. Sarah Wilson, Sir.

Do you know the prisoner Dr. Hensey when you see him?—Yes. (Speaking very low and faintly.)

Counsel. Speak out, child; do not be afraid: raise your voice, that my lords and the gentlemen of the jury may hear you; there is no body here will hurt you: look towards me, speak out, and do not be bashful. Do you see the prisoner, Mr. Hensey, now in the court?—*Wilson*. Yes, Sir; he is there (pointing to the prisoner with her hand), that is Dr. Hensey, and he is now in the same coloured clothes he usually was dressed in.

I find you were a servant-maid in the house where the prisoner lodged; how long had you lived there?—Nigh six years.

How long is it since Dr. Hensey first came to live in your mistress's house?—Not quite two years; I think it was towards the end of last summer was twelve-month.

Does your mistress keep a house, and let out lodgings?—My mistress keeps a house, and lets out rooms and lodgings to gentlefolks.

Are these rooms and lodgings let ready-furnished or unfurnished?—My mistress always lets her rooms and lodgings furnished, never unfurnished.

Then the lodgings your mistress let to the prisoner, Dr. Hensey, were what are generally termed, ready furnished lodgings?—Yes; my mistress never let her rooms otherwise than furnished, while I was with her.

You say, while you were with her; why,

where are you now?—About three months ago, I was taken into custody, where I have remained ever since.

What were the lodgings your mistress let to the prisoner at the bar?—A room up two pair of stairs, and a parlour, even with the street, both of them ready furnished.

Was there a bureau among the furniture in the parlour?—There was then a handsome bureau in the parlour standing under the glass.

Was that bureau in the use and possession of Dr. Hensey? Had he the key of it?—It was generally in his use, and he used to put his papers and linen in it, and he always had the key of it, or mostly he had the key of it.

Did your mistress let these rooms to Dr. Hensey, by the week, month, quarter, or by the year?—I cannot tell which; but ready-furnished rooms are generally let by the month, or the week; for while I have been at Mrs. Blount's, gentlemen have frequently lodged there one week, and sometimes a fortnight, come to town, do their business, pay my mistress, and then go down into the country again; families frequently come to London, to see the town, visit their friends and acquaintance, and dispatch their several little businesses, stay two, three weeks, a month, and sometimes more, and go away again. This has often happened whilst I lived there; but whether Dr. Hensey rented his rooms by the week, month, quarter, or by the year, I never heard.

Did you see Mr. Carrington take any papers, letters and writings out of Dr. Hensey's bureau on the 21st day of August last?—I did see him take a great many papers, letters, and writings out of the prisoner's bureau, and I wondered why he did so; but he said, he had power to do so; he had the king's warrant for what he did; and the constable was there to keep the peace with his little staff; and my mistress seemed to be afraid of him; and then understanding him to be the king's messenger, she first imagined, that he had taken up the doctor, and so it turned out.

Did your mistress let the prisoner at the bar the use of the bureau, at the same time she let him the parlour?—Yes; and he always made use of it, and he kept the key of it in his pocket; and I have often seen him sit at the bureau, and write many times.

[Cross-examined.]

Conn. for Pris. According to my instructions, which I dare say are right, this bureau was not the doctor's, but your mistress's.—*Wilson.* Yes, Sir, the bureau was my mistress's, but then the doctor was by agreement to have the use of it, so long as he lodged in the house, and had the parlour.

Did not your mistress put her things, linen, &c. into the bureau?—No; my mistress had nothing in the bureau; she never kept any thing belonging to her in the bureau, I am sure, since the doctor came to the house; he used the upper part for his papers, writings, and letters, and in the drawers underneath he put his linen and other apparel.

VOL. XIX.

But did not your mistress go and open the bureau and the drawers at any time?—The doctor would often leave the key with my mistress, and she would go to the drawers, open them, and take out any thing she wanted of the doctor's, either to mend or make.

But did not your mistress also frequently open the upper part of the bureau?—I never did see her open the upper part of the bureau, nor had she any occasion, for the doctor's linen and other wearing apparel were in the drawers underneath.

Officer. Stand by.

Counsel for Crown. Mr. Carrington, when you had got these letters, papers and writings, and had numbered them as you say, what did you do with them?—*Carrington.* When I had sorted them, and put them into order, according to my usual method, I carried and delivered them to the honourable Mr. Stanhope.

Are these the letters and papers you delivered him?—Yes, they are the very letters and papers I delivered to him at his office in Whitehall.

[Cross-examined.]

Counsel for Prisoner. With humble submission to the Court, I would ask the messenger two or three questions?

Court. As many as you please.

Q. Mr. Carrington, how did you know, that the bureau out of which you took the letters, papers and writings now in court was the property of the prisoner at the bar?—*Carrington.* The landlady of the house told me, that she had let that room ready furnished to Dr. Hensey, and when I asked her for the key of the bureau, she told me the doctor had it, for that she had let him the use of the bureau together with the parlour. I was going one while to send to the doctor for the key, but it being so far, I laid that thought aside;—I was going to force the lock, and break it open, but at length thinking of my own key, all purposes were immediately answered.

Did you find any of these papers, letters or writings you call treasonable about the person of the prisoner?—After I had taken the prisoner as he came out of the Popish chapel in Soho square, I put him into a coach, and carried him directly to my house where I searched him, but found on him no letter, or other writing, except his pocket-book, containing divers memorandums and recipes wrote in Latin, and which book I shewed to the hon. Mr. Stanhope, and returned it the prisoner the next day.

The Hon. Mr. Stanhope sworn.

Conn. for Cr. Pray. Sir, let the Court and jury know, whether these are the very letters and papers you received from Mr. Carrington; and when you had done with them to whom you delivered them?—*Stanhope.* These letters and papers I received from Mr. Carrington soon after the apprehension of doctor Hensey, and when I had finished his examination.

tion, for the prisoner was examined at several times, I carried them to the solicitor of the treasury, Mr. Francis.

Mr. Francis sworn.

Coun. for Cr. Pray, inform the Court and the gentlemen of the jury, whether these are the very letters and papers you received from the honourable Mr. Stanhope?—*Francis.* I received these very letters and papers from the hon. Mr. Stanhope with my own hands, with directions to proceed against the prisoner at the bar. Hereupon I digested them into the present order in which they are, and procured them to be translated out of the French, in which language they were wrote, into English; and drew up my proceedings therefrom; and they remained in my custody, till I delivered them lately into the hands of Mr. Webb.

Philip Carteret Webb, esq. sworn.

Webb. I received all these letters, papers and writings, relative to Dr. Hensley, from Mr. Francis, and I have brought them here, in case the Court should think proper to have them read in this cause.

[Then the Counsel for the Crown, to corroborate the evidence already given, called two other persons as witnesses to prove that the letters, papers and writings then in court were in the possession of the prisoner at the bar.]

Elizabeth Blount sworn.

Coun. for Cr. Where do you live?—*Blount.* In Arundel-street in the Strand; I keep a house in that street, and have done so for some years past.

What are you?—A widow; my husband has been dead about eight or ten years.

Do you know the prisoner at the bar, Dr. Hensley?—Yes; I do know him very well.

How long have you known him?—Upwards of a year and a half; nigh two years.

Did you let him any rooms to lodge in, and what were those rooms?—He came about two years since to my house to take some lodgings, and I let him a room up two pair of stairs, and a parlour even with the street.

Did you let them to him furnished or unfurnished?—He wanted ready furnished lodgings, and therefore I let them to him ready furnished.

What furniture was in the parlour when you let it him?—A bureau, a glass, chairs, and some other things.

So the prisoner at the bar had the use of these things by agreement; he paid, I suppose, a rent accordingly. Did he keep any thing in the bureau?—Yes; in the upper part of the bureau, he used to put his letters and other papers, and in the drawers his linen and other apparel.

Do you remember Mr. Carrington's coming to your house, and the search he made for Mr. Hensley's papers?—Yes, Sir; I remem-

ber it as well as if it had happened but this morning; for I never saw such a thing before in my life; I thought him a very rude man, he would look about and search, and do as he pleased, all I could say to him. But when he told me, he was the king's messenger, and that he was sent, I think he said by the earl of Holderness, one of the king's principal secretaries of state, and all those with him said the same thing, I was so afraid that I even let him do what he would, though it was in my own house. I saw him open the bureau with a key he had in his pocket, and he took many papers and letters, put them into a bag, tied up the mouth of the bag very tight, and he and his assistants took them away; and indeed, and in truth I was very glad they were gone.

Look on these letters and papers, and tell me whether you believe these are the letters and papers Mr. Carrington took out of the bureau at that time?—*Blount.* (Looking attentively on the letters.) I believe they are the very same; they look like them; they appear to me to be the very same, according to the best of my knowledge and remembrance; but as to that I cannot be very positive, for I did not then look so particularly at these papers as I do now.

Counsel. Well, we have enough of it.

[Cross-examined.]

Coun. for Pris. Did not you, Madam, frequently keep the key of the bureau in the parlour? It was, if my instructions be right, your bureau, and in your use, and you kept the key?—*Blount.* The doctor would frequently leave his key of the bureau with me, that I might give out his linen to his washer-woman.

Coun. Here they endeavour to prove, that the bureau in dispute was the prisoner's.—Was it his, or your's?

Attorney General. (interrupting) No, brother, we do not say, the bureau was the prisoner's, we say, and so it turns out, that the bureau is this honest woman's; but that she let him the use of it, during the time he was her lodger; a landlady may let a person the use of a bureau, a chest of drawers, or an escrutoire, for a time certain, as well as let part of her house for a time certain; and during such agreement and conditions the lodger is absolutely entitled to the possession as much as if it was his own property, and he had been the original purchaser.

Blount. The bureau was mine; I bought it, and had it before I knew Dr. Hensley four or five years; but while he was my lodger, I let him the use of it; and he was to have the use of it so long as he lodged in my house, and paid me his rent; that was the agreement between Dr. Hensley and me.

Officer. Stand by.

Elizabeth Smith sworn.

Co. for Crown. Pray, mistress, what are you?—*Smith.* Sir, I am a washer-woman;—I washed the doctor's linen.

Did there ever happen a dispute between you

and the doctor about some of his linen that was missing?—Yes, Sir, he said, through a mistake, that I had not brought home one of his shirts, when I had; and one day I came to the doctor about it, and I desired the doctor to look in his drawers, I supposing he might some how have overlooked it: on this occasion he took his key out of his pocket, and he opened the lowest drawer but one, and there he found the shirt that was missing.

Mind; he took a key out of his own pocket; he did not ask Mrs. Blount for the key, did he?—There were at this time nobody present but the doctor and myself; and he put his right hand into his pocket, drew out a key, and opened the drawer with it.

Officer. Stand by.

Co. for Crown. Thus, gentlemen, we have made appear, and I hope fully to your satisfaction, that the letters, papers and writings to be produced to the Court and to you were taken in the possession of the prisoner at the bar. But, gentlemen, their being found in the possession of the prisoner at the bar, would avail nothing nor be of any signification, in regard to the heavy charge brought against him, unless it can be proved, that the prisoner at the bar did write all or any of the writings, papers and letters now produced in court. Wherefore, gentlemen, we shall now proceed, in the second place, to produce you several witnesses to prove, that these letters and papers are many of them the hand-writing of the prisoner at the bar.

Mendez da Costa sworn.

Co. for Crown. Do you know the prisoner at the bar, Florence Hensey, doctor of physic?—*Da Costa.* Yes, I have known the doctor now about ten years, and have been conversant with him during that time.

Have you ever seen Dr. Hensey write?—Many times; and I have now in my possession several letters of his own hand-writing, which from time to time, during our acquaintance he has sent to me.

Pray, look on these papers, writings and letters, and tell the Court and gentlemen of the jury, whether you believe they are the hand-writing of the prisoner at the bar?—*Da Costa.* (Looking over them attentively) I know the prisoner's hand-writing very well; and I am sure these are his hand-writing; and they are like the hand-writing of those letters which he sent me; they are wrote in the same form and manner; and likewise they are folded up in the same way, and the inscriptions are wrote likewise in the same form and mode mine are;—I should know his letters and writings from all others; for I have been well acquainted with his hand-writing for ten years past; and have often seen him write.

Have you, Sir, about you any one of those letters the prisoner sent you? If you have, you might compare it with these.—*Da Costa.* (Pulls out of his pocket one of his own letters, which the prisoner had sent him, and compares

them together) They are exactly alike; the likeness is so great, that I can take upon me to say, that they were both wrote by one and the same person. I know doctor Hensey's hand-writing so well that I can no way be deceived; all these letters I now look on, and which I hold in my hands, are his hand-writing.

[Cross-examined.]

Co. for Pris. Sir, you seem to be very positive;—do you consider, that you ought to be very careful what you swear; for the life of the prisoner is at stake; I should think it very hard to swear to a man's hand-writing;—it is a difficult thing, make the best of it.—*Da Costa.* I am so well acquainted with the doctor's hand-writing that I can make no mistake;—I would not say, that these papers and writings were doctor Hensey's hand-writing, if they were not. I have a great regard to what I say; and I would not utter a falsity upon this occasion upon any consideration whatever.

Thomas Brown sworn.

Co. for Crown. Pray, Sir, what may your profession be?—*Brown.* I am, Sir, an apothecary.

Do you know Dr. Hensey the prisoner at the bar?—Yes, Sir.

How long may you have known him?—About five years.

How came you acquainted with him?—I have attended several of his patients as their apothecary.

Did you ever see him write?—I cannot say, that I have seen him write but once, and that was one evening a prescription for a lady who was taken suddenly ill; but I am well acquainted with his hand-writing, and have received several of his prescriptions, and have many of them now by me.

Look on these letters, papers and writings, and tell the Court and jury, whether you believe them to be the hand-writing of doctor Hensey, the prisoner at the bar?—*Brown.* (Takes the papers and letters into his hands, and then looks stedfastly at them) They are written by doctor Hensey;—they are his hand-writing, I am sure of it;—the more I look at them, the more I am convinced the prisoner wrote them.

[Cross-examined.]

Co. for Pris. How came you, Sir, to be so very particular as to keep doctor Hensey's prescriptions?—*Brown.* It is customary for us so to do, and when we have from thence made up our medicines for our patients, according to these little rules or directions sent us by the physician, we always carefully file them, for our own use and justification.

Co. for Pris. Indeed, I do not like the use you are now going to put them to.

Attorney-General. No; I believe not; nor your client at the bar does not like the present use of them.

Co. for Pris. Ay, Mr. Attorney, you have

it all your own way ;—you like to have it all of your own side, and to carry every cause !

[Which made the whole Court laugh.]

Officer. Stand by.

Mrs. Blount re-examined.

Co. for Crown. Did you ever see doctor Hensey write ?—*Blount.* I have seen him write several times at a distance ; I have likewise now by me several little notes of his hand-writing.

Look on any one of these writings, letters and papers, which have been fully proved to have been in the possession of doctor Hensey, and tell us, whether you can say, on your oath, that you believe he wrote them ?—I have looked at them very carefully, and I think they look like his hand-writing ; but I am not so well acquainted with writing as to be able to swear, that these letters, writings and papers, all, or any of them are positively the hand-writing, or that they were wrote by doctor Hensey, and him only.—I did not see him write any of them.

The question is not, whether you saw him write all, or any one of the letters, papers and writings shewn you, but whether you can from the acquaintance you have with the doctor's hand-writing, say, that you do believe them to be wrote by him ?—I cannot say so positively as that amounts to ; though I can say, that I think they appear to me to be the hand-writing of doctor Hensey as far as I can judge of this matter.

Cross-re-examined.

Co. for Pris. Madam ; you seem to be a very honest woman ;—you say you have seen the prisoner write at a distance : Pray, at what distance ?—*Blount.* Sometimes he would sit writing at the bureau, while I was sitting by the fire ; which is about half as far as I am to you ; and at other times he would sit by the fire, he on one side of the table, and I on the other, at a little distance, and he would write a letter or letters, and when the postman rang his bell in the street, he would frequently himself give him the letter, and sometimes I have given such letter to the postman to carry to the General Post-Office.

Why, then the prisoner never made any secret of his writing ! He wrote at all times, before you, before your maid, and before any body else ! Did you ever suspect him to be guilty of what is now laid to his charge ?—I never had any suspicion about the matter in question ; I was the most surprised at what has happened ; for I never heard him say any thing about the French king, ships, number of men, armaments, ammunition, fleets, squadrons, and such like stuff. I only know, that he was a doctor of physic by profession ; and that as to matters of faith I knew he was a Roman Catholic ; but that I no otherwise knew than by his constant custom of going to prayers at the Popish chapel in Soho-square, every morning, hail, rain or shine, as the saying is,

but he never told me he was a Roman Catholic. This I know, he is a very civil, honest, good-natured man ; willing in the way of his profession to do any one a kindness, and ready at all times to assist the poor. He is likewise a sober man, always kept good hours, and not given to any one vice I could perceive.

And perhaps you think, it is pity a man of this character should be hanged !—Indeed, I do ; and I hope he will not. [Which made the Court laugh.]

Sarah Wilson re-examined.

Co. for Crown. Did you ever see Dr. Hensey write ?—*Wilson.* Yes, Sir, several times at a distance, and I have seen of his writing also many times.

What writings have you seen ?—Only washerwomen's bills, and the superscriptions of letters ; but then I never took any particular notice of them, because I never thought then I should ever be questioned about them.

No, I believe not ; but look on these papers, writings, and letters, and see if you can perceive whether the hand-writing of them be like the hand-writing of the washerwomen's bills you mention, and which you have seen.—I cannot say, that I used to mind the bills much he gave me to give his washerwoman ; for I used to give her the bundle and the bill in it, and I very seldom read the bill till she brought home the doctor's linen, when I or my mistress, my mistress most commonly, used to examine the things by the bill. But now I look on these writings, papers, and letters, I think they are wrote by the same person who wrote the bills I have mentioned ; but I cannot take on me to be so sure, as to swear that these are the hand-writing of Dr. Hensey.

Elizabeth Smith re-examined.

Co. for Crown. Sarah Wilson the last evidence, says, that she delivered to you always with the doctor's linen, a bill written by the doctor. Did you ever see the doctor write ?—*Smith.* No, I never did ; but I have seen many bills which I was told was of his hand-writing.

How many of these bills might you see ?—One with every parcel or bundle of linen I washed for the doctor ; I washed his linen once a month, that was generally the custom ; and I believe I might receive ten or twelve of these bills ; but then every one of these bills returned to Mrs. Blount ; when she or sometimes her maid used to examine the linen I brought home by the bill, and pay me.

How do you know then that the bills were wrote by the doctor ?—There happened once a dispute about a shirt that was missing, and in that dispute the doctor produced the bill of that washing, and then he said, that he set it down with his own hand.

You are well enough acquainted with the doctor's hand-writing to tell whether these papers, writings, and letters, look like his hand-writing, or not ; look on them, and tell us what

you think of them.—As far as I can judge, I think they are like the doctor's hand-writing; but I will not swear to it.

Co. for Pris. Ay, you are an honest woman, nor would I swear to a thing I don't know; but my brother, here, would have you swear what you never saw, nor I am afraid now you never will, that is, that you saw my unhappy client write.*

Co. for Crown. Thus have I laid before you our evidence to prove, that the writings, letters, and papers, we have produced are the hand-writing of the prisoner at the bar, which I hope we have done to your entire satisfaction; we come now in the last place to prove, that several of these letters, papers, and writings, were sent by the prisoner at the bar to the agents, officers and subjects of the French king, to give them intelligence of what passed here, in order to distress that monarch and his subjects. We shall call you two witnesses to prove this accusation against the prisoner; and then lastly, we shall, under favour of the Court, read the letters as part of the evidence to be given in this cause. Call James Newman.

James Newman sworn.

Co. for Crown. Do you belong to the general post-office?—*Newman.* Yes; I ring the bell in Arundel-street in the Strand for post letters, and in that walk; and when I have collected them together I carry them to the post-office.

How long have you collected letters in that walk?—Three or four years.

Do you know the prisoner at the bar, Dr. Hensey?—Yes; I know him very well; I have known him above eighteen months.

Tell the Court and jury what you know relative to him.—I have often received from the prisoner at the bar letters of a post-night to carry to the office in Lombard-street, and have carried and delivered them to the office, as I used to do other letters; but at length I began to suspect them.

How came you to suspect the prisoner at the bar of carrying on a treasonable correspondence?—When I have got all my letters together, I carry them home and sort them; in sorting of them I observed that the letters I received of Dr. Hensey were generally directed abroad and to foreigners; and I knowing the doctor to be a Roman Catholic, and as I imagined in the interest of the Pretender, I advised the examining clerk at the office to inspect his letters, telling him, that I had some suspicion, that the writer of those letters was a spy.

Did you open any one of these letters yourself?—No; but I happened to challenge the letter about the Secret Expedition; and when it was opened at the post-office and found to be what it is, after that I received directions to bring every letter I received from the doctor's

own hand, or from that house, directly to the office that it might be opened; and so I continued to do till the doctor was taken up.

If you were to see these intercepted letters should you know them again?—Yes; I should know them again by the outside, because they have got my mark upon them.

Look on these letters, and tell us whether these are the very letters you received of doctor Hensey to carry to the post-office.—I received these very letters from the doctor's own hands, or from the maid or mistress of the house in which Dr. Hensey lodged; sometimes one, and sometimes another, to carry them to the post-office; and I did carry them to the post-office, where they were stopped or intercepted.

To whom did you give these letters at the post-office?—To Mr. Matthews, one of the examining clerks.

Do you know any thing more concerning this matter?—I never heard any thing more after Dr. Hensey was taken on Sunday the 21st day of August last till now.

[Cross-examined.]

Co. for Prisoner. How came you to know, that Dr. Hensey was a Roman Catholic? What had you to do with his religion?—*Newman.* We letter-carriers, or postmen, have great opportunities to know the characters and dispositions of gentlemen in the several neighbourhoods of this part of the town, from their servants, connexions and correspondents; but to be plain, if I once learn that a person who lives a genteel life, is a Roman Catholic, I immediately look on him as one who by education and principle is an inveterate enemy to my king, my country, and the Protestant religion: This led me to keep a watchful eye over Dr. Hensey, and to suspect him of carrying on a correspondence with the king's enemies.

You say, that you never opened one of the prisoner's letters, why did you not?—The first letter which I challenged, or suspected, in my own mind, as I was one night sorting my letters, I held up to the candle, by which means I perceived that the body of the letter was wrote in French, and that it begun with the word Monsieur. It being wrote in French increased my suspicion, and determined me to challenge the letter.

Thomas Matthews sworn.

Co. for Crown. Sir, do you know any thing of certain letters said to be wrote by the prisoner at the bar, and intercepted at your office?—*Matthews.* When war is declared against any nation, immediate orders are given out by the Post Master General to stop all suspected letters, in order to prevent intelligence being given the enemy of our transactions at home. These orders are given to all the clerks of the said office, and to every servant carrying letters. According to which orders, the postman of the walk in which the prisoner at the bar lives, having learnt, as I find, that doctor Hensey was a Roman Catholic, and that all the let-

* As to proof of hand-writing, see vol. 12, pp. 297, 305, and Peake's Law of Evidence, c. 2, § 4.

ters be received from him, or from the house in which he lodged, were directed to people abroad, he came to me, and told me his suspicions, and did challenge one particular letter; which on being opened, I found was under cover directed to a second person, and so to a third. This strengthened my suspicion; and the contents of this letter being read, orders were immediately given, not only to intercept the letters which came from doctor Hensley, but also carefully to intercept all the letters that should come to the post-office directed to the said doctor Hensley. These directions were given with all the secrecy imaginable, and executed with success.

Sir, look on these letters, and let the Court know, whether these are the very letters sent by doctor Hensley the prisoner at the bar, to his correspondents abroad, and which were intercepted at your office?—*Matthews*. (Examining the letters one by one.) They lie now in the order they were intercepted; I received every one of these letters from the postman of the walk; their contents were examined; and I was ordered to carry them to the secretary of state's office at Whitehall, where I delivered them to the honourable Mr. Stanhope.

Counsel for Crown. My lord, we will rest the evidence for the crown here; and beg the favour of the Court, that under their directions, the several papers, letters and writings produced and proved to be the hand-writing of the prisoner at the bar, may be read as evidence in this cause.

Counsel for Pris. (Interposing.) My lord, I hope the Court will favour me with a word or two in behalf of the prisoner at the bar: and, my lord, I must observe, that these letters cannot, I speak under the favour of the Court, be read; because nothing is offered by the evidence to shew, that these letters are an overt-act of the prisoner, and where there is no overt-act the offender cannot be guilty of high-treason; the prisoner at the bar, at least, it has not been proved, any one of the prisoner's letters came to the hands of the agents, officers or subjects of the French king; if they had come to their hands, if they had received these letters, then in such case they would have constituted an overt-act, and consequently the prisoner at the bar would be guilty; but as the case is, as it really is, it amounts to no more than this; a mere suspicion of treason; and it would be a very great hardship a person should be put to death for mere suspicion of treason; nay, these very letters, for ought that appears to the contrary, might have been put into the doctor's bureau, contrary to his knowledge and consent. And this was the case of lord Sydney,* the letters he was said to send

* Query, What case is here intended? Algerian Sidney was not charged with sending letters to the enemy, (see the Indictment against him, vol. 9, p. 317.) nor is any thing

to the enemy, were proved to be sent by another hand, and being intercepted, the letters never reached the enemy, and therefore the bill for taking off his attainder expressly says, that the jury was imposed on, and because the letters did not reach the enemy, he was not guilty. But if the Court should be of opinion some of these letters should be read; yet I cannot see with what propriety the two first letters marked N° 1 and N° 2, should be read, since they were wrote some time before the declaration of war against France.

Lord Mansfield. That which constitutes an overt-act in the eye of the law, is the accomplishment of the end proposed by the party acting to the best and utmost of his power. If a man endeavours to do an act of treason, and that act of treason fails through some intervening accident or occurrence, the party so endeavouring and acting to the best of his ability and power is deemed to be guilty of an overt-act, as though he had done the thing he had proposed and intended. Thus, in cases of murder as well as treason, suppose a man firing off a gun, or a pistol, with a premeditated design to kill another, and by some accident or event, either the gun or pistol do not go off, or the party shot at evades the blow, the party shooting is guilty of an overt-act, and is liable to be indicted as guilty of a capital offence. It is the same here, the prisoner at the bar, as far as appears upon the evidence, and nothing has yet been offered to invalidate or lessen the evidence that has been given, or to impeach its veracity or even probability, did intend to send the letters intercepted to the French king's agents La Roche and P. de France, as far as lay in his power; his intention,—the intention appears plainly in his sending them to the post-office; the prisoner could not carry the letters himself to Paris; no, he was to send advices, instructions and intelligence, that was the agreement. Now the point is, whether the prisoner at the bar did send them? Why, it has been proved, that the prisoner did send them, and that they went from Arundel-street, in the Strand, as far as to the post-office in Lombard street; where they were intercepted. Where were they going then? Why, it is plain, the prisoner intended them to go abroad, as directed, to the agents of the French king. Now, who are the agents of the French king? Those who are and have been declared the enemies of his majesty, and of his subjects ever since the 17th of May, in the year 1756. Herein the overt-act of the prisoner at the bar consists, and in cases of treason, the statute makes every attempt to inform the enemies of his majesty of the state of affairs, whilst in open war, an overt-act, because such attempts to disturb the public peace, and lay the nation open to the insults and invasions of its enemies,

of "letters not reaching the enemy" mentioned in the Act for annulling his attainder. See it, vol. 9, p. 996.

is construed to be a compassing of the life of our sovereign lord the king, and an absolute endeavour to dethrone him. As to my own part, the letters under consideration appear to me, to be absolute overt-acts, as real overt-acts as can possibly be: but whether the jury shall think so, is to be left to their consideration, who are indeed the best and proper judges. Every one of the letters, especially those given to the postman, to be sent abroad, are absolute overt-acts, and in this cause ought to be read. Now as to the two first letters, concerning which so much has been said, why they should not be read, the objection is trifling, for whether they be read or no, this cause cannot be much affected, because they are not proposed as evidence, but only as letters to be read by way of preface and introduction to this iniquitous affair. They are letters, the subject of which do not affect the prisoner's life, if they did, that were another thing; but as they do not, I shall leave it to my brethren;—I think they should be read.

Of this opinion were the rest of the judges.

Court. Let all the letters be read.

They were accordingly read to the number of twenty-nine letters.

[The substance of which letters follows:]

In one of these letters, Dr. Hensley, the unhappy prisoner, having before the breaking out of the war with France heard, that a fellow-student of his, whilst he studied physic at Leyden in Holland, was lately got into the secretary of state's office for foreign affairs at Paris, wrote to him, and informed him, "That he should be glad of an opportunity of doing him any service that lay in his power, and executing any commission he might have in London."

To this letter Dr. Hensley's fellow-student returned for answer: "That he was infinitely obliged to him for the service he offered, and that if he understood him rightly, their correspondence might be rendered more advantageous to both, by changing their topics from literary to political."

In a second letter which Dr. Hensley sent to his fellow-student in answer to the above, he says: "That he was glad to find so discerning a man in his fellow-student, and if he could obtain for him a recompence suitable to the trouble, he would endeavour to make his intelligence of the utmost importance."

Soon after his fellow-student had received this second letter from Dr. Hensley, he sent him a long letter, wherein the doctor was informed he was to receive for his trouble and correspondence 500 livres, or 25*l.* sterling a quarter. And in the same letter, Dr. Hensley was instructed to send lists of all the English men of war, in and out of commission; their condition, situation, and number of men on board each; when they sailed, under what commanders, from what ports, and their destinations, accounts of the actual number of our

troops, what regiments were complete, and which; where recruiting, where they were quartered or garrisoned; the earliest accounts of any enterprises against France; plans of fortified places in England, America, &c. This letter also contained directions to the doctor to whom he was to send his letters with an outside cover, some to Cologne, some to the Hague, and some to Bern in Switzerland; and that those persons to whom his letters should be sent, as soon as received by them, would forward them from thence to Paris.

The substance of another letter read in court, complying with the instructions of the above letter, was: "That the English had fitted out a large fleet at Spithead, and given the command to general Mordaunt and admiral Hawke, and that this squadron was intended to attack Rochefort, and to make a descent on that part of the French coast."

In another letter, Dr. Hensley, after having given his correspondent an account of the condition of the English fleet and army, how many ships guarded, and what troops lined the coasts of England, informs him, "That the people in England were generally dissatisfied with the public proceedings, that the public credit was almost totally destroyed, and the finances quite exhausted. Advises, That an invasion be directly made on the English coast with a considerable body of troops; and that now, in his opinion, was the time to strike the final blow."

In a subsequent letter, Dr. Hensley says, "That the only means of preventing the success of the expedition (he means, that to Rochefort) would be to make a powerful diversion upon the coasts of England, with a considerable number of troops; that by thus attacking us in our very vitals, we might be engaged at home, and so prevented being able to send a number of troops abroad sufficient to give them (the French) any real annoyance."

In a letter, Dr. Hensley received from his correspondent, after he had given him this advice, the doctor's salary, which was till now no more than 25*l.* a quarter, was augmented to 25*l.* a month. This was done in compliance with a letter sent by the doctor to his correspondent desiring an increase of his salary, for that he was obliged to dine every day with a set of gentlemen, at a noted coffee-house, where they always drank claret.

In one of the letters found among the papers taken out of the doctor's bureau, which he had received from abroad, were complaints: "That of late he had sent trifling and insignificant intelligence; that they were better served by one who had lived at Colchester; that there was no need of acquainting them with what the duke was doing in Germany." This letter concludes with instructions to Dr. Hensley to write his letters in lemon-juice, and to direct for his brother, who was chaplain and under-secretary to the Spanish minister at the Hague.

Accordingly, the doctor followed the advice of his correspondent, and the next letter he

wrote, was wrote in the following manner. It was a complimentary letter wrote in black ink, and the lines were wide wrote. Between the wide wrote lines, Dr. Hensey, the prisoner at the bar, wrote a letter in lemon-juice, wherein he very early gave intelligence of admiral Holbourne's destination to America, with a minute account of the number of ships and troops on board, with the day of their departure.

From the reading of another letter it appears, that doctor Hensey gave the French the first account of admiral Boscawen's sailing to North America, and of the taking of the Alcide and Lys men of war, with every circumstance relating thereto.

In many other letters read in court, Dr. Hensey gives the French an account of the sailing of every fleet, and its destination; of the launching of every man of war; of the difficulties relating to raising money; — in short, nothing escaped him, which he thought worthy the notice, or which he thought might be of service to his correspondents the French.

Coun. for Crown. My lord, and gentlemen of the jury, we have now read all the letters relative to the offence committed by the prisoner at the bar; and here we shall rest our evidence.

PRISONER'S DEFENCE.

Counsel for the Prisoner. My lord, and you gentlemen of the jury, I am of counsel for the prisoner at the bar, Florence Hensey, doctor of physic, who you have heard stands indicted for a very heavy crime; a crime of a very heinous nature; and a crime if it had been proved clearly would have affected his life; I shall therefore endeavour to shew the weakness of the evidence given on the side of the crown; and shew that the prisoner is not guilty; at least, if guilty, yet not guilty of high treason. And with submission to the Court, as I have been appointed one of the counsel for the prisoner, I hope no word or expression which I shall fling out, during my pleading in his behalf, will be construed in any sort to affect the allegiance which I always had, have now, and ever shall have for his majesty. And first, gentlemen, give me leave to remark on the evidence which has been given to support the charge brought against the prisoner at the bar. We see this cause is made a matter of the greatest importance;—all the other courts of justice are not sitting; and the whole attention of the law seems attracted hither to attend the event thereof. They have called you first a messenger and divers others to prove, that some letters and writings were found in a certain bureau; and that because they were there, and they were there in a room the prisoner rented, they must therefore be the prisoner's writing; they might be put into the bureau by another hand; for their own witnesses allow, that Mrs. Blount often had the key of the bureau, went to it at pleasure, opened it, put things into it, or took them out, when she liked, or as she

thought proper; and because the prisoner had sometimes the use of this bureau, and accordingly did now and then, though very seldom, use it, therefore all the papers, writings and letters must be his, and his only; must belong to him, and to him only, and must be his writing, and his writing only. It is not reasonable to suppose, no one can suppose it, who gives himself time to think at all, that the prisoner should be so weak, thoughtless, and inconsiderate as to put, it might rather be said, expose treasonable papers, writings and letters in a bureau, other persons and people had free and ready access to, and to which they could come at any time, in the day-time, in the night-time, and at all times. One of their own witnesses says, that she often had the key of this bureau, and that she used frequently to take out Dr. Hensey's linen, deliver it to the washer-woman, and when washed, receive it back again, and then replace it in this bureau, which it seems stood in a parlour the prisoner at the bar rented by the week, or by the month, of one Mrs. Blount who keeps a house, and lets out ready furnished lodgings, in Arundel-street in the Strand. As for my own part, I do not think, that it has been clearly and satisfactorily proved, at least it does not appear so to me, that the bureau in question was ever, and it is certain it never was wholly, in the use and possession of the prisoner at the bar; but these things must be left to you, gentlemen, on whose determination the life of the prisoner depends. Again, gentlemen, to prove, that the letters, writings and papers found in the said bureau, and some other letters said to be intercepted at the Post-office, are the hand-writing of Dr. Hensey, the prisoner at the bar, they have produced two witnesses, that they are the hand-writing of the prisoner; but how do they prove it? Why, one of these witnesses says himself, that he never did see the prisoner write but once, and that was in the dark, at night, in the evening, at owl-light; and the other's evidence or testimony turns chiefly and principally upon the similitude of hands, or of hand-writings; and let me tell you, that the doctrine of the similitude of hands, and the similitude of writings, is a species of evidence in itself extremely uncertain, vague and trifling;—and as to the seeing of another write; what is there in that? All of you have seen me write to-day;—and write a good-deal;—but what avails that? Can any one of you from thence say, much less swear, (swearing is a sacred thing) that you know my hand-writing?—That a person should know the hand-writing of another, so as to swear to the identity and sameness of it, it is certainly necessary, that the person who takes upon himself to swear to the similitude of hands, should be well acquainted with that person's method and form of writing; with the very turn and make of the letters; and, in short, as every man almost has different genius, even with his stile and manner of expression; but how this is possible to be done by any one of the evidence, who now-and-then, accident-

tally or occasionally see the prisoner write, I cannot conceive. In this case there is but one positive evidence to the prisoner's hand-writing, and that is Mendez da Costa, who is very positive to the hand-writing of the prisoner at the bar; and indeed he is so very positive, that it almost destroys or brings into suspicion the credibility of his evidence. What has induced him to come into this court, and here openly and positively swear, from the similitude of writings, that the writings, letters and papers now before the Court are the very hand-writing of doctor Florence Hensey, the prisoner at the bar, were wrote by him, and by him only:—I say, what has induced the evidence to do this, must be left to himself, and his own conscience, but charity forbids me to suggest, that his motives for thus using his old acquaintance, and, I suppose, some time intimate and bosom friend, are any other than the affection and duty he owes to his majesty, and the preservation of his long and precious life; and the love which he bears to this country, and the inhabitants thereof; but these motives, or any other which may or shall arise to you on considering this man's evidence, are worthy of your serious consideration;—if you believe him, it must go hard with the prisoner; but if you should not believe him, I shall have hopes of seeing the prisoner once more set at large. And now, as to the letters intercepted at the Post-office; under the favour of the Court, I beg leave to recommend the consideration of their not going to the place directed as the writer and the sender intended and designed;—they not going, as was intended and designed, the letters cannot be an overt act;—if they had gone to the places directed and designed they would indeed have been an overt act: but that is a case to be left with you, and for your consideration, to determine finally whether they are an overt act, or not an overt act. But suppose, that you should be led to believe, that they were sent, and that the manner of sending them is an overt act, then there will remain for your farther consideration in behalf of the prisoner at the bar, the subject matter of the letters: and what is the subject-matter of the letters? Why, only a parcel of paragraphs chiefly taken from the public daily and weekly papers, old stale news, which every body knew, written in a letter to the prisoner's brother; and this is all he did; and this is now endeavoured to be construed high treason: but, gentlemen, as you will have the letters laid before you, I dare say, you will be able to form a right judgment from thence; and I need not tell you, that the jury may be merciful as well as just, according as things shall appear to them.

Second Counsel for the Prisoner. I hope the Court will favour me with a word or two in behalf of the prisoner at the bar; and, gentlemen, the managers on the side of the prosecution have laid the indictment in the parish of St. Clement Danes in the county of Middlesex,

VOL. XIX.

when the offence was committed in London; every body knows, that the Post-office is in London, in Lombard-street, in the very heart of the city, and that the letters were intercepted in London at the Post-office.—Wherefore, gentlemen, as this is an error in the proceedings; a fundamental error in the proceedings, this cause between the crown and the prisoner at the bar ought to cease now, and the prisoner be acquitted. One word more, gentlemen, and I shall not farther trouble you, in relation to the subject-matter of the letters, papers and writings read in court, I very carefully attended to the reading of every one of them, and I could not perceive that there was so much as one treasonable expression contained in the twenty-nine letters. Is the launching of a ship, high-treason? Is the embarking of the duke of Cumberland at Stade, after he had crossed the Weser, treason?—Mr. Pitt and Mr. Legge are re-instated in the ministry;—the common people of England grumble at the great weight and number of taxes:—at the scarcity and dearth of corn;—and, above all, at the loss of Minorca, and that the commanders of their fleets and squadrons do not do their duty, and fight and destroy the French. Who can call these treasons? Who can say, that a bare and naked recitation of these matters of fact, is high-treason? And this is all that has been done, as you will see, gentlemen, when you come to read and consider the subject of these letters and papers apart by yourselves; for you only are the proper judges whether the subject of the letters is treasonable or not.

*Sol. Gen. for Crown.** I hope, my lord, you will favour me a little while, that I may reply to two or three objections, which have been flung out by the counsel in the prisoner's defence. It has been said, by my brother here, that the evidence we have brought before the Court and the jury is not a credible evidence, nor an evidence to be relied on; my lord, I have been many years in this court, and I do not remember ever to have heard a charge of high treason better, more strongly, or more consistently made out; and what is more remarkable and observable every one of the witnesses brought on the side of the crown, are persons of character, reputation and credibility; and they all together tell a very probable, consistent and credible story; as first, they have proved undeniably that the letters, papers and writings now read in court were in the possession of the prisoner at the bar; secondly, that most or many of them are the hand-writing of the prisoner at the bar; that he the prisoner at the bar did send divers letters to the agents, officers and subjects of Louis the French king, in order to inform the enemies of

* As to the right to a reply on the part of the crown, though no witness have been called in defence, see the case of *Mr. Horne, A. D. 1777.*

his majesty king George, of what warlike preparations were making in England to distress the subjects of the said French king; and that he did also advise the subjects also of the said French king to make a descent on the English coasts. As to the objection concerning the treason being laid in the indictment as done in the county of Middlesex, instead of being laid in London, I shall leave that objection to the determination of the Court. But nothing can be so barefaced, as the objection made about the subject-matter of these papers, whereby they would endeavour to insinuate, that the intelligences contained therein are no more than common pieces of news, known to every body; and which might be told by any one, and communicated to any body, whether friend or foe. Gentlemen, thus do they endeavour to impose on you; and it is to no purpose for me to take up your time, and the time of the Court, and so encrease the length of this trial, which has been unavoidably and perhaps somewhat unnecessarily extended;—You are the proper judges how far we, on the side of the crown, have proved the charge brought against the prisoner at the bar, and how far not; and therefore I shall say no more, but rest the event of this cause upon what has already been said.

Lord Mansfield. Gentlemen of the Jury; this is a trial at bar on an indictment in the crown against the prisoner at the bar, by the name of Florence Hensey, doctor of physic, late of the parish of St. Clement Danes, in the county of Middlesex, for that he, being a false traitor, and not weighing the duty of his allegiance to our sovereign lord George the second, king of Great Britain, France, and Ireland, &c. in the months of May and June, 1757, and at divers other times, as well before as after, in the parish aforesaid, and in the county aforesaid, with force and arms, feloniously, traitorously, and of his malice aforethought, did write certain letters to the agents and subjects of Louis, the French king, with whom we are now at open war, giving an account of the strength of our fleets and armies that were then preparing in Great Britain; and inviting the said Louis, the French king, his subjects and vassals, to invade these realms, and to make a most bloody slaughter on his majesty's subjects. To this indictment the prisoner at the bar has pleaded Not Guilty. Therefore to support the indictment the solicitor of the treasury being prosecutor for the crown, hath brought this cause into court, and has produced the following evidence; in the recapitulation of which if I should make any mistake, I desire you to set me right. The first thing the counsel for the crown undertook to prove, is, that certain writings, letters and papers, were found in the possession of the prisoner at the bar, containing a treasonable correspondence carried on between the prisoner at the bar and the subjects of the French king. On this occasion, they have called you Nathan

Carrington, who it seems is the messenger that went, with proper authority, as he says, to the house of one Mrs. Blount in Arundel-street in the Strand, on Sunday the 21st day of August last, and did there search the lodgings of the prisoner at the bar, and took out of a bureau the writings and papers produced and read to you, and which he has sworn to be the very same letters and papers he took out of a bureau in a room, called a parlour, part of the lodgings of Dr. Hensey, the prisoner at the bar. This testimony is corroborated by the oaths of several others present, who saw Mr. Carrington take these letters and papers out of the bureau;—Mr. Turner, who I think also is a messenger, and who went with Mr. Carrington as an assistant to him, swears downright, that the papers and letters produced and read in court were the very same Mr. Carrington took out of the prisoner's bureau; Turner says, that he is sure they are the very same because he afterwards read several of them in the French language, in which they are wrote. Mr. Carrington likewise is very express and certain, as to the sameness of these letters and papers, for he says, that soon after he had got them into his possession, and sorted them, he put his mark upon them; you will find his mark upon all of them,—upon all of them he took out of the bureau; they are all in a parcel together; and he farther says, that his mark is now upon every one of the said letters, and that they have received no other alteration or addition whatever since, besides that they were digested into order; I suppose, he means they were digested into chronological order, and then numbered. And the substance of this evidence is in a great measure corroborated by the several testimonies of the constable, one Clark an assistant, Mrs. Blount the landlady of the house, and her maid Sarah Wilson, who all swear, that they saw Mr. Carrington, the king's messenger, take out of Dr. Hensey's bureau, on the 21st day of August last, certain letters and papers which they say, do look like the papers and letters shewn them just now in court. In order to shew what became of these papers and letters afterwards, the witness Carrington tells you, that after he had marked them, he carried them to the secretary of state's office in Whitehall, and delivered them to the honourable Mr. Stanhope.—After this Mr. Stanhope examined the prisoner at the bar several times; and then he says, the very letters and papers he had received from Mr. Carrington, he carried and delivered with his own hands to Mr. Francis. Mr. Francis swears, that he received these very letters and papers from the honourable Mr. Stanhope, that he procured them to be translated out of French into English; and that when he had drawn up his proceedings therefrom, he delivered them to Philip Carteret Webb: Mr. Webb says, that the letters and papers he so received from Mr. Francis he has this day brought into court. And thus they have proved the identity of the letters and papers now produced and read in

court to be the very same as those taken out of the prisoner's bureau. As to the objection relating to the property of the bureau, that is trifling; because it plainly appears, that Mrs. Blount, the landlady of the house in which the prisoner lodged, let Dr. Hensley a parlour even with the street ready furnished, having in it a

bureau, a glass,—[*The remainder of this Trial is missing.*]

It appears that after being repeatedly reprieved, the convict received his majesty's pardon. See Gentleman's Magazine for Sept. 1759, p. 438.

ADDENDA

TO THE NINETEENTH VOLUME.

☞ *I was prevented, by an Accident, from inserting in their proper Places the following Articles relative to the Wilkes Causes.*

THE prosecution of Wilkes occasioned directly and consequentially, during a series of years, various proceedings in the two Houses of Parliament; for accounts of which, I must refer the reader to vols. 15 and 16 of the New Parl. Hist. and to the Journals. The 'Essay on Woman,' addressed to a celebrated courtesan of the time, is a parody of passages in Pope's Essay on Man, accompanied with notes bearing the names of Stone archbishop of Armagh, Warburton bishop of Gloucester, and others. It is a composition at once detestable for the wickedness of its design, and despicable for the meanness of its execution; a wretched cumbrous specimen of that perverse jesting, which, Johnson tells us, "a good man dreads for its profaneness, and a witty man disdains for its easiness and vulgarity;" a coarse clumsy tissue of disgusting obscenity and horrible blasphemy, such as might without difficulty be constructed by almost any dunce, who had previously disengaged himself from all regard to decency and morality, all sense of shame, and all reverence for religion.

This composition, as being a breach of privilege, was denounced to the indignation of the House of Lords by the earl of Sandwich. In the New Parl. Hist. vol. 15, pp. 1346 *et seq.* are collected several particulars relative to that proceeding; from some confused notion of which, I conjecture, it was, that Voltaire, with his usual negligence of truth, took on him (*Dictionnaire Philosophique*, art. Dieu) to write of Warburton, as one "qui viole les lois de la société, en manifestant les papiers secrets d'un membre du parlement pour le perdre."

Considering the feelings which the king's ministers expressed concerning Wilkes's political libel, and the ferment which it continued to excite in the nation, at the time when sir James Burrow published his report of Wilkes's Case, we cannot, I think, blame him for avoiding to contribute to the dissemination of the offensive number of the North Briton by inserting in the report the Information which had been filed against Wilkes for that publication. In the present day no reason, I apprehend, exists for

suppressing that document, which therefore I insert below from the Commons' Journal, 23d November, 1768. The consideration of the libel, as the cause of most extensive and long continued national disorder, approaching very nearly to anarchy, and the contemplation of what effect probably would be produced by such a publication at the present time, may lead to no incurious speculation.

PLEAS, before our Lord the King at Westminster, of the Term of Saint Hilary, in the Fourth Year of the Reign of our Sovereign Lord George the Third, by the Grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, and in the Year of our Lord 1764.

Amongst the Pleas of the King. Roll 2.

Middlesex.

Amongst the Informations of last Term, N^o 75.

Be it remembered, That sir Fletcher Norton, knight, late solicitor, but now attorney-general, of our present sovereign lord the king, who prosecutes for our said lord the king in this behalf, came in his proper person into the court of our said lord the king, before the king himself at Westminster, on Saturday next after fifteen days from the day of Saint Martin last past; and for our said lord the king, brought into the court of our said lord the king, before the king himself then there, a certain information against John Wilkes, late of the parish of Saint Margaret, within the liberty of Westminster, in the county of Middlesex, esquire, which said information followeth in these words; (that is to say) *Middlesex*. Be it remembered, That sir Fletcher Norton, knight, solicitor general of our present sovereign lord the king, who prosecutes in this behalf for our said lord the king, cometh here, in his proper person, into the court of our said lord the king, before the king himself at Westminster, on Saturday next after fifteen days from the day of Saint Martin, in this present term; and, for our said sovereign lord the king, giveth the court here further to understand, and be informed, That before the printing and publish-

ing of the seditious and scandalous libel, herein after mentioned; (that is to say), on Tuesday the nineteenth day of April, in the third year of the reign of our sovereign lord George the third, now king of Great Britain, France and Ireland, defender of the faith, and so forth, our said present sovereign lord the king did make, and deliver, a most gracious Speech from his throne to the Lords spiritual and temporal, and the Commons of Great Britain, then in parliament assembled; which Speech of our said lord the king was to the purport or effect following; (that is to say), "My lords, and gentlemen, I cannot put an end to this session of parliament, without expressing my thanks for the signal zeal and dispatch which you have manifested in your proceedings, and which make it unnecessary for me to continue it any longer. I informed you at your first meeting, that preliminary articles were signed by my minister, and those of France and Spain. I ordered them to be laid before you: and the satisfaction which I felt at the approaching re-establishment of peace, upon conditions so honourable to my crown, and so beneficial to my people, was highly increased by my receiving from both houses of parliament, the strongest and most grateful expressions of their entire approbation. These articles have been established, and even rendered still more advantageous to my subjects by the definitive treaty; and my expectations have been fully answered, by the happy effects which the several allies of my crown have derived from this salutary measure. The powers at war with my good brother the king of Prussia, have been induced to agree to such terms of accommodation, as that great prince has approved; and the success which has attended my negotiation has necessarily, and immediately, diffused the blessings of peace through every part of Europe. I acquainted you with my firm resolution, to form my government on a plan of strict economy. The reductions necessary for this purpose, shall be completed with all possible expedition: and although the army maintained in these kingdoms will be inferior in number to that usually kept up in former times of peace, yet I trust that the force proposed, with the establishment of the national militia, (whose services I have experienced, and cannot too much commend) will prove a sufficient security for the future. Gentlemen of the House of Commons, I have seen, with the highest concern, the great anticipations of the revenue, and the heavy debts unprovided for, during the late war, which have reduced you to the unhappy necessity of imposing further burthens on my people. Under these circumstances, it is my earnest wish to contribute by every means to their relief: the utmost frugality shall be observed in the disposition of the supplies which you have granted; and when the accounts of the money, arising from the sale of such prizes as are vested in the crown, shall be closed, it is my intention to direct, that the proceeds shall be applied to the public service.

My lords, and gentlemen, the extension of the commerce of my subjects; the improvement of the advantages we have obtained; and the increase of the public revenue, are the proper works of peace. To these important and necessary objects my attention shall be directed. I depend upon your constant care to promote, in your several counties, that spirit of concord, and that obedience to law, which is essential to good order, and to the happiness of my faithful subjects. It is your part to discourage every attempt of a contrary tendency; it shall be mine, firmly to maintain the honour of my crown, and to protect the rights of my people." And the said solicitor general of our said sovereign lord the present king, doth further, for our said lord the king, give the Court here to understand and be informed, That John Wilkes, late of the parish of Saint Margaret, within the liberty of Westminster, in the county of Middlesex, esq. most audaciously, wickedly, and seditiously, devising and intending to vilify and traduce our said present sovereign lord the king, and his government of this realm, to impeach and disparage his veracity and honour, and to represent, and cause it to be believed amongst his majesty's subjects, that his aforesaid most gracious Speech contained falsities and gross impositions upon the public; and that our said lord the king had suffered the honour of his crown to be sunk, debased, and prostituted, and has given his name and sanction to the most odious measures of government; and also most wickedly, unlawfully, and seditiously, devising, intending, and endeavouring, as far as in him the said John Wilkes lay, to excite disobedience and insurrections amongst the subjects of this realm, and to violate and disturb the public tranquillity, good order, and peace of this kingdom; after the making and delivery of the aforesaid speech of our said lord the king, (that is to say), on the second day of August, in the said third year of the reign of our lord the present king, at Westminster aforesaid, in the said county of Middlesex, unlawfully, wickedly, seditiously, and maliciously published, and caused to be printed and published, a certain malignant, seditious, and scandalous book and libel, intituled, *The North Briton*; in one part whereof, intituled, N^o 45, Saturday, April 23rd, 1763, were then and there contained (amongst other things) concerning our said lord the king, and his aforesaid most gracious Speech, and his measures of government, and also concerning a certain act of parliament then lately made, intituled, *An Act for granting to his majesty several additional duties upon wines imported into this kingdom, and certain duties upon all cyder and perry; and for raising the sum of three millions five hundred thousand pounds, by way of annuities and lotteries, to be charged on the said duties; divers malicious, seditious, and scandalous matters, (that is to say) in one part thereof to the tenor and effect following; to wit, "The king's Speech has always been considered by the legislature, and by the public*

at large, as the speech of the minister. It has regularly, at the beginning of every session of parliament, been referred by both Houses to the consideration of a committee, and has been generally canvassed with the utmost freedom, when the minister of the crown has been obnoxious to the nation. The ministers of this free country, conscious of the undoubted privileges of so spirited a people, and with the terrors of parliament before their eyes, have ever been cautious, no less with regard to the matter than to the expressions, of speeches, which they have advised the sovereign to make from the throne, at the opening of each session; they well knew that an honest House of Parliament, true to their trust, could not fail to detect the fallacious arts, or to remonstrate against the daring acts of violence, committed by any minister. The speech at the close of the session has ever been considered as the most secure method of promulgating the favourite court creed among the vulgar; because the parliament, which is the constitutional guardian of the liberties of the people, has in this case no opportunity of remonstrating, or of impeaching any wicked servant of the crown. This week has given the public the most abandoned instance of ministerial effrontery ever attempted to be imposed on mankind. The minister's speech of last Tuesday," meaning the aforesaid Speech of our said lord the king, which was made and delivered by his majesty on Tuesday the 19th day of April aforesaid, being the Tuesday next preceding the 23d day of April, in the said year of our Lord 1763, "is not to be paralleled in the annals of this country. I am in doubt, whether the imposition is greater on the sovereign, or on the nation. Every friend of his country must lament that a prince of so many great and amiable qualities," meaning our said lord the king, "whom England truly reveres, can be brought to give the sanction of his sacred name to the most odious measures, and to the most unjustifiable public declarations, from a throne ever renowned for truth, honour, and unsullied virtue. I am sure all foreigners, especially the king of Prussia, will hold the minister in contempt and abhorrence. He has made our sovereign declare, 'My expectations have been fully answered, by the happy effects which the several allies of my crown have derived from this salutary measure of the definitive treaty; the powers at war with my good brother the king of Prussia, have been induced to agree to such terms of accommodation, as that great prince has approved; and the success which has attended my negotiation, has necessarily and immediately diffused the blessings of peace through every part of Europe.' The infamous fallacy of this whole sentence is apparent to all mankind; for it is known, that the king of Prussia did not barely approve, but absolutely dictated, as conqueror, every article of the terms of peace." And in another part thereof, to the tenor and effect following; (that is to say,) "The preliminary

articles of peace were such as have drawn the contempt of mankind on our wretched negotiators. All our most valuable conquests were agreed to be restored, and the East India company would have been infallibly ruined by a single article of this fallacious and baneful negotiation. No hiring of the minister has been hardy enough to dispute this; yet the minister himself has made our sovereign declare the satisfaction which he felt at the approaching re-establishment of peace, upon conditions so honourable to his crown, and so beneficial to his people. As to the intire approbation of parliament, which is so vainly boasted of, the world knows how that was obtained." And in another part thereof, to the tenor and effect following; (that is to say,) "The minister cannot forbear, even in the king's Speech," meaning in the aforesaid speech of our said lord the king, "insulting us with a dull repetition of the word 'œconomy.' I did not expect so soon to have seen that word again, after it had been so lately exploded, and more than once, by a most numerous audience, hissed off the stage of our English theatres. It is held in derision by the voice of the people, and every tongue loudly proclaims the universal contempt in which these empty professions" meaning the professions of our said lord the king, in his Speech aforesaid, with respect to œconomy, "are held by this nation. Let the public be informed of a single instance of œconomy," meaning in the conduct of his said majesty's government of this realm, "except indeed in the household." And in another part thereof, according to the tenor and effect following; (that is to say,) "In vain will such a minister, or the foul drags of his power, the tools of corruption and despotism, preach up in the speech," meaning the aforesaid Speech of our said lord the king, "that spirit of concord, and that obedience to the laws, which is essential to good order: they have sent the spirit of discord through the land, and I will prophecy, that it will never be extinguished, but by the extinction of their power. Is the spirit of concord to go hand in hand with the peace and excise through this nation? Is it to be expected between an insolent exciseman and a peer, gentleman, freeholder, or farmer, whose private houses are now made liable to be entered and searched at pleasure? Gloucestershire, Herefordshire, and in general all the cyder counties, are not surely the several counties which are alluded to in the Speech," meaning still the said speech of our said lord the king. "The spirit of concord hath not gone forth among them; but the spirit of liberty has, and a noble opposition has been given to the wicked instruments of oppression," meaning the officers of excise employed in the execution of the aforesaid act of parliament. "A nation as sensible as the English will see that a spirit of concord, when they are oppressed, means a tame submission to injury, and that a spirit of liberty ought then to arise, and I am sure ever will, in proportion to the weight of

the grievance they feel. Every legal attempt of a contrary tendency to the spirit of concord, will be deemed a justifiable resistance, warranted by the spirit of the English constitution. A despotic minister will always endeavour to dazzle his prince with high-flown ideas of the prerogative and honour of the crown, which the minister will make a parade of firmly maintaining. I wish, as much as any man in the kingdom, to see the honour of the crown" meaning his said majesty's crown of this realm, "maintained in a manner truly becoming royalty. I lament to see it" meaning the honour of his said majesty's crown, "sunk even to prostitution." And in another part thereof, according to the tenor and effect following; (that is to say.) "The king of England is only the first magistrate of this country; but is invested by law with the whole executive power. He is, however, responsible for the due execution of the royal functions, in the choice of ministers, &c. equally with the meanest of his subjects in his particular duty;" in derogation of the honour and dignity of our said sovereign lord the present king; to the enormous scandal and abuse of his said present majesty, and his government of this realm; to the great disturbance of the public peace, good order, and tranquillity of this kingdom: in contempt of our said lord the king and his laws; to the evil and dangerous example of all others in the like case offending; and against the peace of our said sovereign lord the present king, his crown and dignity. 2. And the said solicitor general of our said lord the king doth further, for our said lord the king, give the Court here to understand and be informed, that the aforesaid John Wilkes again most audaciously, wickedly, and seditiously devising, intending, and endeavouring to vilify and traduce our said present sovereign lord the king, and his government of this realm, to impeach, disparage, and defame his veracity and honour, and to represent, and cause it to be generally believed amongst the subjects of this realm, that our said lord the king had suffered the honour of his crown to be sunk and debased, and had prostituted his name, in order to give a sanction to the most odious measures, and to the most unjustifiable declarations from his throne. And also, most wickedly and seditiously devising and intending to excite, amongst the subjects of this realm, a general discontent and disaffection to his majesty's government, and a spirit of disobedience to the laws of this realm, and maliciously to violate and disturb the public peace, good order, and tranquillity of this kingdom, after the making and delivery of the aforesaid Speech of our said lord the king; (that is to say) on the second day of August aforesaid, in the said third year of the reign of our said sovereign lord the present king, at Westminster aforesaid, in the said county of Middlesex, unlawfully, wickedly, and seditiously published, and caused to be printed and published, a certain other malignant, seditious, and scandalous libel, intitled N^o 35. Saturday, April

23d, 1763. In which said last mentioned libel, were then and there contained, concerning our said lord the king, and his aforesaid most gracious Speech, divers other malicious, seditious, and scandalous matters; (that is to say.) in one part thereof to the tenor and effect following; to wit, "This week has given the public the most abandoned instance of ministerial effrontery ever attempted to be imposed on mankind. The minister's speech of last Tuesday" meaning the aforesaid Speech of our said lord the king, which was made and delivered by his majesty on Tuesday the 19th day of April aforesaid, being the Tuesday next preceding the 23d day of April, in the year of our Lord 1763, "is not to be paralleled in the annals of this country. I am in doubt, whether the imposition is greater on the sovereign, or on the nation. Every friend of his country must lament, that a prince of so many great and amiable qualities," meaning our said lord the king, "whom England truly reveres, can be brought to give the sanction of his sacred name to the most odious measures, and to the most unjustifiable public declarations from a throne, ever renowned for truth, honour, and unsullied virtue." And in another part of the said last mentioned libel, to the tenor and effect following; (that is to say.) "The minister cannot forbear, even in the king's Speech, insulting us with a dull repetition of the word 'economy.' I did not expect so soon to have seen that word again, after it had been so lately exploded, and more than once, by a most numerous audience, hissed off the stage of our English theatres. It is held in derision by the voice of the people, and every tongue loudly proclaims the universal contempt, in which these empty professions are held by this nation. Let the public be informed of a single instance of economy, except indeed in the household." And in another part of the said last mentioned libel, to the tenor and effect following. (that is to say.) "In vain will such a minister, or the foul dogs of his power, the tools of corruption and despotism, preach up in the speech that spirit of concord, and that obedience to the laws, which is essential to good order. They have sent the spirit of discord through the land, and I will prophecy, that it will never be extinguished, but by the extinction of their power. Is the spirit of concord to go hand in hand with the peace and excise through this nation? is it to be expected between an insolent exciseman, and a peer, gentleman, freeholder, or farmer, whose private houses are now made liable to be entered and searched at pleasure? Gloucestershire, Herefordshire, and in general all the cyder counties, are not surely the several counties which are alluded to in the Speech," meaning the aforesaid Speech of our said lord the king. "The spirit of concord hath not gone forth among them; but the spirit of liberty has, and a noble opposition has been given to the wicked instruments of oppression. A nation as sensible as the English

will see that a spirit of concord, when they are oppressed, means a tame submission to injury, and that a spirit of liberty ought then to arise, and I am sure ever will, in proportion to the weight of the grievance they feel. Every legal attempt, of a contrary tendency to the spirit of concord, will be deemed a justifiable resistance, warranted by the spirit of the English constitution. A despotic minister will always endeavour to dazzle his prince with high-flown ideas of the prerogative and honour of the crown, which the minister will make alprade of firmly maintaining. I wish as much as any man in the kingdom, to see the honour of the crown" meaning his said majesty's crown of this realm, "maintained in a manner truly becoming royalty. I lament to see it sunk even to prostitution." And in another part of the said last mentioned libel, to the tenor and effect following; (that is to say,) "The king of England is only the first magistrate of this country; but is invested by law with the whole executive power. He is, however, responsible to his people for the due execution of the royal functions, in the choice of ministers, &c. equally with the meanest of his subjects in his particular duty." To the great scandal and abuse of our said lord the king and his government of this realm; in contempt of his said present majesty and his laws; to the evil and dangerous example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity. Whereupon the said solicitor general of our said lord the king, on behalf of our said lord the king, prayeth the consideration of the Court here upon the premises; and that due process of law may be awarded against the said John Wilkes to compel him to answer to our said lord the king, concerning the premises aforesaid. Wherefore the sheriff of the said county of Middlesex was commanded, that he should not forbear by reason of any liberty in his bailiwick, but that he should cause him to come to answer to our said lord the king, touching and concerning the premises aforesaid. And now, (that is to say,) on Monday next after the octave of Saint Hilary in this same term, before our said lord the king, at Westminster, cometh the said John Wilkes by William Hughes his attorney, and having heard the said information read, he saith, that he is not guilty thereof; and hereupon he putteth himself upon the country; and the said sir Fletcher Norton, who for our said lord the king in this behalf prosecuteth, doth the like: therefore, let a jury thereupon come before our said lord the king, at Westminster, on Monday next after the octave of the Purification of the Blessed Virgin Mary, by whom the truth of the matter may be the better known, and who then be not of the kindred of the said John Wilkes, to try, upon their oath, if the said John Wilkes be guilty of the premises aforesaid, or not; because, as well the said sir Fletcher Norton, who, for our said lord the king, in this behalf prosecuteth, as the said John Wilkes,

have thereupon put their oaths upon the said jury; the same day is given as well to the said sir Fletcher Norton, who, for our said lord the king, in this behalf prosecuteth, as to the said John Wilkes; on which day, (to wit,) on Monday next after the octave of the Purification of the Blessed Virgin Mary aforesaid, before our said lord the king, at Westminster, come as well the said sir Fletcher Norton, who, for our said lord the king, in this behalf prosecuteth, as the said John Wilkes by his attorney aforesaid. And the sheriff of the said county of Middlesex returned the names of twelve jurors, none of whom come to try in form aforesaid; therefore, the sheriff of the said county of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he distrain them by all their lands and chattels in his bailiwick, so that neither they, nor any one for them, do put their hands to the same, until he shall have another command from our said lord the king, for that purpose: and that he answer to our said lord the king for the issues thereof, so that he may have their bodies before our said lord the king, at Westminster, on Wednesday next after fifteen days from the feast day of Easter, or before the right trusty and well beloved of our said lord the king, William lord Mansfield, chief justice of our said lord the king, assigned to hold pleas before the king himself, if he shall come before that time; (that is to say,) on Tuesday next after the end of the term at Westminster, in the county of Middlesex, in the great hall of pleas, there, according to the form of the statute in such case made and provided, to try upon their oath, if the said John Wilkes be guilty of the premises aforesaid, or not, in default of the jurors aforesaid, who came not to try in form aforesaid; therefore, let the sheriff of the said county of Middlesex have the bodies of the same jurors, accordingly to try in form aforesaid; the same day is given as well to the said sir Fletcher Norton, who, for our said lord the king, in this behalf prosecuteth, as to the said John Wilkes; on which day, (to wit,) on Wednesday next after fifteen days from the feast day of Easter aforesaid, before our said lord the king, at Westminster, come as well the said sir Fletcher Norton, who, for our said lord the king, in this behalf prosecuteth, as the said John Wilkes by his attorney aforesaid, and the aforesaid chief justice, before whom the said jury came to try in form aforesaid, sent here before had before him in these words; (that is to say,) Afterwards on the day, and at the place within mentioned, before the within named William lord Mansfield, chief justice of our said lord the king, assigned to hold pleas before the king himself, John Way, gentleman, being associated to the said chief justice, according to the form of the statute in such case made and provided, come as well the within named sir Fletcher Norton, who prosecuteth for our said lord the king in this behalf, as the within named John Wilkes, by his attorney within mentioned. And the jurors

of the jury within mentioned being called over; (to wit,) George Chardin, Charles Boucher, Winthorp Baldwin, Edward Lovibond, Peter Le Keux, Lister Selman, John Smart, George Stevens, Lynnel Leads, Hugh Roberts, George Garret and Samuel Hawkins, esqrs. come, and are sworn upon the said jury; whereupon public proclamation is made here in court for our said lord the king, as the custom is, that if there be any one who will inform the aforesaid chief justice, the king's serjeant at law, the king's attorney general, or the jurors of the jury aforesaid, concerning the matters within contained, he should come forth and he should be heard. And hereupon the within named sir Fletcher Norton offereth himself, on the behalf of our said lord the king, to do this; whereupon the Court here proceedeth to the taking of the inquest aforesaid, by the jurors aforesaid, now here appearing for the purpose aforesaid, who being chosen, tried, and sworn to speak the truth, touching and concerning the matters within contained, say upon their oath, that the said John Wilkes is guilty of the premises in the information within specified, and charged upon him in manner and form as in and by the said information is within alledged against him; whereupon all and singular the premises being seen and fully understood by the Court here, it is considered and adjudged by the said Court here, that he the said John Wilkes be taken, and so forth: therefore the sheriff of Middlesex is commanded, by the writ of our said lord the king, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Monday next after the morrow of the Ascension of our Lord, to satisfy our said lord the king for his redemption, on account of the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached as aforesaid, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Monday next after the morrow of the Ascension of our Lord, before our said lord the king, at Westminster, the hon. Thomas Harley, and Samuel Turner, esq. sheriff of the county of Middlesex aforesaid, returned the said writ as follows; (to wit) "The within-named John Wilkes is not found in my bailiwick. The answer of the hon. Thomas Harley, and Samuel Turner, esq. sheriff." Therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Friday next after the morrow of the Holy Trinity, to satisfy our said lord the king for his redemption, on account of the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached

as aforesaid, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Friday next after the morrow of the Holy Trinity, before our said lord the king, at Westminster, the hon. Thomas Harley, and Samuel Turner, esq. sheriff of the county of Middlesex aforesaid, returned the said last-mentioned writ, as follows; (to wit) "The within-named John Wilkes is not found in my bailiwick. The answer of the hon. Thomas Harley, and Samuel Turner, esq. sheriff." Whereupon, by another writ of our said lord the king, the said sheriff of Middlesex is commanded that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king at Westminster on Tuesday next after the morrow of All-Souls, to satisfy our said lord the king for his redemption, on account of the trespasses, contempts, and misdemeanors as aforesaid, whereof he is impeached as aforesaid, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid; and if he cannot find the said John Wilkes in his bailiwick, that then he cause public proclamation to be made in the open county court in his county, and at the general quarter sessions of the peace in his county, and at the door of the parish church where the said John Wilkes is an inhabitant, that he be before our said lord the king at the aforesaid day, to satisfy our said lord the king concerning the premises aforesaid; and that the said sheriff then have there that writ: and also at the same time, by another writ of our said lord the king, the sheriff of Middlesex is likewise commanded, that he cause to be exacted the said John Wilkes from county court to county court, until he shall be outlawed, according to the law and custom of England, if he shall not appear; and if he shall appear, that then he take him, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on the said Tuesday next after the morrow of All Souls, to satisfy our said lord the king for his redemption, on account of the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached as aforesaid, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Tuesday next after the morrow of All-Souls, before our said lord the king, at Westminster, Thomas Harris and Brass Crosby, esqrs. then sheriff of Middlesex, returned the aforesaid writ of Capias cum Proclamatione, executed and endorsed as follows; (to wit) "The within-named John Wilkes is not found within my bailiwick: and, by virtue of this writ to me directed, I have caused public proclamation to be made, in manner and form as I am within commanded. The answer of the hon. Thomas Harley, and Samuel Turner, esq.

sheriff. This writ, as it is above endorsed, was delivered to me, the under-named present sheriff, by the above-named Thomas Harley and Samuel Turner, the late sheriff, at the time of his going out of his office. The answer of Thomas Harris, esq. and Brass Crosby, esq. sheriff." And on the same Tuesday next after the morrow of All-Souls, before our said lord the king, at Westminster, the aforesaid Thomas Harris, esq. and Brass Crosby, esq. then sheriff of Middlesex as aforesaid, returned the aforesaid Writ of Exigent, executed and endorsed as follows; (to wit), By virtue of this writ to me directed, at my county court, held at the house known by the sign of the Three Tuns in Brook-street, near Holborn, in the county of Middlesex, the 12th day of July, in the 4th year of the reign of our present sovereign lord George the Third, now king of Great Britain, &c. the within-named John Wilkes was the first time exacted, and did not appear; at my county-court, held at the same place, the 9th day of August in the year aforesaid, the said John Wilkes was a second time exacted, and did not appear; and at my county court, held at the same place, the 6th day of September in the year aforesaid, the said John Wilkes was a third time exacted, and did not appear. The answer of the hon. Thomas Harley, and Samuel Turner, esq. sheriff. This writ, as it is above indorsed, was delivered to me, the under-named present sheriff, by the above-named late sheriff, at the time of his going out of his office; and at my county court, held at the house known by the sign of the Three Tuns, in Brook-street aforesaid, the 4th day of October, in the said 4th year of the reign of our said present sovereign lord the king, the said John Wilkes, within-named, was a 4th time exacted, and did not appear; and at my county court, held at the same place, the 1st day of Nov. in the 5th year of the reign of our said lord the present king, the said John Wilkes was a 5th time exacted, and did not appear: therefore, by the judgment of Edward Umfreville, esq. and Thomas Phillips, gentleman, his majesty's coroners of the said county of Middlesex, the said John Wilkes, according to the law and custom of this realm, is outlawed. The answer of Thomas Harris, esq. and Brass Crosby, esq. sheriff. Therefore the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Wednesday next after the octave of Saint Hilary, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Wednesday next after the octave of Saint Hilary,

VQL. XIX.

before our lord the king at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Wednesday next after fifteen days from the feast day of Easter, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Wednesday next after fifteen days from the feast day of Easter, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Friday next after the morrow of the Holy Trinity, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Friday next after the morrow of the Holy Trinity, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Wednesday next after the morrow of All Souls, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Wednesday next after the morrow of All Souls, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded,

ed, that he do not forbear, by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our lord the king, at Westminster, on Thursday next after the octave of Saint Hilary, to stand right in the Court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Thursday next after the octave of Saint Hilary, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Wednesday next after fifteen days from the feast day of Easter, to stand right in the court of our said lord the king, before the king himself, on the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Wednesday next after fifteen days from the feast day of Easter, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Friday next after the morrow of the Holy Trinity, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Friday next after the morrow of the Holy Trinity, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body be-

fore our said lord the king, at Westminster, on Thursday next after the morrow of All Souls, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Thursday next after the morrow of All Souls, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Friday next after the octave of Saint Hilary, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Friday next after the octave of Saint Hilary, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Wednesday next after fifteen days from the feast day of Easter, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Wednesday next after fifteen days from the feast day of Easter, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Friday next after the morrow of the Holy Trinity, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pro-

nounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Friday next after the morrow of the Holy Trinity, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Friday next after the morrow of All Souls, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Friday next after the morrow of All Souls, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon. Therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Saturday next after the octave of Saint Hilary, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid. On which said Saturday next after the octave of Saint Hilary, before our said lord the king, at Westminster, the sheriff of Middlesex hath not sent the said last-mentioned writ, so issued as aforesaid, nor done any thing thereupon: therefore, as before, the sheriff of Middlesex is commanded, that he do not forbear by reason of any liberty in his bailiwick, but that he take the said John Wilkes, if he shall be found in his bailiwick, and him safely keep, so that he may have his body before our said lord the king, at Westminster, on Wednesday next after three weeks from the feast day of Easter, to stand right in the court of our said lord the king, before the king himself, upon the outlawry aforesaid, so pronounced as aforesaid, concerning the trespasses, contempts, and misdemeanors aforesaid, whereof he is impeached, and thereupon, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted

as aforesaid. On which said Wednesday next after three weeks from the feast day of Easter, before our said lord the king, at Westminster, comes the said John Wilkes, in his proper person, being brought here into the court of our said lord the king, before the king himself, under the custody of the sheriff of the county of Middlesex, by virtue of the said last mentioned writ; and the said John Wilkes, upon the prayer of William De Grey, esq. now attorney-general of our said lord the king, who now prosecutes for our said lord the king in this behalf, present here in court, is committed by the Court here to the custody of the marshal of the Marshalsea of our said lord the king, before the king himself, to be by him kept in safe custody, until, &c. And the said John Wilkes, now here in court, prayeth oyer of the record and process aforesaid, and they are read to him; which being read and heard, the said John Wilkes produceth here in court a certain writ of our said lord the king, to his justices here directed; which said writ followeth, in these words; (that is to say;) George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To our justices appointed to hold pleas before us, greeting. For as much as in the record and process, as also in the publication of an outlawry, against John Wilkes, late of Westminster, in the county of Middlesex, esq. on a certain information against the said John Wilkes, for printing and publishing a certain book and libel, intituled, *The North Briton*; and a certain other libel, intituled, *N° 45*, Saturday, April 23rd, 1763; whereof the said John Wilkes is impeached, and thereupon, by a jury of the country, is convicted, as it is said manifest error hath intervened, to the great damage of the said John Wilkes, as by his complaint we are informed; we, willing that the said error, if any be, be duly amended, and full and speedy justice done to the said John Wilkes in this behalf, do command you, that, if the said outlawry be returned before us, as hath been said, then inspecting the said record and process, you cause further to be done therein, for annulling the said outlawry, as of right, and according to the law and custom of England, shall be meet to be done. Witness ourself at Westminster, the 27th day of April, in the eighth year of our reign. And hereupon the said John Wilkes says, that in the record and process aforesaid, and also in the publication of the aforesaid outlawry, there is manifest error in this, that there is no sufficient information filed or exhibited against the said John Wilkes, whereon to ground the process of the outlawry aforesaid, by reason whereof the said outlawry is void, and of no effect or force whatsoever. There is also error in this, that no public proclamation whatsoever is mentioned to have been made at any open county court, or at any general quarter sessions of the peace whatsoever, or at the door of any parish church where the said John Wilkes was an inhabitant, according to the exigency of the

said writ of *Capias cum Proclamatione*; therefore in that there is manifest error. There is also error in this, that it is not shewn, nor does it appear, by the return of the sheriff of Middlesex, that the sheriff of Middlesex did cause to be exacted, he said John Wilkes, in the said county of Middlesex from county court to county court, until he was outlawed according to the law and custom of England, as the said sheriff by the said writ of Exigent is commanded; and that it is not shewn, nor does it appear, by the return of the sheriff of Middlesex, that the said John Wilkes was a first, second, third, fourth, and fifth time exacted at the county court of the county of Middlesex, as by the law of the land he ought to have been, before he was outlawed; therefore in that there is manifest error. There is also error in this, that in the record and process aforesaid, and in the publication of the outlawry aforesaid, it is no where expressly shewn, that the place called Brook-street (if any such there be) where the several county courts are supposed to have been held, at which the said John Wilkes is said to have been exacted, is in the county of Middlesex, or in any, and what other county; therefore in that there is manifest error. There is also error in this, that it does not appear that any judgment of outlawry was given or pronounced against the said John Wilkes, or if any such judgment was given or pronounced, in what form the same was so given or pronounced, as it ought to have done in order that the legality and propriety of the said judgment might have been seen and examined; but in the record and process aforesaid, and in the publication of the outlawry aforesaid, reference and relation only are had to some judgment not shewn or expressed, but supposed to have been before given, against the said John Wilkes; therefore in that there is manifest error. Wherefore the said John Wilkes prays, that the outlawry aforesaid, for the errors aforesaid, and other errors appearing in the record and process aforesaid, may be reversed and held for nothing, and that he may be restored to the common law, and to all which he hath lost by occasion of the outlawry aforesaid, &c. And the said William de Grey, esq., now attorney general of our present sovereign lord the king, present here in court in his proper person, having heard the matters aforesaid above assigned for error, for our said lord the king, saith, that neither in the record and process aforesaid, nor in the publication of the aforesaid outlawry, is there any error; and he prays, that the court of our said lord the king, now here, may proceed to the examination, as well of the record and process aforesaid, as of the matters aforesaid above assigned for error, and that the outlawry aforesaid may in all things be affirmed. And, because the court of our said lord the king, now here, is not as yet advised about giving their judgment of and concerning the premises, a day is therefore given, as well to the said William De Grey, esq., who prosecutes, &c. as to the said John Wilkes, under the

custody of the marshal aforesaid, until on Wednesday next after the octave of the Holy Trinity, before our lord the king, at Westminster, (the said John Wilkes to be kept in safe custody, under the custody of the said marshal in the mean time) to hear their judgment thereupon; because the court of our said lord the king, now here, is not as yet advised thereupon. At which day, to wit, on the said Wednesday next after the octave of the Holy Trinity, before our said lord the king, at Westminster, comes as well the said William De Grey, esq., who prosecutes, &c. as the said John Wilkes in his proper person, under the custody of the said marshal, being brought here into court by virtue of a rule of the said Court in that behalf; whereupon all and singular the premises being seen, and by the Court here fully understood, it is considered by the Court here, that the outlawry aforesaid, for the errors aforesaid, and other errors appearing in the record and process aforesaid, be reversed, annulled, and held for nothing; and that be the said John Wilkes be restored to the common law of England, and to all that he has lost by occasion of the outlawry aforesaid; and as to the outlawry aforesaid, that he depart hence without day. And hereupon the said William De Grey, who prosecutes, &c. prayeth judgment for our said lord the king against the said John Wilkes, of and upon the premises whereof he is impeached, and, by a jury of the country taken between our said lord the king and the said John Wilkes, he is convicted as aforesaid; but because the Court of our said lord the king, now here, is not as yet advised about giving their judgment of and upon the premises aforesaid, whereof he the said John Wilkes is impeached and convicted as aforesaid, a day is therefore given, as well to the said William De Grey, who prosecutes, &c. as to the said John Wilkes, in the state in which now, &c. under the custody of the said marshal, until on Saturday next after fifteen days from the day of the Holy Trinity, before our said lord the king, at Westminster, (the said John Wilkes to be kept in safe custody, under the custody of the said marshal, in the mean time), to hear their judgment thereupon; because the Court of our said lord the king, now here, is not as yet advised thereupon. At which day, to wit, on Saturday next after fifteen days from the day of the Holy Trinity before our said lord the king, at Westminster, comes as well the said William De Grey, who prosecutes, &c. as the said John Wilkes, under the custody of the said marshal, being brought here into court by virtue of a rule of the said Court in that behalf. Whereupon all and singular the premises being seen, and by the Court here fully understood, it is considered by the Court here, that the said John Wilkes, for his offences aforesaid, do pay a fine to our sovereign lord the king of five hundred pounds of lawful money of Great Britain, and that he the said John Wilkes be imprisoned, in the custody of the aforesaid

marshal, for the space of ten calendar months now next ensuing; and the said John Wilkes, present here in court, is committed by the Court here to the custody of the aforesaid marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall have paid the said fine.

Nov. 22, 1768.

Examined with the original Roll.

REV. FILMER,

Clerk of the King's-bench Treasury.

When the copy of the record of the proceedings on the information against Wilkes, for publishing the *Essay on Woman*, &c. was delivered into the House of Commons, and had been there read, the House, on November 24, 1768, ordered, that it should be locked up by the clerk, and that no copies should be allowed to be taken thereof, nor any persons except the members of the House allowed to peruse it. And on the 3d of February, the House ordered the clerk to destroy the said copy; so that it is not entered in the Journal.

The following variation of part of lord Mansfield's Speech, (see p. 111) on reversing the outlawry against Wilkes, is extracted from the *Gentleman's Magazine*, for July 1768, p. 327.

"The following is handed about, as the Speech made by a great lawyer and orator, on a late memorable occasion:

"I have now gone through the several errors assigned by the defendant, and which have been ingeniously argued, and confidently relied on, by his counsel at the bar: I have given my sentiments upon them, and if upon the whole, after the closest attention to what has been said, and with the strongest inclination in favour of the defendant, no arguments which have been urged, no cases which have been cited, no reasons that occur to me, are sufficient to satisfy me in my conscience and judgment, that this outlawry should be reversed, I am bound to affirm it.—And here let me make a pause.

"Many arguments have been suggested, both in and out of court, upon the consequences of establishing this outlawry, either as they may affect the defendant as an individual, or the public in general: as to the first, whatever they may be, the defendant has brought them upon himself; they are inevitable consequences of law arising from his own act; if the penalty, to which he is thereby subjected, is more than a punishment adequate to the crime he has committed, he should not have brought himself into this unfortunate predicament, by flying from the justice of his country: he thought proper to do so, and he must taste the fruits of his own conduct, however bitter and unpalatable they may be; and although we may be heartily sorry for any person who has brought himself into this situation, it is not in our power, God forbid it should ever be in our power, to deliver him from it: we cannot

prevent the judgment of the law, by creating irregularity in the proceedings; we cannot prevent the consequences of that judgment by pardoning the crime: if the defendant has any pretensions to mercy, those pretensions must be urged, and that power exercised in another place, where the constitution has wisely and necessarily vested it: the crown will judge for itself; it does not belong to us to interfere with punishment, we have only to declare the law; none of us had any concern in the prosecution of this business, nor any wishes upon the event of it; it was not our fault that the defendant was prosecuted for the libels upon which he has been convicted; I took no share in another place, in the measures which were taken to prosecute him for one of them; it was not our fault that he was convicted; it was not our fault that he fled; it was not our fault that he was outlawed; it was not our fault that he repented himself up to justice; none of us revived the prosecution against him, nor could any one of us stop that prosecution when it was revived; it is not our fault if there are not any errors upon the record, nor is it in our power to create any if there are none; we are bound by our oath and in our consciences, to give such a judgment as the law will warrant, and as our reason can approve; such a judgment as we must stand or fall by, in the opinion of the present times, and of posterity; in doing it, therefore, we must have regard to our reputation as honest men, and men of skill and knowledge competent to the stations we hold: no considerations whatsoever should mislead us from this great object, to which we ever ought, and, I trust, ever shall direct our attention. But consequences of a public nature, reasons of state, political ones, have been strongly urged, (private anonymous letters sent to me I shall pass over) open avowed publications which have been judicially noticed, and may therefore be mentioned, have endeavoured to influence or intimidate the Court, and so prevail upon us to trifle and prevaricate with God, our consciences, and the public: it has been intimated that consequences of a frightful nature will flow from the establishment of this outlawry; it is said the people expect the reversal, that the temper of the times demands it, that the multitude will have it so, that the continuation of the outlawry in full force will not be endured, that the execution of the law upon the defendant will be resisted; these are arguments which will not weigh a feather with me. If insurrection and rebellion are to follow our determination, we have not to answer for the consequences, though we should be the innocent cause; we can only say, 'Fiat Justitia ruat cælum;' we shall discharge our duty without expectations of approbation, or the apprehensions of censure; if we are subjected to the latter unjustly, we must submit to it; we cannot prevent it; we will take care not to deserve it. He must be a weak man indeed who can be staggered by such a consideration.

"The misapprehension, or the misrepresent-

tation of the ignorant or the wicked, the 'men-dax infamia,' which is the consequence of both, are equally indifferent to, unworthy the attention of, and incapable of making any impression on men of firmness and intrepidity. Those who imagine judges are capable of being influenced by such unworthy indirect means, most grossly deceive themselves: and, for my own part, I trust that my temper, and the colour and conduct of my life have clothed me with a suit of armour to shield me from such arrows. If I have ever supported the king's measures; if I have ever afforded any assistance to government; if I have discharged my duty as a public or private character, by endeavouring to preserve pure and perfect the principles of the constitution, maintaining unsullied the honour of the courts of justice, and by an upright administration of, to give a due effect to, the laws, I have hitherto done it without any other gift or reward than that most pleasing and most honourable one, the conscientious conviction of doing what was right. I do not affect to scorn the opinion of mankind; I wish earnestly for popularity; I will seek and will have popularity; but I will tell you how I will obtain it. I will have that popularity which follows, and not that which is run after. It is not the applause of a day, it is not the buzzes of thousands that can give a moment's satisfaction to a rational being: that man's mind must indeed be a weak one, and his ambition of a most depraved sort, who can be captivated by such wretched allurements, or satisfied with such momentary gratifications. I say with the Roman orator, and can say it with as much truth as he did, "*Ego hoc animo semper fui, ut invidiam virtute pariam, gloriam non infamiam, putarem*:" But the threats have been carried further; personal violence has been denounced, unless public humour be complied with: I do not fear such threats: I don't believe there is any reason to fear them: it is not the genius of the worst of men in the worst of times to proceed to such shocking extremities: but, if such an event should happen, let it be so; even such an event might be productive of wholesome effects; such a stroke might rouse the better part of the nation from their lethargic condition to a state of activity, to assert and execute the law, and punish the daring and impious hands which had violated it; and those who now supinely behold the danger which threatens all liberty, from the most abandoned licentiousness, might, by such an event, be awakened to a sense of their situation, as drunken men are often times stunned into sobriety. If the security of our persons and our property, of all we hold dear and valuable, are to depend upon the caprice of a giddy multitude, or to be at the disposal of a giddy mob; if, in compliance with the humours, and to appease the clamours of those, all civil and political institutions are to be disregarded or overthrown, a life somewhat more than sixty is not worth preserving at such a price; and he can never die too soon, who lays down his life in

support and vindication of the policy, the government, and the constitution of his country."

The Protest mentioned in Mr. Hargrave's note to Coke upon Littleton inserted in p. 1096, is printed in pp. 994, *et seq.*

The Case alluded to by Mr. Hargrave in the same note, with a reference to 2 Wils. 151, is the Case of John Wilkes, *esq.* printed p. 981.

To the name of Mr. Webb, p. 982, Serjeant Wilson has observed that Mr. Webb had been a common attorney all his life before.

Huckle, one of the journeymen printers,

* "An old Templar, in the Public Advertiser of July the 8th, suspects that the above cannot be the genuine production of the grave person to whom it is publicly ascribed. Let any unprejudiced person, says he, be told, that the supposed speaker had before determined not to affirm the outlawry; and then, after reading the following sentence, let him refuse his assent to the proposition I mean to demonstrate, if he can.

"If upon the whole, after the closest attention to what has been said, and with the strongest inclination in favour of the defendant, no arguments which have been urged, no cases which have been cited, no reasons that occur to me, are sufficient to satisfy me in my conscience and judgment, that this outlawry should be reversed, I am bound to affirm it.

"And here let me make a pause."

"If there be force in words, or propriety in language, the scope of that passage was to inflame a false idea that the outlawry was about to be affirmed. I will never believe then that this speech was pronounced by the very person who—after his pause—was to reverse the outlawry.

"I am aware that it has been extolled as a master-stroke of art; that it has been justified by the laws of oratory and the drama; and that it has been said, the suspense was intended only to heighten the effect.

"Let it be the object of a designing orator to agitate the passions; or of Hays's drama to elevate and surprise; but away with theatrical justice from the bench. Besides, this speech supposes a judge to inflict for his amusement, or to shew his art, a punishment which the laws could not inflict: for the opinion being established in the opening of the speech, that the outlawry should be affirmed, the prisoner must actually feel himself an outlaw, and that too for as long a continuance as it should please his lordship to *placere*.—Could I believe such a dramatic speech to be authentic, I would cry out in the words of the poet (since quoting is the mode)

"Cur in Theatrum Cato severe venisti?"

"My wishes would find an answer from the same poet—"Venisti ut exires." *Gent. Mag.*

brought his action against Money the messenger. (See the Case of Leach v. Money and others, p. 1001.) Upon the trial of the cause before lord chief justice Pratt, it was proved that the plaintiff, who worked for the weekly wages of a guinea, had been taken into custody by the defendant upon suspicion of having printed the North Briton, N° 45; that the defendant kept him in custody about six hours, but used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damage. The jury found a verdict for the plaintiff with 300*l.* damages. Upon a motion for a new trial for the excessiveness of the damages, lord chief justice Pratt, in delivering his opinion, is reported to have expressed himself as follows: "The personal injury done to the plaintiff was very small; so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20*l.* damages would have been thought damages sufficient, but the small injury done to the plaintiff, and the inconsiderableness of his station and rank in life did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial. They saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them: they heard the king's counsel, and saw the solicitor of the treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the Spanish inquisition, a law under which no Englishman would wish to live an hour: it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Charta, "Nullus liber homo capitur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale iudicium parium suorum vel per legem terræ." &c. which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury, but I directed and told them they were not bound to any certain damages, against the solicitor general's argument. Upon the whole, I am of opinion, the damages are not excessive." And the new trial was refused. In the same case Bathurst J. said, "This is a motion to set aside fifteen verdicts in effect; for all the other persons who have brought actions against these messengers have had verdicts for 200*l.* in each cause by consent, after two of the actions were fully heard and tried."

About the same time Arthur Beardmore, an attorney, brought an action of trespass and false imprisonment against Nathan Carrington and three other king's messengers, who, under a

warrant of lord Halifax secretary of state [by which warrant the earl did, in the king's name, authorize and require them (the defendants), taking a constable to their assistance, to make strict and diligent search for the said Arthur Beardmore, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled the Monitor or British Freeholder, N° 357, 358, 360, 373, 376, 378, 379, and 380; London, printed for J. Wilson and J. Fell, in Paternoster-row, which contained gross and scandalous reflections and invectives upon his majesty's government, and upon both Houses of Parliament, and him the said Arthur Beardmore having found to seize and apprehend, and to bring him together with his books and papers in safe custody, before the said earl of Halifax] had arrested the plaintiff and detained him in one of their houses for six days (after which he was discharged upon his recognizance) and had searched for, seized and carried away several of his papers. The cause was tried before lord chief justice Pratt, and a verdict was found for the plaintiff with 1,000*l.* damages. A motion was made for a new trial, upon the ground of excessiveness of damages, but a new trial was refused: and, by the Court, "Can we say that 1,000*l.* are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and pries into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days? It is an unlawful power assumed by a great minister of state. Can any body say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the king's subjects? We cannot say the damages of 1,000*l.* are enormous." See 2 Wils. Rep. 244.

The action which Wilkes brought against lord Halifax, (see pp. 1076, 1169, *et seq.*) after long pendency, (see 2 Wils. Rep. 256,) was on Friday, November the 10th, 1769, tried in the court of Common Pleas at Westminster, before lord chief justice Wilmot and a special jury, who found a verdict for the plaintiff with 4,000*l.* damages. (See Almon's 'Correspondence of the late John Wilkes,' vol. 4, p. 13.)

The following account of the Trial is given in the Gentleman's Magazine for November 1769, p. 556:

"Came on in the court of Common Pleas, before lord chief justice Wilmot, the long expected trial between lord Halifax and John Wilkes, esq.; relative to the seizure of his papers, and the imprisonment of his person. Serjeant Glynn, counsel for the plaintiff, opened the cause, and in a very elegant and spirited manner, explained the unconstitutional nature of the injury. He was answered by serjeant Whitaker, who endeavoured to prove, that what the defendant did was not of that unconstitutional nature as had been represented, but

that it was merely official, and authorized by an invariable succession of precedents from the earliest times.

"Mr. Blackmore, one of the king's messengers, was the first person examined, and honestly confessed, that upon Mr. Wilkes's refusing to him the keys of his bureau, he agreeably to his orders, pickt the lock, and swept away every paper he found.

"Earl Temple was about half an hour under examination, relative to his being refused admittance to Wilkes, when in the Tower.

"Matthew Browne, who was servant to Mr. Wilkes, at the time his house was rifled, and was to have been examined on the trial in behalf of his master, was by some unaccountable means kept out of the way.

"The counsel for the plaintiff were serj. Glynn, serj. Leigh, and Mr. Leigh.—For the defendant, serj. Whitaker, serj. Davy, serj. Nares, and Mr. Wallis.

"The jury who served upon the trial, and who after a most excellent charge given by the Lord Chief Justice to give liberal but not excessive damages, found a verdict for the plaintiff with 4,000*l.* damages, were, George Coulson Smith, esq. of Poplar; Sir Edward Bulkley Baisson, bart. of Hutton-Garden; David Walker, esq. of Kensington; Edward Buckley, esq. of Essex street, Strand; Nicholas Morrison, esq. of East street; Robert Cary, esq. of Hampstead; Robert Hicks, esq. of Great Russel-street; Josiah Holford, esq. of Southampton-row; John Gould, esq. of Hart-street; Samuel Hartley, esq. of Lincoln's-Inn fields; Heneage Robinson, esq. of Hackney; and a Taksinan, viz. Robert Gibson, of Clerkewell, who on account of defaulters in the special jury, was chosen out of the common jury, as the law provides. It is remarkable, that out of the 48 freeholders first struck on this jury, 17 were voters for sir William B. Proctor, [the candidate who opposed Wilkes at the election for Middlesex,] neither of whom however appeared.

"The verdict was much less than the friends of the plaintiff expected, and so little to the satisfaction of the populace, that the jurymen were obliged to withdraw privately, for fear of being insulted. It is reported that they were much divided; some being for more, some for less; but it seems to have operated in some measure, that by the minute book of the treasury, his majesty's pleasure had been signified, that all expences incurred in consequence of actions or prosecutions relative to this affair, should be defrayed by the crown: and that as a farther security to the earl of Hantfax, his lordship had, previous to his resignation in 1745, obtained a privy seal, that is, a warrant signed by the Lord Privy Seal, by way of indemnification for whatever damages Mr. Wilkes should recover, which warrant was signed by his grace of Marlborough, who then held the office.

"Some altercation is said to have happened in court between col. O——w, [Ouslow] and a

very popular sergeant, of which the judge expressed his dislike in very significant terms, and threatened dismissing the court upon a like offence. His lordship's behaviour throughout the whole of this very delicate affair, gave general satisfaction. Nothing could exceed his lordship's impartiality in summing up the evidence, nor any thing he pronounced more spirited. The damages were laid for 20,000*l.* but it has been said, that it is better for Mr. Wilkes that the jury gave but 4,000*l.* because the latter he may recover, but the former might have been thought excessive."

In the 'Memoirs of the Life of the right honourable sir John Eardley Wilmot,' &c. Mr. Wilmot has published the following account of the substance of what the learned judge said in his charge to the jury; of which account, however, Mr. Wilmot observes, that being chiefly taken from the publications of the day, it probably contains only an imperfect sketch of the learned judge's address.

"The form of the declaration, is for breaking and entering the plaintiff's dwelling house, breaking open his locks and doors, destroying his cabinets, boxes, &c. taking away his papers and converting them to their own use; for assaulting the plaintiff, and seizing and imprisoning his person several days in the Tower: but the substantial part of this action, is for taking his person and papers without legal authority. Now there can be no doubt whatever, but that the imprisonment of his person and the seizing of his papers was illegal, because there is no doubt but that the warrant, whereby the plaintiff was imprisoned and his papers seized, was illegal: it has undergone the consideration of this Court, and likewise of the Court of King's-bench, and has very properly been deemed so by every judge who has seen it; and there is no pretence or foundation for the defendant in this cause to make any stand against this action by way of justification in the way he has done, because it clearly and manifestly is an illegal warrant, contrary to the common law of the land: and if warrants of this kind had been found to be legal, I am sure, as one of the plaintiff's counsel observed, it is extremely proper for the legislature of this kingdom, to interpose and provide a remedy; because all the private papers of a man as well as his liberty, would be in the power of a secretary of state, or any of his servants. The law makes no difference between great and petty officers. Tutors, God, they are all amenable to justice, and the law will reach them if they step over the boundaries which the law has prescribed.

"But though this warrant is illegal, yet it appears from the evidence, that it was not of the defendant's own original framing: it was in conformity to many precedents in the secretary of state's office from the time of the Revolution."

[The precedents were then read, about forty

in number, and many more were produced : the evidence was stated, and the proof referred to, that the plaintiff had obtained a verdict of 1,000*l.* against Mr. Webb, for the seizure of his papers. The learned judge then proceeded :]

"The purpose of bringing this evidence is to endeavour to take off the imputation of malice, and to shew you, that it was not done without precedents ; and that, if it was wrong, it was at least a precedent mistake.

"Now, in the first place, it appears most clearly, that the plaintiff has been taken up unlawfully, has been imprisoned seven days, has had his papers seized, examined, and rifled ; that these papers have been likewise improperly and illegally taken notice and made use of ; and by the letter that has been read to you, it appears, that such of them only were to be returned, as could not tend to prove the charge against him. As to the declaration of breaking locks and doors, these are only formal words ; and in assessing the damages, you are not particularly to direct your attention to them ; the spirit of the thing is for the unlawful imprisonment of his person seven days, and unlawfully seizing his papers ; and there is no doubt but that there has been a plain and gross injury done him, which is likewise a plain and gross violation of the laws.

"The manner of doing it is also proper to be considered. It has been proved to you, that there was an order in the warrant, directing him to be kept 'close' prisoner ; it appears that it has been usual to insert these words, 'close confinement,' even for libels ; but the warrant was accompanied with a verbal order, given, not by the defendant, but by lord Egremont, that nobody should be admitted to see the plaintiff, which is a thing extremely unlawful. It must be observed, however, that as soon as it was known his friends were not to see him, Mr. Webb endeavoured to rectify it ; he got the verbal orders relaxed, and sent word that the plaintiff's friends might see him.

"Another thing has been mentioned and insisted on, which is, the change of custody ; but I own there does not appear to me the difference which is contended for. When the plaintiff was taken up, a Habeas Corpus was applied for ; but then it was applied for improperly. It does not appear that the secretary of state knew of it, before the warrant for sending the plaintiff to the Tower was prepared and signed : there was some rumour about it, but the secretaries of state did not know it ; and I do not see that any thing has been proved like an intention to oppress the plaintiff. I never give myself the liberty either to enforce or explain away words, but state them to you precisely as they were used. You are to consider the evidence, and to judge whether you think the custody was changed by the secretary of state with an intention to oppress the plaintiff ; if so, it would, undoubtedly, be a great aggravation of the illegal treatment. I t, upon my oath, I cannot say I see any intention of ill

VOL. XIX.

usage ; there does not seem to me to be any aggravation arising out of this matter ; on the contrary, Mr. Stanhope, one of the witnesses, swore, that the plaintiff said the defendant behaved like a nobleman, and that he should always regard him for it.

"There is another thing I must mention to you—that no prejudices of whatsoever kind should influence you. It is my opinion, that you all come here as unprejudiced and dispassionate to try this cause as I myself do ; and therefore all things said out of doors, all papers and pamphlets, are to be totally laid out of the minds both of judge and jury : they must be deaf, dumb, and blind to every thing but the evidence before them ; they must divest their minds of every thing that might have a tendency to influence them. Gentlemen, I speak for myself as well as for you : I never read any thing about what may come before me in a court of justice ; I keep my mind free from every thing of the kind. There is often a necessity for me to look into the law : but I never suffer my mind to be biased by reports, or such papers or pamphlets as are written with a view to pervert justice.

"Much has been said on both sides, which does not particularly apply to this cause.—But it is the evidence, and what arises necessarily and immediately from the evidence, upon which you are to form your judgment.

"You all very well know what deference I always pay, and ever will, to that part of the office of a jury which properly belongs to them. In regard to the law, I have always been as tenacious of the proper function of a judge, as I have been of that of the jury. I never will, while I have the honour of executing the office of a judge, attempt to controul or influence their minds in respect of damages ; but only submit to them such observations as occur to me upon the evidence ; and as the gentlemen at the bar have industriously avoided pointing at any particular sum you should give, I will as industriously avoid pointing at it too, and leave it for you to determine as you shall think proper. In regard to facts, you are to take all the circumstances of this case into your consideration ; and when a special jury of the first rank in the country appears, there is less necessity for a judge to descant upon the nature and circumstances of a cause, than there is to an inferior rank of men, perhaps not so well acquainted with, nor so well qualified to balance, such a cause as this.

"This warrant being clearly unlawful, you will consider of the damages. If the defendant had set up this mint, and had first invented and coined this warrant, it would certainly have been a prodigious aggravation ; but you see from the evidence, that the office has been in the habit and practice of granting these warrants from before the Revolution to this time : they have been issued in the meridian of this constitution by its best friends and the greatest lawyers, and have never before undergone any animadversion ; and therefore whatever error

this gentleman has been guilty of, he has erred with all the secretaries of state from that time. There is not the least foundation to presume any evil design in the defendant against the liberties of the people. The secretaries of state are not bred to the law, and it would be an act of injustice to consider a precedent mistake, as a tyrannical, depraved, corrupt act of oppression; and you find from the evidence, that they applied, from time to time, to the lawyers of the crown; and when some question arose about the warrant, and a warrant was proposed with Mr. Wilkes's name in it, it was opposed by the solicitor of the treasury, who said, 'this is the course of office, it has been approved of by the crown-lawyers, and I cannot consent to any innovation.'

"But however this proceeding might be in the course of office, and however precedent, it was certainly illegal: you must therefore find a verdict for the plaintiff, and give him such damages as under the circumstances of this case you are of opinion he is entitled to. I will go further and say, that you are not to confine yourselves strictly to the imprisonment of seven days, and the mere seizing of his papers; but you should give 'liberal' damages; by 'liberal,' I do not mean 'excessive.' 'Excessus in jure reprobatur.' The law always condemns excess; it must be within the rules of reason: the circumstances of the case are to govern it, and as nearly as you can, you will give that satisfaction and compensation, which may bear a proper proportion to the injury and to the nature of the injury received, under all its circumstances."

In the Annual Register for the year, the following paragraphs are subjoined to a brief account, agreeing with that which is given above, of this trial:

"Several gentlemen gave two guineas to obtain admittance into the court early; at about ten the price fell to a guinea, and at three in the afternoon people got in for five and three-pence.

"COPY FROM THE TREASURY MINUTE-BOOK,
PRODUCED ON THE TRIAL.

"Whitehall, Treasury-Chamber, 31st May, 1765. Present, Mr. Grenville, lord North, Mr. Hunter, and Mr. Harris.

"Mr. Chancellor of the Exchequer signifies to my lords his majesty's pleasure, that all expences incurred, or to be incurred, in consequence of actions brought against the earl of Halifax, one of his majesty's principal secretaries of state, the under secretaries and messengers, and the solicitor of this office, for proceedings had by them in executing the business of their respective offices against the publisher of several scandalous and seditious libels, should be defrayed by the crown; and that a sufficient sum of money should be, from time to time, issued to the solicitor of the treasury for that purpose.

"Read a paper from Mr. Webb, stating what the expences are likely to be, and that a farther sum of 3,000*l.* may probably be wanted for discharging the same.

"Issue to Mr. Webb, from time to time, as the said service may require, a sum not exceeding 3,000*l.* directing him to apply the same, according to his majesty's commands, to discharge the several expences above-mentioned." Annual Register 1769, Chronicle, p. 150.

I conjecture that the following passage in the celebrated 'Letter concerning Libels, Warrants,' &c. from the 'Father of Candour,' relates to this suit:

"When I see a secretary of state obstinately fighting with the laws of his country, using privilege to the utmost, notwithstanding it was the ground of the royal complaint to the Commons against Mr. Wilkes, availing himself of every practicable essoin, and, at length, withstanding all the process and penalties of a court of justice, to avoid trying the right of a transaction which has never yet been directly given up; and perhaps waiting for an outlawry of his prosecutor, in order then to mock the justice of his country still more, by entering an appearance to the suit against him, at a time, when his prosecutor can no longer go on with it; I protest, although an old, sober, private individual, that I lose my temper, look for redress from some other quarter, and feel myself inclined to join in an address to the Commons of England, to take up the consideration, and go on with the prosecution of that cause, which every freeman is interested in, and which the ordinary courts of justice have been so long foiled in. I remember what is Mr. Locke's definition of liberty; what he makes the province of a court of judicature; what the extent of the legislative power; and what, according to him, creates a dissolution of all government: who, under such circumstances, would blame a jury, should they at last have such a secretary brought before them, for giving extraordinary, exemplary damages, *in terrorem*! Especially if they should have all imaginable foundation for believing the judgment, upon such verdict, will be delayed by every artifice of bills of exceptions, special verdicts, motions for new trial, writs of error, &c. that can be practised, in order to prevent all effect from it, and to overbear, in the long run, the poor prosecutor by dint of expence."

Concerning exemplary or vindictive damages, upon which subject different judges have held different opinions, see the Cases of Grey v. Grant, 2 Wils. Rep. 252. Redshaw v. Brook, and others, 2 Wils. Rep. 405, and the cases referred to in Comyns's Digest, Trial, (E.)

On Nov. 14, 1768, Wilkes presented to the House of Commons a Petition, complaining, among various alleged grievances, of lord Mansfield's having materially altered the Record,

[see pp. 1075 *et seq.*]: and charging, that Mr. Philip Carteret Webb, solicitor to the treasury, had suborned and bribed one Michael Curry to give evidence against the petitioner at the trials, according to the directions of the said Webb. Upon this Petition divers proceedings were had. In support of it, and against it, counsel were heard and witnesses examined; and on the first of February, 1769, the House, after referring to the Report from the Committee, appointed to enquire into the state of the jails of the kingdom, relative to the accusation against lord chief justice Eyre, together with the Resolutions of the Committee, and the proceedings of the House thereupon, [see vol. 17, p. 619]

Resolved, "That the two orders made by lord Mansfield, chief justice of the Court of King's-bench, for the amendment of the informations exhibited in the said Court against Mr. Wilkes, were according to law and justice, and the practice of the said Court, and confirmed by the subsequent determination of the said Court; and that the complaint of Mr. Wilkes, in respect thereof, is frivolous; and that the asper-

sions upon the said Chief Justice, for making the said two orders, thereby conveyed, are utterly groundless, and tend to prejudice the minds of the people against the administration of public justice."

Also on the same day,

"Resolved, That Mr. Wilkes has not made good his charge against Philip Carteret Webb, esq."

ADDENDUM

TO THE

CASE OF ELIZABETH CANNING.

In the Gentleman's Magazine for August, 1773, it is stated that Elizabeth Canning died at Weathersfield in Connecticut, on the 22d of July in that year. In the Magazine the account of her death is accompanied with the observation that "notwithstanding the many strange circumstances of her story, none is so strange as that it should not be discovered in so many years where she had concealed herself, during the time she had invariably declared she was at the house of mother Wells."

END OF VOL. XIX.

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very important document, as it contains the President's annual message to Congress. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

2. The second part of the document is a letter from the Secretary of the Treasury to the Congress, dated January 3, 1862. It is a very important document, as it contains the Secretary's report on the state of the Treasury. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

3. The third part of the document is a letter from the Secretary of the Interior to the Congress, dated January 3, 1862. It is a very important document, as it contains the Secretary's report on the state of the Interior. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

4. The fourth part of the document is a letter from the Secretary of the War to the Congress, dated January 3, 1862. It is a very important document, as it contains the Secretary's report on the state of the War. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

5. The fifth part of the document is a letter from the Secretary of the Navy to the Congress, dated January 3, 1862. It is a very important document, as it contains the Secretary's report on the state of the Navy. The letter is written in a formal, dignified style, and it is one of the most important documents in the history of the United States.

THE NEW YORK PUBLIC LIBRARY
REFERENCE DEPARTMENT

**This book is under no circumstances to be
taken from the Building**

[illegible]

